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Federal Statutes Annotated

Second Edition


Compiled under the Editorial Supervision of
William M. McKinney

Volume VI
Judiciary (concluded) to Passports

Edward Thompson Company
Northport, Long Island, New York
1918
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VIII. PROCEDURE, IN GENERAL

Sec. 911. [Sealing and testing of writs.] All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a circuit court shall bear testament of the Chief Justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and those issuing from a district court shall bear testament of the judge, or, when that office is vacant, of the clerk thereof. The seals of said courts shall be provided at the expense of the United States. [R. S.]


"Circuit" courts mentioned in this section were abolished by Judicial Code, § 229, supra, this title, vol. 5, p. 1082.

Supreme Court Rule 5 requires that all process of the Supreme Court shall be in the name of the President of the United States.

Effect of section.—This section means no more than that when a writ or process issues from a federal court it must be signed by the clerk, and shall be authenticated in the manner therein set out. It is not an ordinance to the effect that no action or proceeding in a federal court shall be instituted except by the issue of process, signed by the clerk, duly sealed, etc. Leas v. Merriman, (W. D. Va. 1904) 132 Fed. 510.

Construed with R. S. sec. 914.—The provisions of this section are not inconsistent with, and therefore are not repealed by, the subsequent Act of Congress embodied in R. S. sec. 914, infra, p. 21. Giving due effect to the latter, the practice, and form and modes of proceeding, in the courts of the United States, in common-law actions, are to be formed to, and be regulated by, those of the state courts, when there is no statute of the United States prescribing different practice or forms or modes of procedure. When the statutes of the United States are silent, the practice of the state courts will prevail, but when those statutes speak they are controlling. Peaslee v. Haberstro, (1879) 15 Blatchf. 472, 19 Fed. Cas. No. 10,884; Dwight v. Merritt, (S. D. N. Y. 1880) 4 Fed. 614.

In any original suit in a federal court which must be commenced by a summons or other process of the court itself, such process must be signed by the clerk and issued under the seal of the court, to be valid, regardless of any different provision as to the form of a summons in the state courts, the general conformity statute not operating to waive this specific requirement as to the process in the federal courts embodied in this section. In re Condemnation Suits, (E. D. Tenn. 1916) 234 Fed. 443.

Other than in the necessary particulars prescribed by this section and R. S. sec. 912, infra, neither the form of the writ or process, nor its contents, nor the manner or method of its delivery to the marshal for service, nor its formal drafting, is sought to be controlled by any legislation of Congress, further than to ordain generally that the writ shall, as to these particulars, so far as possible, harmonize with and be similar to the writs and processes obtaining under the code of procedure of the state in which the court has jurisdiction. Jewett v. Garrett, (C. C. N. J. 1891) 47 Fed. 625.


Process defined.—The word "process," as used in this section, means an order of court, although it may be issued by the clerk. Leas v. Merriman, (W. D. Va. 1904) 132 Fed. 510.

Processes of the court, in its narrowest sense, and as used in this section, means the writs and mandates of the court, under the seal thereof. U. S. v. Murphy, (D. C. Del. 1897) 82 Fed. 893.

Preparation of process.—Any suitor or duly authorized attorney may draft the process or writ. Jewett v. Garrett, (C. C. N. J. 1891) 47 Fed. 627.

Signed by the clerk.—A summons will be set aside when not signed by the clerk. If the summons had been signed by the clerk, it could be amended as regards the seal. Peaslee v. Haberstro, (1879) 15 Blatchf. 472, 19 Fed. Cas. No. 10,884.
See also Bowler v. Eldredge, (1846) 18 Conn. 1.

By a deputy clerk.—The signing of a venditioni exponas by a deputy clerk in his own name, and the want of the signature of the clerk himself, was held to be an irregularity only, and not to avoid the writ and proceedings under it. Griswold v. Connolly, (1871) 1 Woods 193, 11 Fed. Cas. No. 5,833. See also Bragg v. Lorio, (1871) 1 Woods 209, 4 Fed. Cas. No. 1,800.

Test of writ.—On all process and writs from the Supreme Court, including writs of error, the statute makes test of the chief justice indispensable. Wells v. McGregor, (1872) 13 Wall. 188, 20 U. S. (L. ed.) 536; Middleton Paper Co. v. Rock River Paper Co., (W. D. Wis. 1884) 19 Fed. 252.

A summons issued from a District Court, bearing the test of the chief justice instead of that of the district judge, is irregular in that particular, but may be amended under the provisions of R. S. sec. 984, infra. In re U. S. v. Turner, (D. C. S. C. 1892) 50 Fed. 734.

The test of a writ from the former Circuit Court by a deputy clerk was not a compliance with the statute. U. S. v. Antz, (E. D. La. 1883) 16 Fed. 119.

Vacancy in office of judge.—All writs and processes issuing from a District Court when the office of its judge is vacant shall be tested in the name of its clerk. In re Urban, etc., Realty Title Co. (D. C. N. J. 1904) 132 Fed. 140.

Power to amend process.—Power to amend process is given by R. S. secs. 948 and 954, infra, pp. 90, 98. That power is power to amend a want of form in process, but not to amend a paper void for want of compliance with the statute. Dwight v. Merritt, (S. N. Y. 1880) 4 Fed. 614, wherein it appeared that an attempt was made to commence a suit at common law, by serving on the defendant a paper purporting to be a summons, in the form prescribed by the statute of New York for commencing a civil action. It was signed by the plaintiff's attorney, but was not under the seal of the court nor was it signed by the clerk of the court. On motion of the defendant to set aside the summons because of these defects, the plaintiff asked to be allowed to amend the summons, nunc pro tunc, by having the seal and signature added. Denying the motion to amend, and setting aside the summons, the court said: "Power to amend the process is said to be given by sections 948 and 954. That power is power to amend a defect in process, and power to amend a want of form in process. But there must first be a process to be amended. There must be something to amend and to amend by. This paper is no process. The process which can be amended under the power conferred, is process issuing from the court. This paper never issued from the court. If it had in fact issued from the court and was signed by the clerk, but had no seal, or had a seal but was unsigned, what it had might perhaps be accepted as showing that it issued from the court, and the lacking particular might be supplied."

In U. S. v. Turner, (D. C. S. C. 1892) 50 Fed. 734, the original summons issued out of the District Court bore the test of the chief justice, and not of the district judge. The court held that this was a defect or irregularity subject to amendment. As the summons bore the seal of the District Court and issued from the court there was something to amend and to amend by.


Likewise a summons duly signed by the clerk can be amended as regards the seal. See Peales v. Haberstro, (1879) 15 Blatchf. 472, 19 Fed. Cas. No. 10,894.

Delivery of process for service.—Nowhere is it required by statute of the United States that the clerk shall deliver the writ or process to the marshal for service, and, when the clerk has performed all of the acts prescribed by Congress for the issuing of writs and processes, the writ or process, as the case may be, is clearly issued by him. Perris Irrigation Dist. v. Turnbul, (C. C. A. 9th Cir. 1914) 215 Fed. 662, 132 C. C. A. 74, following Leas v. Merriman, (W. D. Va. 1904) 132 Fed. 510; Jewett v. Garrett, (C. C. N. J. 1891) 47 Fed. 625.

But in some districts it seems to have been for many years a settled practice after writ and process has issued in obedience to this section, for the clerk to prepare the requisite number of copies thereof, attesting the same true copies of the original writ and process, and to deliver them to the marshal or his deputy for service. The officer, having made service of such true and attested copies, makes indorsement to that effect upon the original. Elson v. Waterford, (C. C. Conn. 1905) 135 Fed. 247.

Copy of writ.—As the original writ must be issued under the seal of the court, a copy of it, of course, can only be certified by the clerk, who is custodian of the seal, who alone can issue the writ, and who has charge of and makes the record authorizing its issuance. Taylor v. U. S., (E. D. Tenn. 1891) 45 Fed. 531, reversed (1893) 147 U. S. 605, 13 S. Ct. 479, 37 U. S. (L. ed.) 335.

Process subject to requirements of section.—In general.—The provisions of this section apply only to writs and processes issuing from the courts themselves. Adverse Condemnation Suits, (E. D. Tenn. 1916) 254 Fed. 443.
Notices.—Notices given by the parties are not processes of the court and are not embraced within the terms of this section. Hence in any proceeding which may be properly instituted and proceeded with upon mere notice to the parties in interest, without process from the court itself, as in condemnation proceedings, the requirements of section 911 have no application. In re Condemnation Suits, (E. D. Tenn. 1916) 234 Fed. 443.

Garnishment notice.—A garnishment notice is not such a “process” of the court as must conform to the requirements of this section. Such notices are governed by the provisions of state statutes, under the provisions of R. S. sec. 915, infra, p. 64. Wile v. Cohn, (S. D. Ia. 1894) 83 Fed. 750, affirmed (C. C. A. 8th Cir. 1895) 70 Fed. 138, 36 U. S. App. 165, 17 C. C. A. 25. But see Middleton Paper Co. v. Rock River Paper Co., (W. D. Wis. 1884) 19 Fed. 252, wherein it was held that a garnishee summons, served upon the defendant in garnishment proceedings, in the form prescribed by the law and practice in the state court, and running in the name of the state, without seal, and issued and signed by the plaintiff's attorney, cannot be sustained in the federal court. The statutes and decisions of the state courts regard the garnishee proceedings as the commencement of a new suit against the defendant therein.

Notice of motion for judgment.—This section does not apply to a notice given under a state law authorizing a judgment on a contract to be obtained on motion after fifteen days' notice to defendant, and the practice thereunder, which is for the plaintiff or his attorney to sign the notice and serve the same on defendant, such a notice not being a “process issuing from the court.” Leas v. Merriman, (W. D. Va. 1904) 132 Fed. 510.

A warrant of arrest, for preliminary examination, must be under seal, as required by this section. Clough v. U. S., (W. D. Tenn. 1891) 47 Fed. 791, modified (C. C. A. 6th Cir. 1893) 55 Fed. 373, 6 U. S. App. 377, 5 C. C. A. 140.


A warrant of attachment, against a vessel, was held to come within the requirements of this section. Bowler v. Eldredge, (1846) 18 Conn. 1.


Sec. 912. [Tests of process, day of.] All process issued from the courts of the United States shall bear tests from the day of such issue. [E. S.]


Day of tests—Writ of error issued out of term.—It is no objection to a writ of error from the United States Supreme Court to a state Supreme Court that it bears tests on the day of its issue, which was not a day of the term of the United States Supreme Court. Atherton v. Fowler, (1875) 91 U. S. 143, 23 U. S. (L. ed.) 265.

In Kane v. Love, (1822) 2 Cranch C. C. 429, 14 Fed. Cas. No. 7,608, the court refused to quash a fi. fa. on the ground that it was issued after the day of the defendant, where the judgment was in the lifetime of the defendant and the execution bore tests before his death.

An alias capias ad respondendum could not issue unless it was tested of the term to which the original was returned, and made returnable to the next immediately ensuing term. U. S. v. Parker, (1797) 2 Dall. 373, 27 Fed. Cas. No. 15,992.


Sec. 913. [Mesne process, and proceedings in equity and admiralty.] The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules, and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by
the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any circuit or district court, not inconsistent with the laws of the United States. [R. S.]


"Circuit" courts mentioned in this section were abolished by Judicial Code, § 289, supra, this title, vol. 5, p. 1082.
See also R. S. sec. 917, infra, p. 75, and note thereto.

Power to make rules.— Powers as ample as legislation can give are conferred by this section and R. S. sec. 918, infra., p. 77, on the District Court in cases of admiralty and maritime jurisdiction as to the "forms and modes of proceeding," and "such alterations or additions thereto as the said courts shall in their discretion deem expedient," and "to regulate the practice as shall be fit and necessary for the advancement of justice," subject only to any existing provisions of law or the rules established by the Supreme Court. The Hudson, (S. D. N. Y. 1883) 15 Fed. 162.

The general rule prescribed to the Supreme Court an adoption of that practice which is founded on the custom and usage of courts of admiralty and equity constituted on similar principles, but that court is authorized to make such deviations as are necessary to adapt the process and rules of the court to the peculiar circumstances of this country. Grayson v. Virginia, (1896) 3 Dall. 320, 1 U. S. (L. ed.) 619.

Under this section, R. S. sec. 918 (infra, p. 77), and rule 48 of the Supreme Court, a District Court has authority to make a general rule providing for the issuance of commissions, either open or closed, to take testimony, which shall be executed as nearly as may be in accordance with the rules of the state of which the district is a part, and under which rules a sedentary potestas may be issued to examine certain persons in a foreign country upon oral interrogatories and cross interrogatories. The Titanic, (S. D. N. Y. 1913) 206 Fed. 500.

Under this section and R. S. secs. 917 and 918, infra., pp. 75, 77, the forms of mean process in equity and the forms and modes of proceeding therein are to be according to the usages of courts of equity, except as otherwise provided by statute or by rules of court made in pursuance of statute. But any Circuit (now District) Court may alter and add to such forms and modes, subject to the right of the Supreme Court to regulate the matter for such Circuit Court. The Supreme Court has power to prescribe the forms of writs and process and to regulate the whole practice in suits of equity in the Circuit Courts, but any Circuit Court may, in any manner not inconsistent with any law of the United States or with any rule prescribed in the Supreme Court, regulate its own practice to advance justice. Steam Stone Cutter Co. v. Jones, (C. C. Vt. 1882) 13 Fed. 567.

The Circuit Court of Appeals has no power to prescribe rules for the District Courts. This power is vested in the Supreme Court. The Philadelphia, (C. C. A. 1st Cir. 1894) 80 Fed. 425; 21 U. S. App. 90, 9 C. C. A. 54.

Force and effect of rules.— The equity rules prescribed by the Supreme Court and the rules promulgated by the inferior federal courts (subject to alteration by the Supreme Court) have the force and effect of law unless they are inconsistent with the statutes of the United States. American Graphophone Co. v. National Phonograph Co., (S. D. N. Y. 1904) 127 Fed. 349. See also The Bremen v. Card, (J. C. S. C. 1888) 33 Fed. 144; Bailey v. Sandberg, (C. C. A. 2d Cir. 1892) 49 Fed. 583, 1 U. S. App. 101, 1 C. C. A. 387.

Inherent discretionary powers.— Rules prescribed by the Supreme Court do not deprive a court of equity of the inherent power to mould its rules in relation to the time and manner of appearing and answering so as to prevent a rule from working injustice, and it is not only in the power of a court of equity but it is its duty to exercise a sound discretion upon this subject and to enlarge the time if it shall appear that the purpose of justice require it. Putnam v. Fayette, (1838) 12 Pet. 472, 9 U. S. (L. ed.) 1161.


Territorial courts are not governed by the provisions of this section, and it is within the power of a territorial assembly to adopt a code of practice which unites legal and equitable remedies in one form of action. Hornbuckle v. Toombs, (1873) 18 Wall. 648, 21 U. S. (L. ed.) 666. But see Orchard v. Hughes, (1863) 1 Wall. 73, 17 U. S. (L. ed.) 560; Dumphy v. Klein- smith, (1870) 11 Wall. 610, 20 U. S. (L. ed.) 223.

Federal uniformity of equity procedure.


A United States court sitting as a court of equity cannot take cognizance of a proceeding begun by a stipulation, signed by the parties to the controversy, setting forth an agreed statement of facts and consenting that the court may take jurisdiction, hear, try, and determine the case, and render decree without pleadings. If a state statute authorizes such a proceeding in the courts of that state the jurisdiction and practice of a federal court as a court of equity are not affected by that statute Nickerson v. Atchison, etc., R. Co., (C. C. Kan. 1880) 30 Fed. 85.


Admiralty practice.—The admiralty practice alluded to in this statute is the admiralty practice of this country as granted upon the British practice, and has no reference to all courts of admiralty. Manro v. Alimeda, (1825) 10 Wheat. 473, 6 U. S. (L. ed.) 389.

"The rules of the High Court of Chan- cery of England have been adopted by the courts of the United States. In exercising this jurisdiction the courts of the Union are not limited by the chancery system adopted by any state, and they exer- cise their functions in a state where no court of chancery has been established. The usages of the High Court of Chancery in England, whenever the jurisdiction is exer- cised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government it has been observed." Pennsylvinia v. Wheeling, etc., Bridge Co., (1851) 13 How. 518, 14 U. S. (L. ed.) 249. See also Vattier v. Hinde, (1833) 7 Pet. 222, 8 U. S. (L. ed.) 675; Bein v. Heath, (1851) 12 How. 168, 13 U. S. (L. ed.) 940; New York City Bank v. Skelton, (1846) 2 Blatchf. 23, 5 Fed. Cas. No. 2,740; Stretele v. Bellou, (C. C. Colo. 1881) 9 Fed. 238; Richmond v. Atwood, (C. C. A. 1st Cir. 1892) 52 Fed. 10, 15 U. S. App. 151, 2 C. C. A. 506, 17 L. R. A. 615.


Garnishment.—A general equity rule adopted by the Supreme Court under this section cannot have the effect of giving the flood of garnishment proceedings to enforce a decree on the equity side of the court. U. S. v. Swan, (C. C. A. 6th Cir. 1895) 65 Fed. 647, 31 U. S. App. 119, 13 C. C. A. 77.

Attachments in equity.—There may be attachments against property in suits in equity when a rule of court has been adopted so providing. Steam Stone-Cutter Co. v. Jones, (C. C. Vt. 1882) 13 Fed. 567. See also Steam Stone-Cutter Co. v. Sears, (C. C. Vt. 1881) 9 Fed. 9.

prohibiting an appeal from an interlocutory decree made in the District Court, appeals could not be taken from such decrees, following the practice of the High Court of Chancery in England, as the whole policy of the federal statutes had been to allow but one appeal, and that from the final decree. Clark v. Iselin, (1871) 9 Blatchf. 196, 5 Fed. Cas. No. 2,924.

In the absence of statute regulating the time when appeals shall be taken, a course of practice followed by the court is equivalent to a rule of the court. Norton v. Rich, (1824) 3 Mason 443, 18 Fed. Cas. No. 10,362.

Cited in the case of In re Louisville, etc., Packet Co., (E. D. Ky. 1915) 223 Fed. 185, on the question of the authority of the Supreme Court to promulgate a rule distributing admiralty jurisdiction.

Sec. 914. [Practice and proceedings in other than equity and admiralty causes.] The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding. [R. S.]


This is commonly known as the "Practice Conformity Act."

"Circuit" courts, mentioned in this section, were abolished by Judicial Code, § 289, supra, this title, vol. 5, p. 1062.

The language of the text section is used in the Act of Aug. 1, 1888, ch. 728, § 2, in title PUBLIC PROPERTY, BUILDINGS AND GROUNDS, in respect of the practice in proceedings by the United States to condemn real estate for public uses.

The substantive law of the several states, consisting chiefly of their statutory and constitutional provisions, is adopted, with certain qualifications, as rules of decision in trials at common law in the federal courts by R. S. sec. 721, supra, this title, vol. 5, p. 1123.

Competency of witnesses in civil cases and proceedings in federal courts is determined by the laws of the state or territory in which the court is held, as required by R. S. sec. 588 (as amended by Act of June 29, 1906, ch. 3608) in title WITNESSES.

Depositions of witnesses for use in federal courts are to be taken in the mode prescribed by the laws of the state in which said courts are held, as required by the Act of March 9, 1892, ch. 14, in EVIDENCE, vol. 3, p. 225.

The practice in equity and admiralty causes is chiefly regulated by the Equity Rules and the Admiralty Rules promulgated under authority given in R. S. sec. 913, supra, p. 18, and R. S. sec. 917, infra, p. 75.

The practice in bankruptcy proceedings is regulated by various provisions in the Bankruptcy Act of July 1, 1898, ch. 541, and amendments thereof, and by the General Orders and Forms in Bankruptcy; and General Order No. XXVII is a general provision as to the practice to be followed in proceedings in equity and at law for enforcement of rights and remedies given by the Bankruptcy Act. For all of the foregoing see BANKRUPTCY, vol. 1, pp. 495, 583, 659.

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I. CONSTRUCTION GENERALLY

1. Constitutionality


2. Purpose of Act

The purpose of this statute was to bring about uniformity in the law of procedure in the federal and state courts in the same locality, taking cognizance of the statutory enactments of many states. Webb v. Southern R. Co., (S. D. Ala. 1916) 235 Fed. 578.

The idea was to harmonize, as nearly as may be, the manner and form in which parties should present their claims and defense in the preparation of the trial of cases in the federal courts, to those prevailing in the state courts, and it was not the intention to require the federal courts to conform to state courts in all matters of detail respecting practice and procedure, at least as to such details the power to regulate which every court is presumed inherently to possess and exercise as from time to time the ends of
justice may require. Such are the details respecting matters of continuance, intermediate operations, and incidental powers respecting the control of the parties, or the situation of the case in the court. Manitowoc Malting Co. v. Feucht wanger, (E. D. Wis. 1912) 196 Fed. 506. See also Steers v. U. S., (C. C. A. 6th 1911) 192 Fed. 1, 112 C. C. A. 423, wherein it was held that matter pertaining to the conduct of the trial by the trial judge is not governed by this conformity act.

This section is the successor of the Act of Congress of May 19, 1829, ch. 88, § 1, 4 Stat. 278, which declared that "the forms of meane process . . . and the forms and modes of proceedings in suits in [certain] courts of the United States . . . shall be the same . . . as are now used in the highest court of original and general jurisdiction of the" states in which the federal courts are situated. In respect of this statute it was held in Bath County v. Amy, (1872) 13 Wall. 244, at page 250, 20 U. S. (L. ed.) 538, that: "It was a provision, designed only to regulate proceedings in the federal courts after they had obtained jurisdiction; not to enlarge their jurisdiction, . . . It is quite too much to infer from this [statute] an enlargement of jurisdiction, or an adoption of all the powers of the state courts." Section 914 must be construed in the same manner. Sewchulius v. Lehigh Val. Coal Co., (C. C. A. 2d Cir. 1916) 233 Fed. 492, 147 C. C. A. 358.

As to federal practice in actions at law prior to the enactment of the text R. S. sec. 914, see cases cited in notes to R. S. sec. 721, supra, this title, vol. 5, pp. 1217, 1218.

3. Principles Controlling Construction
a. In General
State decisions and statutes not conclusive.—Notwithstanding this provision neither the statutes of a state nor the decisions of its courts are conclusive upon the federal courts in respect to questions of jurisdiction. Mechanical Appliance Co. v. Castleman, (1910) 215 U. S. 437, 30 S. Ct. 125, 54 U. S. (L. ed.) 272; Southern Photo Material Co. v. Eastman Kodak Co., (N. D. Ga. 1915) 224 Fed. 523.

It is settled that this statute does not require a federal court to follow the state procedure, where to do so would defeat the purpose or impair the effect of any congressional statute. U. S. v. Beaty, (W. D. Va. 1913) 198 Fed. 259.

The Act leaves to the federal court "some degree of discretion in conforming entirely to the state procedure" and to reject, "as Congress doubtless expected," any subordinate provisions in such state statutes as would unwisely interfere with the administration of the law and tend to defeat the ends of justice. Mani- towoc Malting Co. v. Feucht wanger, (E. D. Wis. 1912) 196 Fed. 506.

Thus, any such section empowers a federal court to use a similar remedy to that provided by a state statute to enforce its judgments, it does not require the court to follow the method prescribed by a state statute in serving a writ of scire facias to revive a judgment on a nonresident defendant if it deems such method insufficient. Collin County Nat. Bank v. Hughes, (C. C. A. 8th Cir. 1907) 155 Fed. 389, 83 C. C. A. 641.

As to the District Court in Porto Rico it was said prior to the abolishment of the Circuit Court: "We think it was the intention of Congress in the Porto Rican act to require the District Court exercising the jurisdiction of a Circuit Court, in analogy to the powers of the Circuit Courts in the states, to adapt themselves, save in the excepted cases in equity and admiralty, to the local procedure and practice in Porto Rico. This conclusion is in accord with the policy of the United States, evidenced in its legislation concerning the islands ceded by Spain, and secured to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law." Perez v. Fernandez, (1906) 202 U. S. 80, 20 S. Ct. 561, 50 U. S. (L. ed.) 492.

b. Constitutional Restrictions

So it has been said that: "It must be held that the body of the local law thus adopted in the general must be construed in the courts of the United States in the light of their own system of jurisprudence as defined by their own constitution as tribunals, and of other Acts of Congress on the same subject." Einstein v. Rothschild, (E. D. Mich. 1884) 22 Fed. 61.

The requirements of this statute apply only to cases of which the court has jurisdiction according to the Constitution and laws of the United States. Goldfe v. Morning News, (1895) 156 U. S. 518, 5 S. Ct. 599, 39 U. S. (L. ed.) 517.
4. Clauses in Act Constructed

a. "Practice, Pleadings, and Forms and Modes of Proceeding"


The provisions for uniformity do not extend to modes of procedure established by judicial interpretation of the common law, but only to such as are established by the statutes of the several states. Wall v. Chesapeake, etc., R. Co., (C. C. A. 7th Cir. 1899) 55 Fed. 595, 57 C. C. A. 129.


There are certain powers inherent in the judicial office, and it may be questioned how far the legislature may grant the government to impair them or dictate the manner of their exercise. Nudd v. Burrows, (1875) 91 U. S. 426, 23 U. S. (L. ed.) 286. See also Strahm v. Deims, (N. D. Ill. 1896) 73 Fed. 430.

Disqualification of judge.—While it section does not expressly authorize a federal court to adopt a state rule as to who shall constitute a disqualification of judge, notwithstanding it has been held that judge is justified in adopting "as near a... may be" as his guide on such a question the state rule or statute; and that where under such rule or statute disqualification exists, the judge will decline any further connection with the cause. The right to certify a case to another court because of the disqualification of the district judge was provided for by R. S. sec. 601 (now superseded by the equivalent provision in Judicial Code, § 20, supra, this title, vol. 4, p. 831, and expressly repelled in Judicial Code, § 207, supra, this title, vol. 5, p. 1085). In re Eatonton Electric Co., (S. D. Ga. 1903) 120 Fed. 1010.

Relationship of judge to party.—Where the relationship of the judge to party has an interest in the controversy was declared by a state law to be a disqualification, it was held to be a proper ground to the action of a federal judge sitting in that state. In re Eatonton Electric Co., (S. D. Ga. 1903) 120 Fed. 1010.

b. "Civil Causes"


So the United States Supreme Court declared, prior to the abolishment of the Circuit Courts, that this section "in terms excludes equity causes therefrom, and the jurisprudence of the United States has always recognized the distinction between law and equity as under the Constitution matter of substance, as well as of form and procedure, and, accordingly, legal and equitable claims cannot be blended together in one suit in the Circuit Courts of the United States, nor are equitable defenses permitted." Scott v. Armstrong, (1892) 146 U. S. 499, 13 S. Ct. 148, 36 U. S. (L. ed.) 1059.

And in another case it says: "If the defendant have equitable grounds for relief against the plaintiff, he must seek to enforce them by a separate suit in equity." Northern Pac. R. Co. v. Paine, (1887) 119 U. S. 561, 7 S. Ct. 323, 30 U. S. (L. ed.) 513.

Similarly the Circuit Court of Appeals for the second circuit has declared: "It is hardly necessary to state that the law of the remedy is not to be determined by the decisions of the courts of the state in which the action was brought, and that neither the decisions of its courts nor the statutes of New York can confer authority upon the federal courts sitting within that state to exercise equitable jurisdiction in actions at law. State legislatures cannot abolish in the federal courts the distinctions in actions at law and in equity by abolishing such distinctions in their own courts." Goodyear Shoe Machinery Co. v. Danzel, (C. C. A. 2d Cir. 1902) 119 Fed. 692, 56 C. C. A. 300.

And the Circuit Court of Appeals for the ninth circuit states: "It is thoroughly settled that it was not the design of this section to abolish, in the federal courts, the distinction between actions at law and suits in equity." Hill v. Northern Pac. R. Co., (C. C. A. 9th Cir. 1902) 113 Fed. 914, 51 C. C. A. 544.

Again, in the fourth circuit the following language is employed: "The distinction between legal and equitable defenses, whatever it may be elsewhere in other jurisdictions, in the courts of the United States is always recognized and jealously guarded. They cannot be mixed. Equitable suits must be on the equity side of the docket, and actions at law on the law side. No principle is better settled in these courts." Levi v. Mathews, (C. C. A. 4th Cir. 1906) 145 Fed. 152, 76 C. C. A. 122.

And in a Circuit Court decision it was
remarked that: "In the courts of the United States the distinction between actions in law and suits in equity is firmly maintained, and it is not competent for the Congress or the state legislature to abrogate such distinction. The federal courts will take cognizance of and enforce newly created statutory rights, but they will do so according to the practice of those courts. Newly created rights which are of a legal nature will be enforced in courts of law, while such rights as are equitable in their nature must be enforced by suits in courts of equity. Hence, if the statute of the state has created new rights of action or grounds of defense which authorize the blending together of legal and equitable rights and remedies in one pleading, while such pleading would be proper in the courts of the state it cannot properly be entertained in a federal court. To permit it would be to disregard the distinction between legal and equitable rights and remedies, which is inadmissible." Jewett Car Co. v. Kirkpatrick Constr. Co., (C. C. Ind. 1901) 107 Fed. 622.

"In all actions at law equitable defenses may be interpolated," etc., is the provision in Judicial Code, § 2744, supra, this title, vol. 5, p. 1061. Said section 2745 was enacted March 3, 1915, and affects some of the rulings in the foregoing paragraphs of this note. Judicial Code, § 2745, enacted at the same time (supra, this title, vol. 5, p. 1059), provides for amendment of pleadings to obviate the objection that the suit was brought on the wrong side of the court.

c. "As Near as May Be" General doctrine.—"This section is intended to secure on the law side of the federal courts the practice which prevails in like causes in courts of the states. Its requirement is that such proceeding shall conform 'as near as may be' to that prevailing in the state courts 'in like cases.' This section was not intended to require that the practice shall be consistent with the terms or defeat the purposes of the legislation of Congress. Luxton v. North River Bridge Co., (1893) 147 U. S. 337, 338, [13 S. Ct. 358, 37 U. S. (L. ed.) 194]; Chappell v. U. S., [1888] 160 U. S. 409, 512, [16 S. Ct. 397, 40 U. S. (L. ed.) 510]. In fact, the language of the statute is itself an indication that the state practice cannot be at all times and under all circumstances complied with. It is enough if the federal courts in adjudicating the rights of parties comply with the state practice 'as near as may be.' State statutes which defeat or encumber the administration of the law under federal statutes are not required to be followed in the federal courts. Mexican Cent. R. Co. v. Finkney, [1893] 149 U. S. 154, [13 S. Ct. 580, 37 U. S. (L. ed.) 699]. It follows that where the state stat-
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perhaps, supplant the equity practice which prevails in the federal court; it is reasonable to conclude that although a case was instituted by summons, instead of the filing of a bill and the issuing of a subpoena, when the parties and subject matter are brought within the jurisdiction of the court, it is then within the power of the court to attain the cause upon the law or transfer it to the equity docket, as may be necessary in order fully to administer the rights of the parties with reference to the subject matter of the action. Wilson v. Waldo, (W. D. N. C. 1816) 221 Fed. 505.

But in Amy v. Watertown, (1889) 130 U. S. 301, 9 S. Ct. 530, 32 U. S. (L. ed.) 946, the court said that the statute "is peremptory, and whatever belongs to the three categories of practice, pleading, and forms and modes of proceeding, must conform to the law and the practice of the state courts, except where Congress itself has legislated upon a particular subject and prescribed a rule. Then, of course, the Act of Congress is to be followed in preference to the laws of the state."


Discipline given to courts.—These words are construed as leaving to the federal courts some degree of discretion in conforming entirely to the state procedure, and were intended to qualify what would otherwise have been a mandatory provision. "These words imply that, in certain cases, it would not be practicable, without injustice or inconvenience, to conform literally to the entire practice prescribed for its own courts by a state in which federal courts might be sitting." Mexican Cent. R. Co. v. Pinkey, (1893) 149 U. S. 194, 13 S. Ct. 599, 37 U. S. (L. ed.) 699. See also Senior v. Pierce, (S. D. Ia. 1897) 31 Fed. 625.


d. "Any Rule of Court to the Contrary Notwithstanding"

It may be stated generally that no rule of court is ordinarily effective against the provisions of this section. Perris Irrigation Dist. v. Turnbull, (C. C. A. 9th Cir. 1914) 215 Fed. 562, 132 C. C. A. 74.

So, in Dexter v. Sayward, (C. C. Wash. 1902) 139 Fed. 729, it was held that a rule of court, requiring matter in abatement to be pleaded in a separate plea or answer, is a nullity, when the Civil Practice Act of the state permits the defendant to set forth in his answer as many defenses as he may have. See also Amy v. Watertown, (1889) 130 U. S. 301, 9 S. Ct. 530, 32 U. S. (L. ed.) 946, and Perkins v. Watertown, (1873) 5 Biss. 320, 19 Fed. Cas. No. 10,991, as to mode of serving process.

It has, however, been declared that from this section, and R. S. secs. 915 and 916, infra, pp. 84, 70, it appears "that while it was the purpose of Congress to bring about a general uniformity in federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the federal courts, exercised in the form of general rules, adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." Shepard v. Adams, (1898) 168 U. S. 618, 18 S. Ct. 214, 42 U. S. (L. ed.) 602.

So a federal court may, by a standing rule, change subordinate provisions which they deem unsuited to their procedure. Hein v. Westinghouse Air Brake Co., (N. D. Ill. 1909) 168 Fed. 766.

And it has also been held that this section and R. S. sec. 915, supra, p. 77, are to be construed together to give due effect to both. "The general provision of the one as to practice, pleading, and forms and mode of procedure applies to systems of judicial procedure as matters of separate study, and not to details of methods of doing the business of courts. . . . The rules of court under the other section, and the returning of writs is there specially mentioned as a subject of such rules, which are within the power of the court, and valid when made." Ewing v. Burnham, (C. C. V. 1896) 74 Fed. 254.


e. "Like Causes"

Actions in personam and in rem.—"It is a proper construction of this section to hold that, while the provisions of the code of Kentucky in regard to pleadings in civil suits in personam apply to like causes in the federal courts in Kentucky, they do not apply to suits in rem by the United States for the forfeiture of property, after its seizure, for the violation of a revenue law, because there are no 'like causes' known to the laws of Kentucky. Such suits in rem are peculiar in their practice, pleadings, and forms of procedure, and so long as there is ample scope for the operation of section 914 of the Revised Statutes in regard to civil suits in personam, and no intention is manifest to change the established practice in such suits in rem, and any change in practice is limited to 'like causes,' we must continue to regard the former practice as applicable to the present suit." Coffey v. U. S., (1886) 117 U. S. 233, 6 S. Ct. 717, 29 U. S. (L. ed.) 890. See also U. S. v. Fifty Boxes, etc., Lace, (S. D. N. Y. 1889) 92 Fed. 601.

II. FEDERAL LEGISLATION EXCLUSIVE

In general.—"The power of the federal courts to administer rights and remedies in equity was vested in them as part of the judicial power of the nation under the Constitution of the United States and the Judiciary Act of 1789, and as it was not granted by, it may not be revoked, impaired, or destroyed by, the legislation or act of any state. Butler Bros. Shoe Co. v. U. S. Rubber Co., (C. C. A. 8th Cir. 1907) 156 Fed. 1, 84 C. C. A. 167.

And this Act applies only in the absence of direct legislation upon a subject by Congress. Berry v. Mobile, etc., R. Co., (W. D. Ky. 1915) 228 Fed. 395.

It does not require a federal court to follow the state procedure, where to do so would defeat the purpose or impair the effect of any congressional statute. U. S. v. Beatty, (W. D. Va. 1912) 198 Fed. 254.

And the direction of the statute must give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect of any legislation of Congress. Luxton v. North River Bridge Co., (1893) 147 U. S. 327, 13 S. Ct. 397, 37 L. ed. (L. ed.) 184.


In such cases the rules of the state practice in respect thereof are superseded, and the extent and limitations of the powers of the courts of the United States are to be found in the congressional enactments, and not in the laws of the states. Lange v. Union Pac. R. Co., (C. C. A. 8th Cir. 1903) 126 Fed. 338, 62 C. C. A. 48; Sillivas v. Arizona Copper Co., (D. C. Ariz. 1914) 213 Fed. 504.

Conformity is required to the state law and practice only in matters of practice, reading, and forms and modes of proceedings, and not even in such matters where Congress has prescribed a rule; and not in matters of jurisdiction, as to which Congress has prescribed the rule. Shumaker v. Security Life, etc., Co. of America, (C. C. A. 2d Cir. 1908) 159 Fed. 112, 36 C. C. A. 302.

Nor can a substantive right or defense arise under a federal law be lessened or destroyed by a rule of practice. Norfolk Southern R. Co. v. Ferebee, (1915) 238 U. S. 289, 35 S. Ct. 781, 59 U. S. (L. ed.) 1503.

Where the state statute or practice is not adequate to afford the relief which Congress has provided in a given statute, resort must be had to the power of the federal court to adapt its practice and issue its writ and administer its remedies so as to enforce the federal law. Buckley Powder Co. v. E. I. Du Pont De Nemours Powder Co., (D. C. N. J. 1912) 196 Fed. 514.

III. Effect on Jurisdiction of Federal Courts

1. General Doctrine

sens of different states lawfully invoke the jurisdiction of the federal courts to determine controversies between them which involve the requisite amounts, they have the constitutional right to the conduct of that litigation by the methods, to the administration of the remedies, and to the determination of those controversies by the independent judgments of those courts; and so state, by conferring exclusive jurisdiction of such issues upon its own courts, by prescribing exclusive methods of commencing or of conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means, may lawfully strike down that right or take away the plenary power of the national courts to conduct litigation, to administer their remedies, and, in the exercise of their judicial discretion, to control the possession of its subject-matter during its pendency in accordance with their established rules and finally to adjudicate the claims of the parties and to enforce their judgments." Morrill v. American Reserve Bond Co., (W. D. Mo. 1907) 151 Fed. 305.

And the United States Supreme Court has declared: "In cases which concern the jurisdiction of the federal courts, notwithstanding the so-called conformity act, Rev. Stat. sec. 914, neither the statutes of the state nor the decisions of its courts are conclusive upon the federal courts. The ultimate determination of such questions of jurisdiction is for this court alone." Mechanical Appliance Co. v. Castileman, (1910) 215 U. S. 437, 30 S. Ct. 125, 54 U. S. (L. ed.) 272. See also, to same effect, Southern Photo Material Co. v. Eastman Kodak Co., (N. D. Ga. 1915) 224 Fed. 523.

2. Equity Courts

a. General Doctrine

Equity causes are expressly excepted from the operation of the conformity statute (Rev. Stat. sec. 914), with the result that the practice, pleadings, and forms and modes of procedure in such causes are uniform in the United States courts, and are not governed by state laws, statutory or customary. U. S. v. California Timber Co., (C. C. A. 9th Cir. 1916) 236 Fed. 196, 149 C. C. A. 386.

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By the legislation of Congress and repeated decisions of the Supreme Court it has long been settled that the remedies afforded by the enactments of proceeding pursued in the federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting. Guffey v. Smith, (1915) 237 U. S. 101, 35 S. Ct. 528, 59 U. S. (L. ed.) 856.

In the administration of their equitable jurisdiction the federal courts are not, excepting so far as affected by local statutes, administering the laws of the state in which they sit, but are administering the law as applicable to all the states. And in applying the general principles of equity, such as alone are involved in this controversy, they determine for themselves what those principles are, untrammeled by differing decisions of the state tribunals.

While the reasoning of a state court in determining such a question is always to be regarded with respect, and will be followed, if persuasive of a correct statement of the law, it is in no sense conclusive or binding upon a federal court. Loewe v. California State Federation of Labor, (N. D. Cal. 1911) 189 Fed. 714.

In the case of a statute which requires the complainant, in any suit for an injunction to interfere with proceedings for the collection of taxes or for the recovery of property sold for taxes, to allege and prove that before commencing suit the amount justly due was paid, or tendered and refused, it has been said that so far as this statute extends the rule of equity which requires a suitor in equity to do or offer to do equity on his part, it is not controlling in a court of the United States, which cannot be hampered, in the exercise of its chancery jurisdiction, by local statutes. Klenk v. Byrne, (W. D. Wash. 1906) 143 Fed. 1008.

b. Qualification of Doctrine

While it is well settled that the state cannot exercise control over the chancery powers of the federal court, nevertheless "an enlargement of equitable rights by state statute may be administered" by such court "as well as by the courts of the state." Farr v. Hobe-Peters Land Co., (C. C. A. 7th Cir. 1911) 188 Fed. 10. 110 C. C. A. 180. See likewise National Surety Co. v. State Bank, (C. C. A. 8th Cir. 1903) 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394; Carravan v. O'Calligan, (C. C. A. 9th Cir. 1903) 125 Fed. 657, 60 C. C. A. 347, affirmed (1905) 190 U. S. 89, 25 S. Ct. 727, 80 U. S. (L. ed.) 101.

Property and convenience are greatly promoted by pursuing the practice of the courts of the state, and if there be nothing in the character of the equities recognized by the state statute or the remedies prescribed which interfere with what legitimately pertains to the chancery practice, the federal courts will deal with controversies instituted under a state statute, so as to give effect to state legislation and state policy. Ames Realty Co. v. Big Indian Min. Co., (C. C. Mont. 1906) 146 Fed. 166.

And it is said to be the settled doctrine that an enlargement of equitable rights by state statute may be administered by the courts of the United States. U. S. Shipbuilding Co. v. Conklin, (C. C. A. 3d Cir. 1903) 126 Fed. 132, 80 C. C. A. 889.

And in this connection it has been declared that: "It is well established, that state legislation on the subject of procedure cannot impair the remedial powers of federal courts of equity. Over against this, however, stands the equally well established principle that the legislature of the state may, within constitutional limits, change the substantive law; such changes will, of necessity, frequently produce changes in remedial relief. A system of practice which took no account of changes in the substantial rights of litigants would be anomalous indeed. Whole departments of equitable jurisdiction have been swept away by changes in the substantive law. . . . A statute which gives a new right, that may be enforced by an action at law, may remove the very evil which was the ground of equitable jurisdiction. When such a statute is passed, it must be taken in connection with section 723, Rev. St. U. S., and the combination must produce a change in the right to equitable relief in the federal courts." Union Pac. R. Co. v. Wild County, (C. C. A. 8th Cir. 1915) 222 Fed. 631, 138 C. C. A. 175. R. S. sec. 723, mentioned in the foregoing quotation, now constitutes Judicial Code, § 267, supra, this title, vol. 5, p. 989. See further as to enforcement by federal courts of new rights created by state statutes the notes to R. S. sec. 721, supra, this title, vol. 5, at pp. 1126-1127.

But it is not always easy to determine whether a given statute of a state (1) enlarges equitable rights, in which case the jurisdiction of the federal courts in equity may be indirectly increased; or (2) enlarges the jurisdiction of a court of equity, in which case it is without application to the federal courts. Only by a comparison of the decision cases of binding authority can the court determine into which class a statute in question properly falls. Mathews Slate Co. v. Mathews, (C. C. Mass. 1906) 148 Fed. 490.

It is also declared to be a well-established doctrine that, when rules of practice of federal courts in equity conflict with the
constitutional laws of the state in force when contracts regarding land were made, the latter prevail, because they become a part of the contracts between the parties. Childs v. Ferguson, (C. C. A. 8th Cir. 1910) 181 Fed. 795, 104 C. C. A. 305.

IV. APPLICABILITY IN GENERAL

"There can . . . be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence, and the statute of limitations—depend upon the law of the place where the suit is brought." Central Vermont R. Co. v. White, (1918) 238 U. S. 507, 35 S. Ct. 865, 59 U. S. (L. ed.) 1433, Ann. Cas. 1916B 252. See also same effect Day v. Atlantic Coast Line R. Co., (C. C. A. 4th Cir. 1910) 179 Fed. 26, 102 C. C. A. 854.

But this section is not applicable to causes in the appellate courts of the United States. The practice in such cases is governed by the constitutional, statutory, and common-law provisions applicable to writs of error in actions at law in appellate courts of the United States, and by the rules of those courts. Farmer v. Atlantic Coast Line R. Co., (E. D. S. C. 1912) 255 Fed. 319. "The statutes of the state, under section 914 of the Revised Statutes, govern the trial courts in actions at law, but the proceedings in the appellate courts are not amenable to such statutes or rules adopted in pursuance thereof, but are governed by the statutes of the United States and the rules adopted in pursuance of the powers therein granted." Western Union Tel. Co. v. Aldridge, (C. C. A. 6th Cir. 1914) 121 Fed. 836, 126 C. C. A. 506.

V. APPLICABILITY IN PARTICULAR INSTANCES

1. Amendments


So it has been held that in an action at law a federal court sitting in New York will regulate its practice so far as may be by the Code of Civil Procedure of that state and the rules of practice of the state Supreme Court. Hanum v. Jerome, (N. D. N. Y. 1911) 184 Fed. 179.


Power of court generally.—This section and R. S. sec. 916 and 954, infra, pp. 77, 98, must be construed together and their full effect should, as far as possible, be given to each of them. While it was the clear intention of Congress that the practice and pleadings in civil actions at law in the federal court should generally conform to the practice and pleadings in like causes in the courts of record of the state in which the federal court should be held, exact conformity is not required, but only conformity "as near as may be." Federal courts, subject to the requirement of such general conformity, may in any manner not inconsistent with any law of the United States or with any rule lawfully prescribed by the Supreme Court "regulate their own practice as may be necessary or convenient for the advancement of justice," and permit parties to "amend any defect in the process or pleadings upon such conditions" as they shall, in their discretion and by their rules, prescribe. Van Doren v. Pennsylvania R. Co., (C. C. A. 3d Cir. 1899) 93 Fed. 260, 35 C. C. A. 282. See also same effect Salisbury v. Bennett, (S. D. N. Y. 1896) 72 Fed. 743; New York Importers' etc., Nat. Bank v. Lyons, (E. D. Pa. 1905) 134 Fed. 510.

So it has been held that a federal court where an amendment to pleadings is sought is not, by reason of this provision, bound to follow the practice act of a state requiring the filing of an affidavit showing good cause therefor, as R. S. sec. 954 contains the legislation of Congress on the subject of amendments to pleadings in the federal courts and is paramount to the local state statute. Truckee River General Electric Co. v. Benner, (C. C. A. 9th Cir. 1914) 211 Fed. 72, 127 C. C. A. 503.

And a state statute providing that the allowance by the court of an amended declaration shall be conclusive evidence of the identity of the cause of action stated therein with that relied on in the original declaration is not made binding on a federal court in that state by this section, the allowance of amendments in such courts being governed by R. S. sec. 954. De Valle Da Costa v. Southern Pac. Co., (C. C. Mass. 1908) 167 Fed. 654.

Limitation on power of court.—Amendments of process and pleadings cannot follow the state statutes and practice when they are inconsistent with the federal statutes of amendments. Booth v. Denike, (W. D. Tex. 1894) 65 Fed. 43. See also Tiller v. Clavin, (1898) 3 Summ. 379, 23 Fed. Cas. No. 14,066; Einstein v.

And it has been declared that in the matter of the amendment of pleadings plenary power has been conferred by Congress upon the federal courts; and whether a amendment when authorized and made work a waiver of substantial rights or a release of errors should be determined by the principles which obtain in those jurisdictions and not by those which prevail in the state tribunals. Williamson v. Liverpool, etc., Ins. Co., (C. C. A. 8th Cir. 1905) 141 Fed. 54, 72 C. C. A. 542, 5 Ann. Cas. 402.

Amendments after verdict.—In North Chicago St. R. Co. v. Burnham, (C. C. A. 7th Cir. 1900) 102 Fed. 699, 42 C. C. A. 584, the court said that a state statute, "if designed to go so far, will hardly be followed by the federal courts to the extent of ordering or permitting after verdict amendments which involve the formation of new issues." See Whitaker v. Pope, (1876) 2 Woods 483, 29 Fed. Cas. No. 17,528.


But if the order allowing an amended petition to be filed could be lawfully made in this case, so long as final judgment had not been entered it was equally within the power of the court to modify that order so as to treat the amendment as a mere addition to the original petition, and thus to preclude the contention that she had not possessed the necessary knowledge, which she had once solely avowed. Henderson v. Louisville, etc., R. Co., (1887) 123 U. S. 61, 8 S. Ct. 60, 31 U. S. (L. ed.) 92.

a defendant in an action for money received in a fiduciary capacity may be followed in a federal court in such an action. Moffett v. Goree, (1873) 6 Ben. 556, 16 Fed. Cas. No. 8,844. See also Marble v. Fulton, (1873) 1 Hask. 462, 16 Fed. Cas. No. 9,059.

4. Bill of Exceptions

See in this connection infra, this note, V, 24, d, p. 42.

5. Bill of Particulars

See in this connection infra, this note, V, 36, a, p. 56.

6. Claim and Delivery Action


7. Commencement of Proceedings

Although a state statute provides that a suit is commenced "by the service of a summons . . . or by filing a complaint with the county clerk," it has been held that national courts will not be governed by such a practice and that jurisdiction only attaches upon the service of process. U. S. v. Eisenbeis, (C. C. A. 9th Cir. 1901) 112 Fed. 190, 60 C. C. A. 179.

A state statute providing that an action at law in the state courts may be commenced by filing the petition in the office of the clerk was followed in a case in a federal court in Texas in which it was held that in the Circuit Court of the United States an action at law was commenced by petition filed in the office of the clerk. International Bank, etc., Co. v. Scott, (C. C. A. 5th Cir. 1908) 159 Fed. 55, 96 C. C. A. 248.

8. Continuance

The granting or refusing a continuance is a matter within the discretion of the court, notwithstanding the applicant for continuance has complied with the terms of the state statute, a compliance with which in the state courts gives a right to a continuance. Texas, etc., R. Co. v. Nelson, (C. C. A. 5th Cir. 1892) 50 Fed. 514, 2 U. S. App. 213, 1 C. C. A. 688.

9. Copyright Suit

In a copyright suit the court considered a motion to strike out a pleading in the form of a common-law plea, and granted it on a construction of this section and R. S. sec. 4969, which provided that "in all actions arising under the laws respecting copyrights, the defendants may plead the general issue, and give the special matter in evidence." Johnston v. Kloepch, (S. D. N. Y. 1898) 88 Fed. 692. R. S. sec. 4969, above cited, was repealed by force of section 63 of the Copyright Act of 1909, in title Copyright, vol. 2, p. 622.

A direct proceeding to secure condemnation and forfeiture of goods for a violation of the copyright laws is not an ordinary action of replevin under the New York Code which is dependent on the plaintiff having the right of property or possession before commencing the action. American Tobacco Co. v. Werkmeister, (C. C. A. 2d Cir. 1906) 146 Fed. 375, 76 C. C. A. 847.

10. Costs and Fees

a. In General

As to right to costs see also R. S. sec. 791 and notes thereto, supra, this title, vol. 5, pp. 1166-1168, and R. S. secs. 823, 824, in Coers, vol. 2, pp. 624, 628, and notes thereto.

Prior to the Act of Feb. 26, 1853 (R. S. secs. 823, 824, above cited), the taxation of costs between party and party in civil suits, in the various districts, conform to the practice of the state in which the district was situated, and it has been held that since its passage the practice has been the same except so far as in terms restricted by that statute. Primrose v. Fenno, (C. C. Mass. 1902) 113 Fed. 375.

So when a proceeding is adopted from the state practice under this section it is held that the allowance or refusal of costs will also follow. Hunter v. Esposon, (C. C. N. H. 1883) 15 Fed. 732; New Hampshire Land Co. v. Tilton, (C. C. N. H. 1887) 29 Fed. 764; Morrison v. Bernards Tp., (C. C. N. J. 1888) 35 Fed. 400.

And where a suit commenced in a state court to recover from the collector of internal revenue for taxes alleged to have been illegally assessed and collected from the plaintiff has been removed to a federal court, it has been decided that if the case is one in which the plaintiff would have recovered costs in the state court if the suit had not been removed, he is entitled to recover costs in the federal court, although if the suit had been originally brought in that court he would have recovered no costs. De Barry v. Carter, (C. C. A. 5th Cir. 1900) 102 Fed. 130, 42 C. C. A. 200. But see Richter v. Magone, (S. D. N. Y. 1899) 47 Fed. 192.

And if Acts of Congress make specific provision for costs, they control. If they make no provision for certain kinds of costs, the provisions, if any, of the state statutes may be followed (Scatcherd v. Love, (C. C. A. 6th Cir. 1908) 186 Fed. 53, 91 C. C. A. 639, and cases cited), at least if they do not result in injustice in a particular case (Primrose v. Fenno, [C. C. Mass. 1902] 113 Fed. 375). Such seems to be the prevailing doctrine at this time. Michigan Aluminum Foundry
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b. Security for Costs

A state statute permitting a court to require a plaintiff to give security for costs may be followed by a federal court, where no federal statute covers the case. Handy Varnish Co. v. Midland Linseed Oil Co., (E. D. Mich. 1911) 161 Fed. 256. See also Visking Mfg. Co., (N. D. N. Y. 1910) 180 Fed. 624.

The question whether the plaintiff should be required to give security for costs, there being no federal statute on that subject, is determinable either by a rule of the court or by the state statute on the same subject made applicable by this section. Silvas v. Arizona Copper Co., (C. C. A. 9th Cir. 1915) 220 Fed. 116, 136 C. C. A. 208.

c. Attorneys’ Fees

A decision of the highest state appellate court sustaining a statute allowing attorney’s fees against a defeated defendant has been followed by the United States Supreme Court. Missouri, etc., R. Co. v. Cade, (1914) 233 U. S. 642, 54 U. S. Ct. 678, 59 U. S. (L. ed.) 1135.

And it has been declared that a state statute allowing attorney’s fees to a plaintiff in certain actions relates to a matter of procedure and will be followed by a federal court in that state. Kline v. Royal Ins. Co., (S. D. N. Y. 1911) 192 Fed. 378.

And according to the well-settled rule in Pennsylvania the amount of the attorney’s commission stipulated for in the mortgage and accompanying bond is subject to the control of the court by whom it may be reduced to such sum as appears to be an adequate compensation for the labor that has actually been performed. So, in such a case a federal court in that state, in a bankruptcy proceeding, will act in conformity to that rule. In re Wendell, (E. D. Pa. 1907) 152 Fed. 672.

d. Referee’s Fees

The fees of a referee appointed by an order of a federal court must be controlled by the allowance of that court if not agreed upon by the parties. New Jersey Terminal Dock, etc., Co. v. Long Beach, (E. D. N. Y. 1910) 179 Fed. 973.

11. Counterclaim

A contention that according to the practice under a state enactment, a counterclaim must be set up by a defendant in his answer and cannot, if not set up, be used as an independent cause of action, will not be sustained by a federal court where the provision has not been so construed by the highest appellate court of the state. Virginia-Carolina Chemical Co. v. Kirven, (1908) 215 U. S. 252, 30 S. Ct. 76, 54 U. S. (L. ed.) 179.

12. Creditors’ Bill

A state statute which allows the filing of a creditors’ bill upon every judgment for the payment of money after an execution has been returned nulla bona, whether the original cause of action was in contract or in tort, provides a remedy which will be administered by the federal courts. Jahn v. Champagne Lumber Co., (W. D. Wis. 1908) 167 Fed. 407.
13. Criminal Cases


Setting aside verdict.—The setting aside of a verdict and granting of a new trial by a federal court in a criminal case is not governed by any statute, but is a matter of discretion, which may be exercised at any time before judgment has been entered upon the verdict, although the term at which the verdict was returned may have passed. U. S. v. Rogers, (W. D. Ky. 1908) 164 Fed. 520.

14. Damages

As to following state decisions as to measure of damages, see notes to R. S. sec. 721, supra, this title, vol. 5, p. 1169.

A federal court should apply in the assessment of damages, whether in actions in contract or tort, the rules existing and applicable in the state court; such assessment being a matter of practice. Loew v. Union Sav. Bank, (D. C. Conn. 1915) 226 Fed. 294. See also to same effect Raymond v. Danbury, etc., R. Co., (1877) 14 Blatchf. 133, 20 Fed. Cas. No. 11593; Johnson v. Bridgeport Deoxidized Bronze, etc., Co., (C. C. Conn. 1903) 125 Fed. 631.

Where a state statute creates an action for the exclusive benefit of the widow and next of kin to recover damages for the death of a person as a result of the negligence of another it has been held that although a court of admiralty has jurisdiction of such cause of action in consequence of its maritime nature as a tort committed upon navigable waters, it can give no relief except in conformity with the statute that creates the right. Stern v. La Compagnie Generale Transatlantique, (S. D. N. Y. 1901) 110 Fed. 996.

15. Demurrer to Evidence

A demurrer to the evidence is a matter of "practice, pleadings, and forms and modes of proceeding," as to which the courts of the United States are required to conform as near as may be to those existing in the courts of the state within which the trial is had. Central Transp. Co. v. Pullman's Palace Car Co., (1891) 159 U. S. 24, 11 S. Ct. 478, 35 U. S. (L. ed.) 55.

16. Continuousness

A discontinuance and withdrawal of a juror may be made upon request of the plaintiff. Wolcott v. Studebaker, (N. D. Ill. 1887) 34 Fed. 8. See also Nusbaum v. Northern Ins. Co., (S. D. Ga. 1889) 40 Fed. 337, as to discontinuing a suit as to part of the amount sued on.

17. Dismissal

A dismissal of the case on motion by the plaintiff, upon an announcement by the court that it would direct the jury to find a verdict for the defendant, should be allowed when the motion to do so is reasonably made in accordance with the state statute. Gassman v. Jarvis, (C. C. Ind. 1899) 94 Fed. 603.

But it has also been held that this section does not control the dismissal of a case by the federal court for failure to try the case when reached, and the rule obtaining in state courts allowing the case to be dismissed if later issues have been tried cannot be invoked. Watts v. M. Hamilton Coal Co., (E. D. N. Y. 1915) 219 Fed. 1003.

And under a statute providing that "an action may be dismissed, and such dismissal shall be without prejudice to a future action": (1) By the plaintiff, before the final submission of the case to the jury, or to the court when the trial is to the court," it has been held that an announcement of a purpose to dismiss comes too late when made after the court has directed a verdict for the defendant and a juror designated as foreman is in the act of signing the verdict. Duffy v. Glucose Sugar Refining Co., (S. D. Ia. 1906) 141 Fed. 206.

18. Ejectment Actions

Such an action has been held to be one which may be revived in accordance with the provisions of a state Code of Civil Procedure. McArthur v. Williamson, (S. D. Ohio 1891) 45 Fed. 154.

And where it is settled by the laws of the state that the holder of an oil or gas lease cannot maintain an action of ejectment thereon it has been decided by the United States Supreme Court that it results from the text section 914 and R. S. sec. 721, supra, this title, vol. 5, p. 1123, that such an action cannot be maintained in a federal court. Guffey v. Smith, (1916) 287 U. S. 101, 35 S. Ct. 526, 59 U. S. (L. ed.) 856.

So a recognition by the state court of ejectment as a proper remedy under state laws for a riparian owner to secure the removal of a structure that interferes with access by him from his land to navigable water is a sufficient answer to an objection to jurisdiction by the federal court. Scranton v. Wheeler, (1900) 179 U. S. 141, 21 S. Ct. 48, 45 U. S. (L. ed.) 126.

But in actions of ejectment, as the controversy concerns merely the legal title of
the parties, the rules of courts of equity do not obtain, and it matters not whether the one or the other is the best equitable title. This is the law of the federal courts, even when they are sitting in states in which equitable titles are triable in ejectment. Mead v. Chesbrough Bldg. Co., (C. C. A. 2d Cir. 1907) 151 Fed. 996; 81 C. C. A. 184; McRae v. Darling, (C. C. A. 2d Cir. 1907) 151 Fed. 1006; 81 C. C. A. 192.

See also to same effect Tegarden v. LeMarchel, (W. D. Ark. 1904) 129 Fed. 487.


And a state practice of permitting the action of ejectment to be maintained upon warrants for land upon other titles not complete or legal in their character, but equitable only, can in no wise affect the jurisdiction of the United States courts.


19. Eminent Domain

As to following decisions in state courts relating to eminent domain, see annotations to R. S. sec. 721, supra, this title, vol. 5, p. 1177.


In general.—In condemnation proceedings the federal court is required by this section to follow the modes of procedure in like causes in the state court. U. S. v. Eisenbeis, (C. C. A. 9th Cir. 1901) 112 Fed. 190, 50 C. C. A. 179.

And it has been held that R. S. sec. 586, infra, p. 121, does not embrace condemnation cases, and there is no reason why state procedure should not be followed unless by so doing procedure in the federal courts is unduly encumbered. U. S. v. Beaty, (W. D. Va. 1912) 196 Fed. 234.

In condemnation proceedings under the Act of Aug. 1, 1888, ch. 728, 25 Stat. L. 357 and the Act of Aug. 18, 1890, ch. 797, 26 Stat. L. 315, 316, both Acts in title PUBLIC PROPERTY, BUILDINGS, AND GROUNDS, it has been held that the provision that the proceedings shall be prosecuted in accordance with the laws of the state cannot be construed literally so as to limit the federal court of jurisdiction, where the state statute designates a special tribunal for such proceedings, but only requires a general conformity to the state practice as a whole. U. S. v. Certain Land in New Castle, (C. C. N. Y. 1908) 185 Fed. 763. See also U. S. v. Honolulu Plantation Co., (C. C. A. 9th Cir. 1903) 122 Fed. 581, 58 C. C. A. 279; U. S. v. Sargent, (C. C. A. 8th Cir. 1908) 162 Fed. 81, 89 C. C. A. 81.

A district attorney of the United States, authorized to institute and conduct proceedings to condemn land for public building within a state, has the same power to bind the United States by an agreement to submit the matter of damages to arbitration, in accordance with a provision of a state statute applicable to such actions, as the attorney for an individual litigant would have. Judson v. U. S., (C. C. A. 2d Cir. 1903) 120 Fed. 637, 57 C. C. A. 99.

Right to jury.—Where a state statute relating to proceedings for the condemnation of land provides that any party to any such proceeding "before the appointment of commissioners . . . and before the expiration of the time for the defendant to appear and answer may demand a jury of freeholders residing in the county in which the petition is filed, to ascertain, determine and appraise the damages or compensation to be allowed," it was held that a jury could not be impaneled for such purpose in any event, unless some party to the proceeding required it, nor unless said party should require it before the appointment of commissioners and before the expiration of the time for the defendant to appear and answer, and that a party failing to comply with this requirement waived its right to a jury. Broadmoor Land Co. v. Curr, (C. C. A. 8th Cir. 1905) 142 Fed. 421, 73 C. C. A. 537.

After the removal of condemnation proceedings from the court of a state to the United States court, the latter court is bound to follow the statutes of the state regulating the taking of private property for public purposes, and the ascertainment of proper compensation therefor. Broadmoor Land Co. v. Curr, (C. C. A. 8th Cir. 1905) 142 Fed. 421, 73 C. C. A. 537.

20. Evidence and Mode of Obtaining

As to following decisions and statutes relating to evidence, see annotations to R. S. sec. 721, supra, this title, vol. 5, p. 1177 et seq.


So it has been held that a state statute permitting a party to an action at law to be examined by his adversary as a witness in advance of the trial is not a rule for the guidance of the federal courts. The federal statutes provide a system to govern the practice of procuring testimony to be used in the courts of the United States, and exclude all other modes of proof. Ex p. Fisk, (1885) 113 U. S. 713, 5 S. Ct. 724, 28 U. S. (L. ed.) 1117; Beardsley v. Littell, (1877) 14 Blatchf. 102; Cas. No. 1,185; Easton v. Hodges, (1877) 7 Bina. 324, 5 Fed. Cas. No. 4,358.

So examination before trial authorized under the procedure in New York has been held to be inapplicable to actions in the federal courts within that state. Barnes v. Trees, (S. D. N. Y. 1912) 194 Fed. 230.

In Anderson v. Mackay, (S. D. N. Y. 1891) 46 Fed. 105, the court said that the Fisk case, supra, did not cover an examination of a defendant to enable plaintiff to frame a complaint.

Interrogatories.—A state law providing that a party to a suit as law may submit interrogatories to the other concerning matters material to the issue, and that written answers shall be made thereto within thirty days, which answers shall only be evidence in the cause if offered by the party proposing the interrogatories, is not applicable to federal courts. Smith v. International Mercantile Co., (C. C. N. J.) 154 Fed. 786.


Physical examination of party.—The United States Supreme Court has decided that the power to order such an examination, where authorized by a state statute, exists by virtue of R. S. sec. 721, supra, this title, vol. 5, p. 1123. Camden, etc., R. Co. v. Stetson, (1900) 177 U. S. 172, 20 S. Ct. 617, 44 U. S. (L. ed.) 721.

And a state statute which authorizes a state court to require that the defendant allow a reasonable inspection of his premises has been held to be applicable to actions at law in a federal court to recover for a personal injury. Mills v. Providence Belting Co., (C. C. R. I. 1906) 145 Fed. 447.

Taking down examination in writing.—State statutes requiring, upon request of a party, the evidence to be taken down in writing by the clerk need not be followed. Parsons v. Bedford, (1830) 3 Pet. 433, 7 U. S. (L. ed.) 739.

Deposition.—Where a party to an action elects to follow the mode prescribed by the state law for securing testimony, it is incumbent upon him to proceed in conformity with the requirements of the state law as to the mode of procuring a deposition. Pullman Co. v. Jordan, (C. C. A. 5th Cir. 1914) 218 Fed. 573, 134 C. C. A. 301.


Taking testimony on legal holidays.—Where being nothing in the law to prevent a federal court from being in session on a legal holiday and taking testimony in open court, the statute of a state relating to legal holidays and the taking of testimony on such days is not controlling in the case of rebuttal testimony taken on a holiday. American Automonteeer Co. v. Porter, (E. D. Mich. 1913) 206 Fed. 106.

Objection to introduction of evidence.—The practice of objecting to the introduction of any evidence “for the reason that the petition shows on its face that the plaintiff is not entitled to recover” is said to be very objectionable and not recog-
nised in the national courts, though it may be permitted in the courts of a state where a cause is pending. United Kansas Portland Cement Co. v. Harvey, (C. C. A. 8th Cir. 1914) 216 Fed. 316, 192 C. C. A. 460.


A federal court has, however, ample power in some cases to issue a subpoena duces tecum under this section. Palmer v. Mahin, (C. C. A. 8th Cir. 1903) 120 Fed. 737, 57 C. C. A. 41.

And in Frescoe v. Lancaster, (E. D. Pa. 1895) 10 Fed. 337, the court made an order on the defendant to produce in advance of the trial certain "plans," it being averred by petition that the plans were a part of the agreement sued upon, and that an inspection by the plaintiff was necessary to fully complete his pleadings in the cause, following the practice in the state courts. See Victor G. Bloede Co. v. Joseph Bancroft, etc., Co., (C. C. Del. 1899) 98 Fed. 171.

Burden of proof.—In a contest as to the validity of a will, the state practice and mode of proceeding, throwing the burden of establishing the will and its validity upon the party who relied upon it to the same extent as if it had never been probated, is within the state. Sawyer v. White, (C. C. A. 8th Cir. 1903) 122 Fed. 223, 58 C. C. A. 587. See Roberts v. Lewis, (1892) 144 U. S. 653, 12 S. Ct. 781, 36 U. S. (L. ed.) 579, and Foster v. Cleveland, etc., R. Co., (S. D. N. Y. 1893) 56 Fed. 434, as to burden of proof of diverse citizenships; Imperial Refining Co. v. Wyman, (N. D. Ohio 1898) 38 Fed. 574.

But it is a misnomer to say that the question as to the burden of proof as to contributory negligence is a mere matter of state procedure, for in some states proof of plaintiff's freedom from fault is a part of the substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. In those states the plaintiff is as much under the necessity of proving one of these facts as the other, and as to neither can it be said that the burden is imposed by a rule of procedure, since it arises out of the general obligation imposed upon every plaintiff, to establish all of the facts necessary to make out his cause of action. Central Vermont R. Co. v. White, (1915) 238 U. S. 507, 35 S. Ct. 865, 59 U. S. (L. ed.) 1433, Ann. Cas. 1916B 262.

In Delaware, etc., R. Co. v. Welchman, (C. C. A. 3d Cir. 1916) 229 Fed. 82, 143 C. C. A. 358, L. R. A. 1916E 815, applying and approving Erie R. Co. v. Schmidt, (C. C. A. 3d Cir. 1915) 225 Fed. 513, 140 C. C. A. 655, as to the effect to be given to the New Jersey statute regulating to the care of persons crossing a railroad crossing at which there is a guard or warning safety device, the court said: "This statute has not been sought to be enforced by the New Jersey courts, and its full meaning may not be entirely free from doubt; but so far as the facts of the present case require us to declare its full meaning we think the proper construction is as follows: A railroad company may protect a crossing by a safety device, or by a flagman, or by both these means. If the device is not in order, due notice to that effect must be given; in the absence of such notice, an approaching traveler may assume that the device is in order and will be duly and properly operated. If a flagman is on duty, the traveler may assume that such employee will give sufficient warning of danger; and if the traveler be nevertheless injured or killed, no action brought for such injury or death shall be defeated by the mere fact that the traveler did not stop, look, and listen. . . . In our opinion, the railroad is in no way in supposing that the act compels the trial judge to submit to the jury every case of injury or death at a protected grade crossing in New Jersey. The evidence may establish contributory negligence so clearly that the judge would be bound to give the jury binding instructions in favor of the railroad. The act does no more than declare as a rule of evidence that in certain situations the mere fact that the deceased did not stop, look, and listen shall not of itself defeat recovery; but it does not attempt to lay down a rule that every grade crossing, case where contributory negligence is alleged must be submitted to a jury. For example: A situation may easily be supposed where the warning of a flagman might be seen and recklessly disregarded, and in such a case the duty of the judge has not been changed by the statute. The legislature has done nothing more than exercise its conceded power to regulate procedure; it simply provides that a plaintiff is not to be defeated unless more than a specified minimum of evidence be
present. This, of course, would bind the state courts, and we see no reason why the federal courts in New Jersey should not conform to the same procedure."

As to presumption of negligence being overcome by undirected testimony that due care was exercised, a state rule so held was followed as a rule of evidence in Great Northern R. Co. v. Coats, (C. C. A. 8th Cir. 1902) 115 Fed. 452, 53 C. C. A. 382.

21. Foreclosure Proceedings

Foreclosure proceedings in a federal court must go upon the ordinary lines of such proceedings in the courts of the state in which the property is located. Knickerbocker Trust Co. v. Penacock Mfg. Co., (C. C. N. H. 1900) 100 Fed. 814. If it is the practice in a state for a decree in foreclosure proceedings to be entered before assessment of damages by a commissioner, judgment of foreclosure may be entered as of the day when the plaintiff shall elect to take it. If, under the practice, computation and assessment of damages must first be made, judgment may be entered as of the day when such assessment is filed in the clerk's office. Knickerbocker Trust Co. v. Penacock Mfg. Co., (U. C. N. H. 1900) 100 Fed. 814.

22. Garnishment

When a garnishee has been summoned and files his answer, and the plaintiff takes issue thereon, it is a civil action within the meaning of this section, notwithstanding the suit may have grown out of the remedy and process of attachment. "While the suit grows out of the remedy and process of attachment, which is provided for by R. S. sec. 915, infra, p. 64, it is not part of that process any more than a suit between the plaintiff in the attachment and a third person who intervenes and claims the attached property can be said to be a part of the attachment. Citizens' Bank v. Farrell, (C. C. A. 8th Cir. 1893) 58 Fed. 570, 12 U. S. App. 409, 6 C. C. A. 24. See also Logan v. Goodwin, (C. C. A. 8th Cir. 1900) 104 Fed. 490, 43 C. C. A. 68. And see U. S. v. Swan, (C. C. A. 6th Cir. 1895) 60 Fed. 947, 31 U. S. App. 112, 15 C. C. A. 77.

23. Interpleas

"If the statute of the state contained provisions regulating trials of the right of property in such cases, it might be most convenient to make them a part of the practice of the court, as contemplated by sections 914, 915, 916 of the Revised Statutes." Krippendorf v. Hyde, (1884) 110 U. S. 273, 4 S. Ct. 27, 28 U. S. (L. ed.) 145. See also Gumbel v. Pitkin, (1888) 124 U. S. 131, 8 S. Ct. 379, 31 U. S. (L. ed.) 374; Bowen v. Needle Nat. Bank, (S. D. Cal. 1896) 76 Fed. 176.

24. Judgments and Proceedings Subsequent to a. In General

As to following decisions and statutes of state as to operation and effect of judgments, see annotations to R. S. sec. 721, supra, this title, vol. 5, p. 1197 et seq.

Application generally of section.—This section applies to the forms and modes of procedure for procuring judgment, and not to subsequent proceedings. Friedly v. Giddings, (C. C. Vt. 1902) 119 Fed. 438.

Everything after judgment, looking to a review by an appellate court, is regulated solely by the acts of Congress, the practice at common law, and the rules and decisions of the federal courts, and this section is not applicable. Detroit United Ry. v. Nichols, (C. C. A. 6th Cir. 1908) 165 Fed. 289, 91 C. C. A. 257. See to same effect Laurel Oil, etc., Co. v. Galbreath Oil, etc., Co., (C. C. A. 8th Cir. 1908) 165 Fed. 162, 91 C. C. A. 106.

So it has been held that a motion for an adjudication that the cause of action arose from the willful and malicious act of the defendants, and that they ought to be confined in close jail, should not be granted. Friedly v. Giddings, (C. C. Vt. 1902) 119 Fed. 438.

And it has been held that the court is to be guided by the common law and not by the state statute where a motion is made to set aside a general verdict and enter judgment for the defendant on certain findings. Detroit v. Grummund, (C. C. A. 8th Cir. 1914) 216 Fed. 273, 132 C. C. A. 417.

But it has been held that an order in a proceeding in aid of execution, under a state statute, directing a garnishee to pay to the judgment creditor money which he owed to the judgment debtor, is not a judgment which does not determine finally the liability of the garnishee, and such practice will be followed in the United States courts in that state, and a federal court erred in directing that execution issue against the garnishee if payment should not be made according to the order, as the payment of the money can be enforced from the garnishee to the creditor only by an ordinary action. Atlantic, etc., R. Co. v. Hopkins, (1876) 94 U. S. 11, 24 U. S. (L. ed.) 48.

Judgments against one or more of several parties, when authorized by state law, may be rendered in the federal courts in that state. Sawin v. Kenny, (1879) 93 U. S. 289, 23 U. S. (L. ed.) 926. See also Atlantic, etc., R. Co. v. Laird, (1896) 164 U. S. 393, 17 S. Ct. 120, 41 U. S. (L. ed.) 485; Witters v. Sowles, (C. C. Vt. 1889) 34 Fed. 119.

This section applies to the mode of entering and recording judgments, including provisions for entering judgments against one or more defendants. Knight
Judgment for part of items claimed.—
In accordance with state practice, a court has directed a judgment to be entered in favor of plaintiff for certain items as to which an affidavit of defense was found to be insufficient, without prejudice to the right to proceed for the balance of the amount claimed. Harding v. York Knitting Mills, (M. D. Pa. 1905) 142 Fed. 228.

Judgment for part of land in ejectment.
In an action of ejectment, when, by the local statute, the plaintiff is entitled to recover the whole of the premises, or any part thereof, or any interest therein, according to the rights of the parties, judgment may be entered on a general finding for the plaintiff only as to a part of the land in controversy. Morgan v. Eggers, (1888) 157 U. S. 65, 8 S. Ct. 1041, 32 U. S. (L. ed.) 66.

Adding interest to judgment.—A state statute providing that "when final judgment for the plaintiff is rendered the clerk must add to the sum so awarded interest thereon from the decedent's death and include it in the judgment," is a matter of procedure, and is made a rule of the federal court, but the plaintiff may waive the interest. Robostelli v. New York, etc., R. Co., (S. D. N. Y. 1898) 34 Fed. 710. See also Marke v. Northern Pac. R. Co., (C. A. 9th Cir. 1896) 76 Fed. 941, 44 U. S. App. 714, 22 C. C. A. 430.

Signing of judgments by judge.—A state statute providing that "the judge must sign all definitive or final judgments rendered by him, but that he shall not do so until three judicial days have elapsed, to be computed from the day when such judgments were given," is a rule of practice for United States courts within that state (Louisia). Yznaga del Valle v. Harrison, (1876) 93 U. S. 235, 23 U. S. (L. ed.) 892.

Provision of judgments in state statute as to notice before entry of judgment need not by reason of this section be followed where the parties have by stipulation agreed otherwise. Nelson v. McMillan, (Ia. 1916) 156 N. W. 923.

In the mode of entering and recording judgments the state law will be followed. Morrison v. Bernards Tp., (C. N. J. 1888) 35 Fed. 400. See also Chicago Fourth Nat. Bank v. Neyhardt, (1876) 13 Blatchf. 393; 9 Fed. Cas. No. 4,991; Detmold v. G. \\


As to the form of judgments in actions on official bonds, see Hagood v. Bylthe, (C. C. S. C. 1889) 37 Fed. 249.


"At common law, a judgment non obstante veredicto could only be granted upon the application of the plaintiff, and upon a plea to the declaration which confessed the cause of action and set up matters in avoidance, which, upon their face, were insufficient to constitute a defense or a bar. German Ins. Co. v. Frederick, (C. C. A. 8th Cir. 1893) 58 Fed. 144, (19 U. S. App. 241), 7 C. C. A. 122. The rule has been relaxed in most of the states so far as to permit a judgment on the pleadings notwithstanding the verdict in behalf of either the plaintiff or the defendant." U. S. v. Gardner, (C. C. A. 9th Cir. 1904) 133 Fed. 285; 66 C. C. A. 683, holding that where there is no statute in a state nor decision of the Supreme Court therein further relaxing the rule so as to permit the consideration of the evidence in a case, a federal court sitting in that state will grant such a judgment, if at all, solely upon the record.

A statute provided that "whenever upon the trial of any issue a point requesting binding instructions in writing is made, and the party declining the party presenting the point may . . . move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence and to enter such judgment as should have been entered upon that evidence." As construed by the Supreme Court of the state, such statute does not infringe upon the province of the jury, but merely gives the court the same power after verdict that it had before to direct a verdict for either party upon the whole evidence. Such practice is adaptable to the federal courts, and one which the Circuit Courts within the state are required to follow by a prior decision of state law. Foss v. Bergren, (E. D. Pa. 1909) 165 Fed. 380, affirmed (C. C. A. 3d Cir. 1909) 176 Fed. 76; Baltimore, etc., R. Co. v. McCune,
(C. C. A. 3d Cir. 1909) 174 Fed. 991. 98

Construction of judgment of dismissal.—
The state law will be followed as to whether a judgment of dismissal is a judgment on the merits. U. S. v. Parker, (1887) 120 U. S. 89, 7 S. Ct. 454, 30 U. S. (L. ed.) 601.

b. Enforcement of Judgment


Proceedings for a stay of execution upon a judgment prescribed by state law are not governed by this section. R. S. sec. 916, infra, p. 70, provides for remedies on judgments. Lamaster v. Keeler, (1887) 123 U. S. 376, 8 S. Ct. 107, 31 U. S. (L. ed.) 238.

c. Motions for New Trials

As to new trials see Judicial Code, § 269, supra, this title, vol. 5, p. 1047.


So it is said by the United States Supreme Court: "It has long been the established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the subject of review on a writ of error. We cannot think that Congress intended by the Act of June 1, 1872 (17 Stat. L. 197, § 5), to abrogate this salutary rule." Newcomb v. Wood, (1878) 97 U. S. 581, 24 U. S. (L. ed.) 1086.

And a state statute providing that where the Supreme Court orders a new trial or further proceedings in the lower court the record shall be transmitted to such court and proceedings had thereon within one year from the date of such order, or in default thereof the action shall be dismissed, has been held not to be obligatory upon a federal court. Manitowoc Malting Co. v. Feuchtswanger, (E. D. Wis. 1912) 196 Fed. 506.

d. Bill of Exceptions


This section does not apply to bills of exceptions and proceedings on review.


So it has been said that: “It has been uniformly held by the federal courts that the settlement of bills of exceptions is governed by the federal statutes and the practice of the federal courts, and not by the practice of the several states.” New York, etc., R. Co. v. Hyde, (C. C. A. 1st Cir. 1893) 50 Fed. 188, 5 U. S. App. 443, 5 C. C. A. 461; Green v. Fitchburg R. Co., (C. C. A. 1st Cir. 1903) 119 Fed. 872, 56 C. C. A. 402.

In the courts of the United States the proceedings preparatory to obtaining a review of their rulings, including the questions of when an exception need be taken and how motions and rulings, not in themselves part of the record, may be made such, are not regulated by state statutes, but by the statutes of the United States, and, if they be silent, by the common law and the practice prevailing in those courts. Ghoist v. U. S., (C. C. A. 8th Cir. 1909) 105 Fed. 841, 94 C. C. A. 263.

e. Vacating or Modifying Judgments

In general—“After the term has ended all final judgments and decrees of the court pass beyond its control unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the declaratory judgment. The question relates to the power of the courts and not to the mode of procedure, and state statutes and decisions on the point are not binding. Bronson v. Schulten, (1861) 104 U. S. 410, 26 U. S. (L. ed.) 797. See also to same effect U. S. v. Wallace, (D. C. S. C. 1891) 46 Fed. 586; Tryon v. Pennsylvania R. Co., (C. C. A. 8th Cir. 1901) 111 Fed. 269, 49 C. C. A. 309, 55 L. R. A. 638; Tryon v. Pennsylvania R. Co., (D. C. N. J. 1914) 213 Fed. 49.

So where in U. S. v. Mayer, (1914) 235 U. S. 55, 35 S. Ct. 13, 59 U. S. (L. ed.) 129, the question arose whether the District Court had power to vacate its own judgment, the court said: “In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term. . . . There are certain exceptions. In the case of courts of common law,—and we are not here concerned with the special grounds upon which courts of equity afford relief, —the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors, and, in civil cases, to rectify such mistakes of fact as were reviewable on writ of error coram nobis. See also the cases generally with which the proceeding by motion is the modern substitute. . . . These writs were available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon, and were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment,—for, it was said, ‘error in fact is not the error of the judges, and reversing it is not reversing their own judgment.’ So, if there were error in the process, or through the default of the clerks, the same proceeding might be had to procure a reversal. But if the error were ‘in the judgment itself, and not in the process,’ a writ of error did not lie in the same court upon the judgment, but only in another and superior court. . . . The errors of law which were thus subject to examination were only those disclosed by the record, and, as the record was so drawn up that it did not show errors in the reception or rejection of evidence, or misdirections by the judge, the remedy applied ‘only to that very small number of legal questions’ which concerned ‘the regularity of the proceedings themselves.’ See Report Royal Commission on Crim. Code (1879) p. 37; 1 Stephen, History of Crim. Law, 309, 310. In view of the statutory and limited jurisdiction of the federal district courts, and of the specific provisions for the review of their judgments on writ of error, there would appear to be no basis for the conclusion that, after the term, these courts in common-law actions, whether civil or criminal, can set aside or modify their final judgments for errors of law; and even if it be assumed that in the case of errors in certain matters of fact, the district courts may exercise in criminal cases — as an incident to their powers expressly granted — a correctional juris-
diction at subsequent terms analogous to that exercised at common law on writs of error or appeals (see Bishop, New Crim. Proc. 2d ed. § 1369), as to which we express no opinion, that authority would not reach the present case. This jurisdiction was of limited scope; the power of the court thus to vacate its judgments for errors of fact existed, as already stated, in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid. In cases of prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence, as well as where it is sought to have the court in which the case was tried reconsider its ruling, the remedy is by a motion for a new trial (Jud. Code, § 289) — an application which is addressed to the sound discretion of the trial court, and, in accordance with the established principles which have been repeatedly set forth in the decisions of this court above cited, cannot be entertained, in the absence of a different statutory rule, after the expiration of the term at which the judgment was entered."

See to the same effect Forty Fort Coal Co. v. Kirkendall, (M. D. Pa. 1916) 233 Fed. 704; wherein the court said: "However, it will not be denied that many of the state law courts have and exercise this power. In some states it is expressly conferred by statute; in others it is considered one of the 'inherent powers' of the law courts. In a state court, where a system has been adopted which amalgamates the equitable and law jurisdiction in one form of action, it is easy to see how relief might be granted on motion in a case like this. It would be a matter of no consequence whether the case be considered as one at law or in equity; the form of action and the court which had jurisdiction would be the same. It would be useless to examine the state decisions on this subject, for neither the practice of the state courts in exercising control over their judgments and administering equitable relief in a summary way, nor the statutes of the states, can determine the actions of the courts of the United States on this subject. 'It is a question of power, and not of procedure. Jurisdiction at law and in equity are as separate in the federal courts as if administered by different tribunals.'"

Similarly in Bronson v. Schulten. (1882) 104 U. S. 310, 26 L. Ed. 787; Justice Miller, speaking for the court upon this point, said: "In this country all courts have terms and vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by a statute, and the end of it by the final adjournment of the court at the session of that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the state courts they are unimportant. It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding, by a writ of error or appeal, as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court that, while recognizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court." Wellman v. Bethes, (E. D. S. C. 1914) 213 Fed. 367, was a case where the court held that a state statute empowering the courts of a state to vacate their judgments at any time within one year could not apply to the federal courts, as under the authoritative decisions these courts have no power to make any order affecting the validity or legal effect of a judgment after the adjournment of the term at which it was rendered. And it now appears to be the rule of universal application, see also Cameron v. McRoberts, (1818) 3 Wheat. 591, 4 U. S. (L. ed.) 467; Sibbald v. U. S., (1838) 12 Pet. 488, 9 U. S. (L. ed. 1) 116; Phillips v. Negley, (1886) 117 U. S. 605, 6 S. Ct. 961, 29 U. S. (L. ed.) 1013; Allen v. Wilson, (E. D. Mich. 1884) 21 Fed. 881; Baptist v. Farrell Transp. Co. (N. D. Ohio 1886) 29 Fed. 180; Grames v. Havley, (C. C. Kan. 1883) 50 Fed. 319; Klever v. Seawall, (C. C. A. 6th Cir. 1894) 65 Fed. 373, 22 U. S. App. 468, 12 C. C. A. 463; U. S. v. 1,201 Pounds of Fur Clippings, (C. C. A. 2d Cir. 1900) 106 Fed. 161, 45 C. C. A. 263; King v. Davis, (W. D. Va. 1905) 137 Fed. 222; O'Connor v. O'Connor, (C. C. A. 5th Cir. 1905) 142 Fed. 449, 73 C. C. A. 565; U. S. v. One Trunk, (E. D. Mich. Y. 1907) 155 Fed. 1; Electric Vehicle Co. v. De Dietrich Import Co., (S. D. N. Y. 1908) 159 Fed. 492.

But in Virginia, etc., Steel, etc., Co. v. Harris, (C. C. A. 4th Cir. 1907) 151 Fed. 428, 80 C. C. A. 658, it was held that the power conferred on judges by the state law to vacate a judgment after the term at which it was rendered, and within
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one year, when rendered against a party through his mistake, inadvertence, surprise, or excusable neglect, may be excused by a federal court sitting in that state.

And it has been held that state statutes giving the court jurisdiction to vacate or modify a judgment after the term at which it was rendered, and providing a full scheme for the trial of a proceeding for that purpose, as in an action by proceedings at law, are applicable to and govern procedure in the federal courts in cases coming within their purview. Such statutes afford a party a plain and adequate remedy at law, and forbid a resort to a court of equity for relief. Travellers' Protective Ass'n v. Gilbert, (C. C. A. 8th Cir. 1901) 111 Fed. 299, 49 C. C. A. 309, 55 L. R. A. 538.

Striking judgment by default off record.
—Judgment by default for want of an appearance will be stricken off the record upon motion of the defendant, on affidavit showing a proper case for relief following the state statute and practice, and the defendant will be let in to try the case upon its merits upon pleading an issuable plea and paying the costs of the suit up to date. Brown v. Philadelphia, etc., R. Co., (C. C. Del. 1891) 9 Fed. 153. See also Republic Ins. Co. v. Williams, (192) 3 Biss. 370, 20 Fed. Cas. No. 11,707.

f. Methods of Review


"The question of the finality of a judgment or decree for purposes of review by writ of error or appeal in the federal courts is not affected by the procedure in the state courts, but must be governed by the rules established by federal legislation and by the decisions of the federal courts." Menge v. Warrin, (C. C. A. 5th Cir. 1903) 120 Fed. 816, 57 C. C. A. 432.

The power and practice of the federal appellate courts are derived exclusively from the Constitution, the Acts of Congress, the common law, the ancient English statutes, and the rules and practice of the courts of the United States, and they are neither controlled nor affected by the statutes of the states or the practice of their courts. Francisco v. Chicago, etc., R. Co., (C. C. A. 8th Cir. 1906) 149 Fed. 354, 79 C. C. A. 292, 9 Ann. Cas. 628; Boatsman's Bank v. Trower Bros. Co., (C. C. A. 5th Cir. 1910) 151 Fed. 804, 104 C. C. A. 314 (citing the earlier cases).

"No portion of the proceedings touching the removal of causes in the federal courts on error or appeal, from the noting the exceptions to the close, is governed by the local rules." New York, etc., R. Co. v. Hyde, (C. C. A. 1st Cir. 1893) 56 Fed. 188, 5 U. S. App. 443, 5 C. C. A. 461. And, in general, this section has no application to the practice or proceedings of appellate courts or to matters relating to bills of exceptions, motions for new trials, or any other means adopted to secure a review of judgments or decrees. Its effect is limited to the practice and proceedings in the trial courts to secure their judgments. Francisco v. Chicago, etc., R. Co., (C. C. A. 8th Cir. 1908) 149 Fed. 554, 79 C. C. A. 292, 9 Ann. Cas. 628.

It has also been held that this section is inapplicable to a subsequently created appellate court for a circuit comprising several states. Shumaker v. Security Life, etc., Co., (C. C. A. 3d Cir. 1908) 159 Fed. 112, 86 C. C. A. 302.

g. Writ of Error

This section has reference only to practice on the law side of the trial courts. It has nothing to do with the prosecution of the common-law writ of error which prevails in federal appellate procedure. McBride v. 1st. Fed. Co., (C. C. A. 1st Cir. 1914) 214 Fed. 966, 131 C. C. A. 562.

"The Acts of Congress give to defeated litigants in the national courts the right to a review of final judgments at law against them by writs of error, and a right to a review of final decrees in equity
by appeal. These Acts grant the power and fix the jurisdiction of the federal appellate courts. They are not matters of form or practice, but matters of power and jurisdiction. They are not affected by the act of conformity (R. S. sec. 914), nor by the legislation or practice of the state." Hooven, et al., Co. v. Featherstone, (C. C. A. 8th Cir. 1901) 111 Fed. 81, 49 C. C. A. 229, quoted and followed in Smith v. Currie, (C. C. A. 4th Cir. 1918) 230 Fed. 805, 146 C. C. A. 113.

b. Remedies on Appeal or Superseded Bonds


Where the statutes of a state authorize a summary judgment against the sureties on an appeal or superseded bond, District Courts of the United States in that state may render such judgment. Egan v. Chicago Great Western R. Co., (N. D. Ia. 1908) 163 Fed. 344.

i. Actions on Judgments

By the common-law procedure, the appropriate form of an action at law to recover an amount due upon a judgment is an action of debt, and although under a state statute an action to recover on a judgment is styled an action in assumpsit yet it has been said that the principles applicable to the case, since the action was one to recover a sum certain alleged to be due on a decree or judgment, were the same as those that are applicable to an action in debt at common law instituted for that purpose. Du Bois v. Seymour, (C. C. A. 3d Cir. 1907) 152 Fed. 600, 81 C. C. A. 590, 11 Ann. Cas. 656.

In an action in a federal court on a foreign judgment the form of the action and the pleadings are matters in respect to which the court will be governed by the practice of the state within which the court takes jurisdiction. Cruz v. O'Boyle, (M. D. Pa. 1912) 197 Fed. 824. See to same effect Springs v. James, (N. D. Ga. 1909) 172 Fed. 626.

25. Judicial Sales

In case of a judicial sale without confirmation, whatever the practice in the federal courts, and however erroneous a decree that does not provide for confirmation, the United States court sitting in a state has power to enter such a decree where at the time the sale took place it is the established rule in that state that such confirmation and approval is not a prerequisite to the validity of the title acquired at the sale. Paulding v. Tilton, (C. C. A. 7th Cir. 1911) 192 Fed. 297, 112 C. C. A. 555.

26. Jurisdiction

The question of the amount necessary to give a federal court jurisdiction is not a local question, controlled by the statute of the state, or the rulings of its Supreme Court. It pertains to a subject matter of procedure exclusively within the federal jurisdiction, in which it is well settled that in the action of assumpsit, like that of an action on several notes, bonds and the like, the requisite jurisdictional amount is the aggregate of the judgments prayed for. Heffner v. Gwynne-Treadwell Cotton Co., (C. C. A. 8th Cir. 1908) 160 Fed. 635, 87 C. C. A. 606.

27. Jury and Jurors

a. In General

As to juries in federal courts see Judicial Code, ch. XII, supra, this title, vol. 5, p. 1063 et seq.


But where a state statute does not point out any method for raising questions as to the proceedings before a grand jury it will not be literally followed so as to deny a defendant the right to challenge such proceedings. U. S. v. Wells, (D. C. Idaho 1908) 163 Fed. 313.


Challenges to jury.—The practice in a state court in respect to challenges to the jury is not binding on the federal courts. U. S. v. Davis, (W. D. Tenn. 1900) 103 Fed. 457.

Conduct of jurors.—"Neither in letter nor in spirit does the Conformity Act apply to the power of the court to inquire into the conduct of jurors who had been summoned to perform a duty in the administration of justice, and who, for the time being, were officers of the court. The conduct of parties, witnesses and counsel in a case, as well as the conduct of the jurors and officers of the court, may be of such a character as not only to defeat the rights of litigants, but it may directly affect the administration of public justice. In the very nature of things the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules." McDonald v. Pless, (1915) 238 U. S. 264, 35 S. Ct. 783, 9 U. S. (L. ed.) 1300, affirming (C. C. A. 4th Cir. 1913) 206 Fed. 263, 124 C. C. A. 131.

Waiver of jury and submission to referee.—When there is a written waiver of a jury, and the cause has been re-
ferred to a referee under the authority of a state statute, the referee and the trial court shall be governed by the local practice and modes of proceeding "as near as may be" in accordance with the Conformity Act as generally construed. Tierman v. Chicago Life Ins. Co., (C. C. A. 8th Cir 1914) 214 Fed. 238, 131 C. C. A. 254.

b. Submission of Case to Jury

General doctrine.—The statutes, rules and practice of the state and state courts of the state in which the case is tried have no application in the submission of a case to the jury. U. S. v. Oppenheim, (N. D. N. Y. 1915) 228 Fed. 220.

The law of the state does not control the federal courts in respect to the mode in which causes shall be submitted to a jury. Toledo, etc., R. Co. v. Reardon, (C. C. A. 6th Cir. 1906) 159 Fed. 356, 66 C. C. A. 366.

The matter of instructing a jury pertains to the conduct of the trial itself by the trial judge and is not governed by the Conformity Act. Steers v. U. S., (C. C. A. 6th Cir. 1911) 192 Fed. 1, 112 C. C. A. 423.

This section does not require federal judges to conform to state regulations in the submission of causes and the control of the deliberations of juries; such proceedings being governed by the common law. Liverpool, etc., Ins. Co. v. N. & M. Friedman Co., (C. C. A. 6th Cir. 1904) 133 Fed. 713, 66 C. C. A. 543.

So a rule of practice under a state statute that it is error for a judge during a recess of his court, in the absence of a party and his counsel, and without notice to them, to give instructions to the jury to whom the case has been submitted, is not applicable, under this section, to the federal courts. The power of federal judges, as defined by the common law, in the submission of cases and the control of the deliberations of juries, is not automatic. Yates v. Weylbooke Cooke Co., (C. C. A. 6th Cir. 1915) 221 Fed. 603, 137 C. C. A. 327.

And in Times Pub. Co. v. Carlisle, (C. C. A. 6th Cir. 1890) 94 Fed. 762, 36 C. C. A. 476, the court said that the refusal of the trial court, in an action where punitive damages were recoverable, to instruct the jury to state separately the amount thereof in their verdict in accordance with a state statute, was not error.

Instructions in writing.—State statutes requiring that all instructions of the court to the jury shall be in writing are not obligatory on the United States courts. Lincoln v. Power, (1894) 151 U. S. 436, 14 S. Ct. 387, 38 U. S. (L. ed.) 224.

Nor are state statutory provisions requiring written instructions to be taken by the jury on retiring, or permitting papers read in evidence to be taken by them, or requiring written instructions, or forbidding the separation of the jury, or requiring exceptions to the charge to be made before the jury retires. Knight v. Illinois Cent. R. Co., (C. C. A. 6th Cir. 1910) 180 Fed. 368, 103 C. C. A. 514.

So where an assignment of error complained of the action of the court in instructing the jury to retire instead of in writing, for the reason that under the laws of the state of Texas the courts were required to give their instructions in writing, and for the further reason that the defendant could not reserve its exceptions to the charge of the court without interrupting the court at the time it was delivering its charge, and the jury could not so well understand the law under verbal instructions as they might have done under written instructions, the court declared that assuming that this assignment of error was serious, it would be dismissed with the remark that the laws of Texas with regard to instructing juries in the state courts did not prevail in the courts of the United States. Mexican Cent. R. Co. v. Glover, (C. C. A. 5th Cir. 1901) 107 Fed. 356, 46 C. C. A. 334.

Instructions taken by jury on their retirement.—A state statute requiring that the instructions shall be taken by the jury on their retirement, and returned with the verdict, and that papers read in evidence, other than depositions, may be carried from the bar by the jury, is not adopted by this section. Nudd v. Burrows, (1875) 91 U. S. 426, 23 U. S. (L. ed.) 286. See also Western Union Tel. Co. v. Burgess, (C. C. A. 6th Cir. 1901) 108 Fed. 28, 47 C. C. A. 168.


Nor is a provision in the constitution of a state forbidding judges making any comments on the facts in their instructions applicable to the practice in the federal courts. Southern R. Co. v. Carborundum Coal Co., (C. C. Wash. 1898) 91 Fed. 357. See also same effect Knight v. Illinois Cent. R. Co., (C. C. A. 6th Cir. 1910) 180 Fed. 368, 103 C. C. A. 514.

"A state constitution cannot, any more than a state statute, prohibit the judges of the United States from informing jurors with regard to matters of fact."

28. Limitation of Actions

"Matters of substance and procedure must not be confounded because they happen to have the same name. For example, the time within which a suit is to be brought is treated as pertaining to the remedy. But this is not so if, by the statute giving the cause of action, the lapse of time not only bars the remedy but destroys the liability... In that class of cases the law of the jurisdiction, creating the cause of action and fixing the time within which it must be asserted, would control even where the suit was brought in the courts of a state which gave a longer period within which to sue," Central Vermont R. Co. v. White, (1915) 238 U. S. 507, 35 S. Ct. 865, 59 U. S. (L. ed.) 1433, Ann. Cas. 1916B 252.

In A. J. Phillips Co. v. Grand Trunk Western R. Co., (1915) 236 U. S. 602, 35 S. Ct. 444, 59 U. S. (L. ed.) 774, which was a case begun in Michigan, it was held that the Michigan practice which did not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration did not apply to a cause of action arising under the Hepburn Act, which indicated its purpose to prevent suits in delayed claims by the provision that all complaints for damages should be filed within two years and not after. Under such a statute the lapse of time not only bars the remedy, but destroys the liability.


29. Mandamus

In general the practice in the federal court in mandamus proceedings is not affected by this section. U. S. v. Union Pac. R. Co., (1873) 2 Dill. 531, 28 Fed. Cas. No. 16,599. See also Bath County v. Amy, (1871) 13 Wall. 244, 20 U. S. (L. ed.) 539.

But see a dissenting opinion in Rosembaum v. Bauer, (1887) 120 U. S. 460, 7 S. Ct. 533, 30 U. S. (L. ed.) 743, in which Bradley, J., and two others concurring, said: "If there be such a suit in which, by the law of the state, the form of proceeding is required to be in mandamus, section 914, R. S., applies." See also Virginia Coupon Cases, (E. D. Va. 1884) 25 Fed. 644. And see Parsons v. Marya, (E. D. Va.)
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Power to issue writs of mandamus, see Judicial Code, § 262, supra, this title, vol. 5, p. 928.

30. Mechanic's Lien
Proceedings to enforce a mechanic's lien in the courts of the United States must be by a suit in equity, notwithstanding that by the statute of the state in which the lien is created the enforcement thereof may be had by an action at law. Continental, etc. Trust, etc. Bank v. Corey Bros. Const. Co., (C. C. A. 9th Cir. 1913) 208 Fed. 976, 126 C. C. A. 64. See also to same effect Armstrong Cork Co. v. Merchants' Refrigerating Co., (C. C. A. 8th Cir. 1910) 184 Fed. 199, 107 C. C. A. 93.

31. Partition Proceedings
A code provision that: "Tenants in common, joint tenants and coparceners, shall be compellable to make partition, and the circuit court of the county wherein the estate, or any part thereof, may be, shall have jurisdiction, in cases of partition, and in the exercise of such jurisdiction may take cognizance of all questions of law affecting the legal title that may arise in any proceeding," has been held applicable in the case of a like a federal court for partition of real estate and for an accounting. Woods v. Woods, (N. D. W. Va. 1910) 184 Fed. 159.

32. Nonsuit
a. Voluntary Nonsuit
In the Sixth Circuit Court of Appeals this section has been held to apply to a state law permitting a plaintiff to dismiss without prejudice before final submission of the case to the jury; and in such case it is said to be error to refuse to allow the plaintiff to dismiss without prejudice before a peremptory instruction for defendant, though a motion was made after the judge stated he would sustain the defendant's motion for a verdict. Knight v. Illinois Cent. R. Co., (C. C. A. 6th Cir. 1910) 190 Fed. 565, 103 C. C. A. 518.

So, in a case in the Seventh Circuit Court of Appeals, it was said that while it may be true that there is sufficient elasticity in the Conformity Act to permit the United States courts to decide that the state practice giving plaintiffs in actions at law, where jury trial has not been waived, the right to take nonsuits at any time before the jury retire should not be applied to the disposition of a case on the mere murmur to the evidence, or on the present-day substitute, the motion for a directed verdict, nevertheless the long-established custom of the United States courts sitting in Illinois of following the Illinois practice respecting nonsuits should be adhered to, at least until duly promulgated rules the bar have been advised of the change, and it was held error to refuse plaintiff's motion for leave to take a nonsuit, after the judge had announced his decision sustaining a motion for a directed verdict.


Again, in a case in the Southern District of Illinois, where an action was brought by an administrator for damages for the death of his intestate and the case was tried by a jury, and at the close of plaintiff's evidence the court gave a peremptory instruction, directing the jury to find for the defendant, and discharged the jury from further service in the case, whereupon, and while the jury still remained in their seats, counsel for plaintiff moved the court that the plaintiff be allowed to suffer a nonsuit, it was held that the statute of the state controlled the question. Drummond v. Louisville, etc., R. Co., (S. D. Ill. 1901) 109 Fed. 531.

And the Circuit Court of Appeals for the Eighth Circuit follows the established practice of the state court with respect to the right of a party to take a nonsuit. Connecticut Fire Ins. Co. v. Manning, (C. C. A. 8th Cir. 1910) 177 Fed. 893, 101 C. C. A. 107.

Also in this circuit it has been decided that a voluntary nonsuit may be taken by the plaintiff after a request by the defendant for an instruction directing a verdict in its favor. Chicago, etc., R. Co. v. Metalstaff, (C. C. A. 8th Cir. 1900) 101 Fed. 769, 41 C. C. A. 669.

But in the Fourth Circuit it has been held that, although according to the practice in a state court a plaintiff may take a voluntary nonsuit after a motion has been made to instruct a verdict for the defendant, a federal court will not recognize such a right, even in a case arising in that state. Cogdill v. Whiting Mfg. Co., (C. C. A. 4th Cir. 1914) 212 Fed. 189, 129 C. C. A. 194.

In an earlier case, however, in the same circuit and state, in which it was insisted by the plaintiff in error that the court below erred, first, in refusing to permit the plaintiff in error to take a nonsuit after all the plaintiff's evidence had been introduced and after the defendant had made a motion to instruct a verdict in his behalf, and the court upon argument of such motion had passed thereon favorably to the defendant,
and, secondly, in directing the jury to find a verdict in favor of the defendant in error, the court said: "We think that under the circumstances it was within the discretion of the court to either permit the plaintiff to take a nonsuit or to direct a verdict in favor of the defendant in error." Parks v. Southern R. Co., (C. C. A. 4th Cir. 1906) 143 Fed. 276, 74 C. C. A. 414.

In another case in the Fourth Circuit, where error was assigned for refusal below to permit a nonsuit, it was said: "The courts of the United States have always exercised the right to control the disposition of causes pending before them, when either the allegations of the plaintiff or the evidence introduced in support thereof has failed to make out the case." Hunt v. McNamee, (C. C. A. 4th Cir. 1905) 141 Fed. 295, 72 C. C. A. 441.

And in the Eastern District of Arkansas it has been held that it is too late for a plaintiff to ask for a nonsuit after the court has granted a motion for a peremptory instruction in favor of the defendant and directed the jury to sign it, unless demanded by some extraordinary reason. Whitten v. Southwestern Tel., etc., Co., (E. D. Ark. 1914) 217 Fed. 835, wherein the court, advertizing to the conflict of opinion among the national courts on this question, said: "The authorities on the question as to when the court may permit a voluntary nonsuit are anything but harmonious. Some of the courts hold that no nonsuit can be taken after the motion for a directed verdict has been made; others hold that the action may be dismissed at any time before the court announces its decision, but not thereafter. Some of the courts hold that it may be taken at any time before the court has actually directed the jury to return the verdict, but not thereafter; and still others hold that the cause may be dismissed at any time before the verdict has been actually signed by the jury."

b. Peremptory Nonsuit


If the state law permits a nonsuit where the evidence, with all the inferences to be drawn therefrom, would not sustain a verdict for the plaintiff, such practice may be followed by a federal court under the provisions of the conformity statute. Russo-Chinese Bank v. National Bank of Commerce, (C. C. A. 9th Cir. 1911) 187 Fed. 80, 100 C. C. A. 398; Shank v. Great Shoshone, etc., Water Power Co., (C. C. A. 9th Cir. 1913) 206 Fed. 833, 134 C. C. A. 35.

But a compulsory nonsuit is not allowed in the courts of the United States, except where a statute of the state authorizes it; the practice of directing a verdict for the defendant when the evidence is clearly insufficient to support a verdict for the plaintiff having taken its place. Denver v. Home Sav. Bank, (C. C. A. 8th Cir. 1912) 200 Fed. 28, 118 C. C. A. 256.

33. Parties

a. Parties Plaintiff


And where a state statute expressly authorizes the prosecution of a suit by a pendente lite assignee of the demand in the name of the original plaintiff, his assignor, it has been held that the rule of practice established by the state statute will prevail in the federal court. Greensboro v. Southern Paving, etc., Co., (C. C. A. 4th Cir. 1909) 168 Fed. 880, 94 C. C. A. 292.

Where the rules of the common law prevail, choses in action are assignable in equity only, and courts of law will not recognize an assignment so as to allow the assignee to sue on it in his own name, and the federal courts will follow such established rules of the state wherein the suit is brought. Nederland Life Ins. Co. v. Hall, (C. C. A. 7th Cir. 1898) 54 Fed. 278, 55 U. S. App. 598, 27 C. C. A. 390.

But where a state statute required actions at law to be prosecuted in the name or names of the real parties in interest, 2 however the rule may be in the courts of the state, section 914 of the Revised Statutes of the United States, requiring conformity of practice of the federal courts in actions at law with the practice in the courts of the state, does not compel or even authorize the maintenance of an action at law by any one except the owner of the legal title in cases exclusively cognizable in the courts of the United States." New York Continental Jewell Filtration Co. v. Sullivan, (C. C. Ind. 1901) 111 Fed. 179.

Trustees of an express trust.—Under a state statute an agent of a corporation to whom, "as executive agent of the company," a promise is made to pay money, is "a person with whom, or in whose name, a contract is made for the benefit of another," and may therefore sue in his own name on the promise. Albany, etc., Iron, etc., Co. v. Lundberg, (1887) 121 U. S. 451, 7 S. Ct. 958, 30 U. S. (L. ed.) 983.

Husband and wife.—Where a state statute provides that the husband is not a necessary or proper party to an action to recover damages to the person, estate, or character of his wife, it has been held that such statutory modifications of the common law in regard to the rights of husband and wife as plaintiffs in actions at law are applicable also in the United States courts for such state. Morning Journal Ass'n v. Smith, (C. C. A. 2d Cir. 1892) 56 Fed. 141, 1 U. S. App. 270, 4 C. C. A. 8. See also cases cited supra, this title, vol. 5, p. 1192, under sidehead, Actions by married women.

Action by executor or administrator.—Where it is provided by a state statute that "any executor or administrator, by virtue of letters obtained in another state, may proceed in any court of this state, without first taking out letters in this state, provided such executor or administrator shall, upon commencing suit, file in the office of the clerk of the court in which such suit shall be brought an exemplified copy of the record of his or their appointment," such provision will be followed in the federal court. Hayes v. Pratt, (1892) 147 U. S. 557, 13 S. Ct. 503, 37 U. S. (L. ed.) 279.

b. Parties Defendant

Necessary parties defendant.—As the federal court is governed by, and follows, the local laws in proceedings to establish claims against the estate of deceased persons, it is only necessary in such a proceeding in that court to serve those whom it would be necessary to serve if the proceeding was in the state court; and such parties only are indispensable parties defendant either in the state or federal court. Farmers' Bank v. Wright, (N. D. Ia. 1908) 158 Fed. 841.

Absent defendants.—State statutes conflicting with R. S. sec. 737, as to proceedings to try where some of the defendants cannot be found, will not be followed. Allnut v. Lancaster, (C. C. S. C. 1896) 76 Fed. 131. See also cases cited supra, this title, vol. 5, p. 485, under sidehead, State laws and practice.

Joint of parties.—A state statute providing for a joint action against both principal and sureties on a bond furnishes the rule of practice for the United States courts. St. Louis Brewing Ass'n v. Hayes, (C. C. A. 5th Cir. 1899) 97 Fed. 559, 35 C. C. A. 449. See also Borland v. Haven, (N. D. Cal. 1888) 37 Fed. 394, as to actions against stockholders of a corporation.

So where in case of a joint and several bond the common-law right to sue the parties jointly or severally has been modified by a state statute, such a statute will control in a federal court sitting in that state, as to what parties are necessary. Columbia Digger Co. v. Rector, (W. D. Wash. 1914) 215 Fed. 618.

And a state statute providing that "where two or more persons are jointly bound by contract the action thereon may be brought against all or any of them, at the plaintiff's option" (section 4480, Gantt's Dig., 1874); that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants" (section 4701), and that "though all the defendants have been summoned, judgment may be rendered against any of them separately where the plaintiff would be entitled to judgment against such defendants if the action had been against them alone" (section 4704), furnishes a rule of practice for the courts of the United States in that state. Sawin v. Kenny, (1876) 93 U. S. 259, 23 U. S. (L. ed.) 926. See also Atlantic, etc., Co. v. Laird, (1896) 164 U. S. 393, 17 S. Ct. 120, 41 U. S. (L. ed.) 485; U. S. v. Tracy, (1875) 8 Ben. 1, 23 Fed. Cas. No. 16,536.

Again, the legislature of a state has a right to say that in an action for the protection of water rights a plaintiff may make all persons who have diverted water from the same stream parties to such action, and that the courts of the state may in one judgment settle relative priorities and rights of all the parties to such action; and, having so provided, the federal courts may conform to the state practice, and in so doing are but applying their mode of proceeding to the enforcement of a remedy substantially consistent with the ordinary modes of proceeding in chancery. Ames Realty Co. v. Big Indian Min. Co., (C. C. Mont. 1906) 140 Fed. 166.

After the removal of a cause from a state court the jurisdiction of the federal
court is not ousted by admitting as a party, under the state law, a citizen of the same state. Phelps v. Oaks, (1886) 117 U. S. 236, 6 S. Ct. 714, 29 U. S. (L ed.) 888.

Parties improperly joined.—Where a state statute provides that no action shall be defeated on account of the misjoinder of parties if the matter in controversy can be properly dealt with and settled between the parties before the court, the court may order any party improperly joined in any action to be stricken out. Such a statute will be followed. Perry v. Mechanics' Mut. Ins. Co., (C. C. R. I. 1882) 11 Fed. 478.

Admitting new party defendant.—The jurisdiction of the court once lawfully attached by removal of the cause from a state court cannot be defeated by admitting, under the state practice, a party as a codefendant who is a citizen of the same state as the plaintiff. Phelps v. Oaks, (1886) 117 U. S. 236, 6 S. Ct. 714, 29 U. S. (L ed.) 888.

Substitution of one defendant for another.—A state statute provided that a defendant against whom an action to recover upon a contract is pending may, at any time before answer, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt, without collusion with him, apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place and to discharge him from liability to either on his paying into court the amount of the debt; and that the court may, in its discretion, make such an order." Such proceeding was adopted by this section. Harris v. Hess, (S. D. N. Y. 1882) 10 Fed. 263.

34. Patent Suits

The section is applicable to the federal jurisdiction over patent cases, but it does not change the methods of trial of an issue at law under R. S. sec. 861 (in Evidence, vol. 3, p. 168), which requires a motion under R. S. sec. 724 (in Evidence, vol. 3, p. 160), or a bill of discovery to obtain the relief given in the New York courts by section 803 of the New York Code of Civil Procedure, including the examination of property. Cheatham Electric Switching Device Co. v. Transit Development Co., (E. D. N. Y. 1911) 190 Fed. 292.

In Fischer v. Automobile Mfg. Co., (E. D. N. Y. 1912) 199 Fed. 191, the court said: "The plaintiff has sued at law and expects to try the case before a jury. The procedure, therefore, while based upon jurisdiction in the federal courts over patent causes, will nevertheless conform, as near as may be, to the practice in the state courts, under section 914 of the Revised Statutes. But in spite of this the defendant would not be entitled to an examination of the parties, unless its application be brought under the sections of the Revised Statutes providing for the taking of testimony."

In a patent infringement suit the court considered a motion to strike out a plea, and granted it on a construction of this section and R. S. sec. 4919 (in Patents). Celluloit Mfg. Co. v. American Zylonite Co., (S. D. N. Y. 1889) 54 Fed. 744; See Campbell v. Haverhill, (1895) 155 U. S. 610, 15 S. Ct. 217, 39 U. S. (L ed.) 280, as to a state statute of limitations; Cottier v. Stimson, (C. C. Ore. 1883) 18 Fed. 659, as to the verification of the plea in an action "on the case;" May v. Mercer County, (C. C. Ky. 1887) 30 Fed. 246, as to the sufficiency of plaintiff's "petition" or "declaration."

We think that inasmuch as the Circuit Court of the United States is vested with exclusive jurisdiction to try cases involving the validity of patents issued by the United States, it cannot be said that there are "like causes" in the courts of the several states to which the practice, pleadings, forms and mode of proceedings shall conform. It is not material whether the declaration is called a "petition" or a "declaration," nor is it very important as to the precise form in which it is expressed; but it should contain all the essential averments that are prescribed for a declaration in an action on the case under the common-law form of pleading, because that was supposed to be in the mind of Congress when section 4919 was enacted. The petition in this case contains all such essential averments, and is therefore a good petition; but we do not think the plaintiff has the right to avail himself of the provisions of the Ohio statute in attaching to his petition interrogatories, and thereby compel the defendant to disclose testimony which is important in the issue of the cause. The statutes of the United States specifically provide how testimony in actions of this kind may be secured and offered in the courts of the United States." Marvin v. Aultman. (N. D. Ohio 1891) 46 Fed. 338. See also Myers v. Cunningham. (N. D. Ohio 1892) 44 Fed. 346; Kulp v. Snyder. (E. D. Pa. 1899) 94 Fed. 613.

35. Penalty Actions

Where a statute affixes pecuniary penalty to an act or a neglect, and there is no imprisonment provided for, or provision to suppose that a mere punishment is intended, and no special remedy is pointed out in the statute, a civil action will lie for their recovery, and an action of tort will lie in a United States court sitting within a state in which by the law such a form of action will lie to recover a penalty. U. S. v. Elliott. (1879) 25 Int. Rev. Rec. 319; 25 Fed. Cas. No. 15,043.
JUDICIARY

36. Pleadings

a. General Matters

Amendments to pleadings, see supra, this annotation, Amendments, p. 32.

As to the blending of legal and equitable remedies, and the setting up of equitable defenses to actions at law, see supra, this note, Civil Causes, p. 24.

Purpose of section with reference to pleadings.—The purpose of this section was to secure a harmony between the state and national courts in respect of the general structure or framework of pleading and practice in civil causes, other than those in equity and admiralty, but it does not require an adherence to the state rules in all their subordinate and minor details. Williamson v. Liverpool, etc., Ins. Co., (C. C. A. 9th Cir. 1908) 141 Fed. 54, 72 C. C. A. 542, 5 Ann. Cas. 402.

The object was to assimilate the form and manner in which parties should present their claims and defense, in the preparation for the trial of suits in the federal courts, to those prevailing in the courts of the state. Liverpool, etc., Ins. Co. v. N. & M. Friedman Co., (C. C. A. 6th Cir. 1904) 133 Fed. 713, 66 C. C. A. 543.


Forms and mode.—This section applies especially to the form and order of pleading, which in actions at law must conform to the requirements of the state statutes and practice. Brown v. Cumberland Telephone, etc., Co., (W. D. Tenn. 1909) 181 Fed. 246. See also to same effect Sanford v. Portsmouth, (1877) 2 Flipp. 105, 21 Fed. Cas. No. 12,315; Monarch Tobacco Works v. American Tobacco Co., (W. D. Ky. 1908) 166 Fed. 274.


But it has been declared that the rules to be followed do not include modes of procedure established by judicial construction of common-law remedies. Sunford v. Portsmouth, (1877) 2 Flipp. 105, 21 Fed. Cas. No. 12,315.

Order of pleading.—"Under this Act, the Circuit Courts of the United States follow the practice of the courts of the state in regard to the form and order of pleading, including the manner in which objections may be taken to the jurisdiction and the question whether objections to the jurisdiction and defenses on the merits shall be pleaded successively or together." Southern Pac. Co. v. Denton, (1892) 146 U. S. 202, 13 S. Ct. 44, 36 U. S. (L. ed.) 942.

Discretion of court as to following state rule.—A federal court may refuse to follow the state statutes in matters of pleading, where to do so would unduly extend the trial and involve the parties in great expense. Elk Garden Co. v. T. W. Thayer Co., (W. D. Va. 1913) 206 Fed. 212.


b. Construction of Pleadings

Pleadings should be construed as they would be in the state courts. Dakota County

...unless the strictness of the common-law rules of pleading, so that, instead of construing pleadings strictly against the party, they are to be construed liberally in his favor, for the furtherance of justice, such a rule of construction will be observed in the United States courts in that state. U. S. v. Parker, (1887) 120 U. S. 89, 7 S. Ct. 454, 30 U. S. (L. ed.) 601.

And the federal courts will follow a rule of construction in the state courts, that where an answer sets up several distinct defenses, a denial in one is held to be qualified by an admission in another. Northern Pac. R. Co. v. Paine, (1887) 110 U. S. 561, 7 S. Ct. 323, 30 U. S. (L. ed.) 513.

And the federal courts may look to the state statutes upon the question of the construction of pleadings. Bryson v. Gallo, (C. C. A. 6th Cir. 1910) 180 Fed. 70, 103 C. C. A. 424.

But a liberal construction of the pleadings and procedure will not be permitted to work an injustice. Davis v. Bessemer City Cotton Mills, (C. C. A. 4th Cir. 1910) 175 Fed. 784, 102 C. C. A. 232.

c. Sufficiency and Scope of Pleadings


Thus under a state law, requiring that the invalidity of a statute if relied on should be alleged by special plea, it was held that an interstate railroad was not entitled to offer evidence to show that a local statute was invalid as an unreasonable regulation of interstate commerce, where such objection was not pleaded. Southern R. Co. v. King, (C. C. A. 5th Cir. 1908) 160 Fed. 332, 87 C. C. A. 284.

So a federal court will follow the state practice, in the matter of the sufficiency of the declaration and the statement of the several causes of action relating to an injury arising from a single occurrence in one and the same count. J. W. Bishop Co. v. Shelhorse, (C. C. A. 4th Cir. 1905) 141 Fed. 643, 73 C. C. A. 337.

Alleging character of title in adverse suits.—Where, in construing a state statute as to adverse suits, the state Supreme Court has repeatedly held that it is not necessary for a plaintiff to set out specifically the character of his own title, or the alleged title of the defendants; that it is always sufficient simply to allege that plaintiff is the owner and in possession of the property, describing it, and that the defendants are unlawfully asserting a claim thereto adverse to him, the sufficiency of a complaint in such a case will be tested in a federal court by the same rule. Tonopah Fraction Min. Co. v. Douglass, (C. C. Nev. 1903) 123 Fed. 936.

Exception in statute of limitations.—Where, according to a state practice, an exception in a statute of limitation need not be pleaded in the complaint, but may be introduced by way of reply, that practice is said to be binding on the federal court therein. St. Louis Boatsman's Bank v. Fritzlen, (C. C. A. 8th Cir. 1915) 221 Fed. 145, 137 C. C. A. 46.

Pleading damages.—Where the practice in a state is that if the damages claimed are such as would usually or naturally accompany or follow or be included in the results of the injuries complained of, they may be stated and claimed in general terms, but that other and further damages can neither be proved nor recovered unless expressly averred and shown, such practice will be followed in a federal court sitting in that state. Monarch Tobacco Works v. American Tobacco Co., (W. D. Ky. 1908) 165 Fed. 774.

Contributory negligence.—While the burden of proving contributory negligence is in the national courts on the defendant, the question as to whether he must plead it specially or not depends upon the practice of the state in which the court is sitting. Hardy v. Chicago, etc., R. Co., (C. C. Minn. 1909) 172 Fed. 454.
Under the rule of the federal courts that contributory negligence is a matter of special defense, the facts constituting such negligence must be set out, and, where the answer contains only a general averment, a motion will lie to require it to be made more specific when, under the practice of the state in which the court is sitting, such motion would lie as to any matter of special defense. Gadomex v. New Orleans R. Co., (E. D. La. 1904) 128 Fed. 805.

Action to cancel usurious mortgage.—A complainant may ask relief in equity for the cancellation of an alleged usurious mortgage without averring an offer to pay the money loaned with legal interest, where if the suit had been brought in the state court the complainant would undoubtedly have been entitled to the relief, because the state usury laws expressly so provide for it, notwithstanding a borrower has not paid and did not offer to pay the amount. Oida v. Curlette, (S. D. N. Y. 1905) 146 Fed. 661.

An affidavit, in a suit for the recovery of personal chattels in specie, may be made under the provisions of a state statute by "the plaintiff, his agent or attorney," and when made by a special agent of the general land office, it was sufficient if made "to the best of his knowledge, information, or belief," as the making of an affidavit by an agent or attorney necessarily implies that he may not be able to make it on positive knowledge. U. S. v. Bryant, (1884) 111 U. S. 499, 4 S. Ct. 601, 28 U. S. (L. ed.) 496.

d. Joinder of Causes of Action

A federal court will follow a state rule as to whether a cause of action is entire. Beckwith v. Chicago, etc., R. Co., (W. D. Wash. 1916) 223 Fed. 858.

The rule of pleading of the courts of the state of New York requires that different causes of action relied upon must be stated separately, and each must contain facts sufficient to sustain such cause of action, irrespective of any averments of another first cause of action, and objection to a complaint because of a failure to comply with such provision has been sustained in a federal court. Moore Bros. Glass Co. v. Drever Mfg. Co., (S. D. N. Y. 1897) 154 Fed. 737.

And where according to the practice in a state, actions ex delicto and ex contractu cannot be joined, the same rule will be followed in the federal court. Tiana v. Chicago, etc., R. Co., (W. D. Wash. 1915) 228 Fed. 824.

But it has been held that a statute providing that "any number of persons claiming liens against the same property may join in the same action" does not authorize the United States courts to entertain jurisdiction of several separate causes of action in one suit, when each claim is for a less amount than is necessary to give the court jurisdiction. Holt v. Bergevin, (N. D. Idaho 1894) 60 Fed. 1.

And when a case which unites both legal and equitable grounds for relief, as permitted by the prescribed practice in the state in which it is brought, is removed into a federal court, the pleadings should be recast so as to separate the action at law from the suit in equity, and the two cases should proceed separately, each according to its nature. Hatcher v. Hendrie, etc., Mfg., etc., Co., (C. C. A. 8th Cir. 1904) 133 Fed. 267, 68 C. C. A. 19. See also to same effect Fletcher v. Burt, (C. C. A. 6th Cir. 1903) 126 Fed. 619, 63 C. C. A. 201.


e. Defendant's Pleadings Generally

"All defenses are open to a defendant in the Circuit Court of the United States, under any form of plea, answer, or demurrer, which would have been open to him under like pleading in the courts of the state within which the Circuit Court is held." Roberts v. Lewis, (1892) 144 U. S. 653, 12 S. Ct. 781, 36 U. S. (L. ed.) 579.


A defense that must be specially pleaded in the state court, as the defense of res ju- dicata, may be so pleaded in the federal court. Preferred Acc. Ins. Co. v. Barker, (C. C. A. 5th Cir. 1899) 92 Fed. 158, 35 C. C. A. 250.

The right to enter a special plea instead of the general issue was allowed, though the construction of the state statute was doubtful. English r. Saleton, (E. D. Pa. 1901) 112 Fed. 272.

Statute providing allegations in com- plaint not controverted are true.—When the state statute provides that "each ma- terial allegation of the complaint, not controverted by the answer," "must, for the purposes of the action, be taken as true," a ruling of the state court that when none of the allegations of the complaint were denied in the manner required by the stat- ute, no issue is joined upon any one of them, will be followed. Robertson v. Per- kins, (1899) 129 U. S. 233, 9 S. Ct. 279, 32 U. S. (L. ed.) 686.

And where, under the state practice as regulated by statute, a defendant does not waive his right to object to the jurisdic- tion, by including in his answer every defense upon which he relies to defeat the action, a federal court sitting in that state will not depart from that practice. Leonard v. Merchants' Coal Co., (C. C. A. 2d Cir. 1908) 162 Fed. 885, 89 C. C. A. 575.

When, under the state code, the answer puts in issue every material allegation in the complaint, it is incumbent upon the plaintiff to prove at the trial all such allega- tions. Hodges v. Easton, (1882) 106 U. S. 408, 1 S. Ct. 307, 27 U. S. (L. ed.) 169.

f. Plea in Abatement

In general.—Since the assimilation of the practice in the national courts to that in the state courts by the Conformity Act, in those states where the answer takes the place of all pleas at common law, and where it must contain a general or specific denial of each material allegation of the petition controverted by the defendant, the common law requirement of pleading matters in abatement of the action before taking issue on the merits has become ob- solete, and a denial in the answer of all the allegations of the petition puts each and all of them in issue, whether they be matters in abatement or in bar. Cole r. Langenbach, (C. C. A. 8th Cir. 1902) 119 Fed. 349, 56 C. C. A. 253; Yoeum r. Par- ker, (C. C. A. 8th Cir. 1904) 130 Fed. 770, 66 C. C. A. 80.

Exception to view that statute controls.—Where there is a manifest intention in a federal statute that jurisdictional defects may properly be raised by plea in abate- ment, the rule of the state codes that all pleas and defenses shall be embodied in the answer is not obligatory upon the federal courts when dealing with the subject of jurisdiction. Hill r. Walker, (C. C. A. 8th Cir. 1909) 167 Fed. 241, 92 C. C. A. 633.

And to the operation of this act of con- formity there is also an exception, and that is, where the defense is that the court has no jurisdiction of the defendant, that defense must be set up by a special plea in abatement. Kimball v. Detroit, etc., Short Line R. Co., (N. D. Ohio 1910) 189 Fed. 406.

g. Demurrers to Pleadings

Where under the state law a defect in a complaint, in that it does not state facts sufficient to constitute a cause of action, cannot be taken advantage of on motion or in any other way than by answer, which answer, however, may be a demurrer, this state law binds the United States courts. Chemung Canal Bank v. Lowery, (1876) 93 U. S. 72, 23 U. S. (L. ed.) 408. See Kent v. Bay State Gas Co., (C. C. Del. 1899) 93 Fed. 887. See also Kester r. Western Union Tel. Co., (W. D. N. Y. 1901) 106 Fed. 928, as to a demurrer to an answer.

h. Bill of Particulars

This conformity provision has been applied in the case of a bill of particulars. Wetmore v. Goodwin Film, etc., Co., (D. C. N. J. 1915) 226 Fed. 352.

The practice in a state court as to bills of particulars will be followed in a federal court in that state, where such prac- tice will save time, labor and expense in the trial of the real controversy. Wet- more r. Goodwin Film, etc., Co., (D. C. N. J. 1915) 226 Fed. 352.

So it has been held that a federal court sitting in New Jersey has power under the statute in that state to permit, in the exercise of a sound discretion, a bill of particulars in an action of ejectment to be amended at the trial. Lamar r. Spalding, (C. C. A. 3d Cir. 1907) 154 Fed. 27, 83 C. C. A. 111.

i. Verification of Pleadings

A state statute as to the verification of pleadings regulates the pleading, in simi- lar cases in the federal courts. Ralls County r. Douglass, (1861) 105 U. S. 728, 26 U. S. (L. ed.) 937; St. Louis, etc., R.
In this connection it has been held that cases tried by a referee in the federal courts in states where such practice exists cannot be reviewed in the Supreme Court. Boogher v. New York Life Ins. Co., (1880) 103 U. S. 90. 26 U. S. (L. ed.) 310.

So under a state law, authorizing a reference by consent in actions at law, which, by virtue of this section, is applicable in actions in the federal courts, or at least may be made so by consent of the parties, and which provides that in case of such reference the referee shall try all the issues whether of fact or law, and "report a finding and judgment thereon," which must stand as the finding of the court, and "may be excepted to and reviewed in like manner as if made by the court," the court has no power on exceptions filed to a referee's findings of fact to review the evidence, but can only do so on a motion for a new trial, as in case of a finding by the court or the verdict of a jury; the office of the exceptions provided for being merely to bring in question the conduct of the referee, the regularity of the proceedings, or the sufficiency of the findings under the order of reference or to meet the issues. U. S. v. Ramsey, (C. C. Idaho 1907) 158 Fed. 488.

Although the state practice in conducting a reference may be followed if stipulation be made, nevertheless the rules as to the entry of judgment and of hearing upon appeal or by writ of error will still be controlled by the United States statutes and the practice of the United States courts. Alder v. Edemborn, (E. D. N. Y. 1912) 198 Fed. 926.

38. Removal of Cloud from and Quieting Title

The settled rule of the Supreme Court of the United States seems to be that, independently of a statute of the state wherein the land lies, a bill to remove a cloud upon the title of a complainant will not lie where he, the complainant, is not in actual possession of the premises, and that such a bill must show a legal and actual possession. American Asn. v. Williams, (C. C. A. 6th Cir. 1908) 166 Fed. 17, 93 C. C. A. 1.

But it has been frequently adjudged "that where the laws of a particular state give a remedy in equity, as, for instance, a bill by a party in or out of possession, to quiet title to lands, such remedy would be enforced in the federal courts, if it does not infringe upon the constitutional rights of the parties to a trial by jury." Smith Oyster Co. v. Darbee, etc., Co., (N. D. Cal. 1906) 149 Fed. 555. See also cases cited, supra, this title, vol. 5, p. 1128, under headline Cloud on title.

And the remedy given by a state statute to remove a cloud from title may be enforced in the federal courts when the parties are inhabitants of different states.

So where by a local statute a bill in equity will lie to remove a cloud independently of possession, the enlarged equitable right thus created may be enforced by an equity court of the United States where there exists the requisite diversity of citizenship or some other ground of federal jurisdiction. American Asso'n v. Williams, (C. C. A. 6th Cir. 1908) 166 Fed. 17, 93 C. C. A. 1.

The rule that a bill to quiet title cannot be maintained save by a party in possession may be dispensed with by a state statute, and where this is done an action in conformity with the state practice may be maintained in a federal court sitting in that state. Baum v. Longwell, (D. C. N. M. 1912) 200 Fed. 450; Warren v. Oregon, etc., Realty Co., (W. D. Wash. 1907) 156 Fed. 503; Kraus v. Compton, (C. C. A. 9th Cir. 1908) 161 Fed. 18, 88 C. C. A. 182; American Asso'n v. Williams, (C. C. A. 6th Cir. 1908) 166 Fed. 17, 93 C. C. A. 1. But see Gibson v. Cook, (W. D. Ark. 1903) 124 Fed. 986.

And where a statute provides that "an action may be brought by any person against another who claims an estate or interest in real property, adverse to him, for the purpose of determining such adverse claim," it has been held that such a remedy may be enforced in a federal court. Smith Oyster Co. v. Darbee, etc., Co., (N. D. Cal. 1906) 149 Fed. 555.

But although under the laws of a state a bill may be maintained in the Circuit Court of the United States by a person not in possession against another who is also out of possession, "still this does not make the complainant's rights any the less dependent upon title in him, nor does it put him in a position to have a cloud removed from a title which has no existence." Dick v. Foraker, (1894) 155 U. S. 404, 15 S. Ct. 324, 39 U. S. (L. ed.) 201. In Holland v. Challen, (1884) 110 U. S. 15, 3 S. Ct. 495, 28 U. S. (L. ed.) 52, it was said: "Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises;" and in Frost v. Spitley, (1897) 121 U. S. 552, 7 S. Ct. 1129, 30 U. S. (L. ed.) 1010: "The necessary conclusion is that Spitley, not having the legal title of the lots in question, cannot maintain his bill for the purpose of removing a cloud on the title." See also Guarantee Trust, etc., Co. v. Delta, etc., Co., (C. C. A. 6th Cir. 1900) 104 Fed. 5, 43 C. C. A. 396.

39. Restoration of Lost Records

A proceeding to restore records does not come within the general term of practice or pleading in the courts, and is not governed by this section. Turner v. Newman, (1872) 3 Blass. 307, 24 Fed. Cas. No. 14,262. 40. Review of Action

Revisor is governed by the law of the state where the suit is brought and prosecuted. Spears v. Sells, (S. D. Ohio 1909) 176 Fed. 797.

But where it was sought to revive a suit brought to enjoin the defendant from maintaining a dam, it was declared that the right to revive the suit was not governed by local state statutes, but that both the right and procedure seemed to be governed entirely by the federal equity rules and practice in the courts of the United States. Miller v. Wattler, (C. C. Ore. 1908) 165 Fed. 359.

See also cases cited, supra, this title, vol. 5, p. 1171, under sidehead Abatement and revisor.

41. Set-Off and Counterclaim

In matters of set-off the federal courts follow the laws of the state, provided the distinction between law and equity is not lost sight of. Arkwright Mills v. Aultman, etc., Machinery Co., (C. C. Mass. 1904) 128 Fed. 195.

The right to assert a counterclaim in actions at law is governed by the state law relating thereto. Californian Canneries Co. v. Pacific Sheet Metal Works, (C. C. A. 9th Cir. 1908) 164 Fed. 978, 91 C. C. A. 106.


But it has been held that statutes relating to set-off do not deprive courts of the United States of jurisdiction in equity even if, by providing a remedy at law, they would a state court. Sowles v. Flattsburg First Nat. Bank, (C. C. Vt. 1900) 100 Fed. 552.

42. Survival of Actions

"If the cause of action survives, the practice, pleadings, and forms and modes of proceeding in the courts of the state may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties." Schreiber v. Sharpless, (1884) 110 U. S. 76, 3 S. Ct. 423, 28 U. S. (L. ed.) 65.

But where the cause of action is given by a federal statute, a federal court cannot have recourse to a state statute in order to determine whether the cause of action survives or not. Walsh v. New York, etc., R. Co., (C. C. Mass. 1890) 173 Fed. 494.

See also cases cited, supra, this title, vol. 5, p. 1171, under subhead Abatement and revivor.

43. Transcripts of Stenographer's Notes

Where by the act of a state relating to the appointment of official stenographers they become sworn officers of the court, and the act further provides that it shall be the duty of the official stenographer to make a typewritten transcript of his notes, and that such transcript "shall be filed in the proper office of the court, and shall thereafter become a record of the proceedings therein reported," and "shall be taken and held to be prima facie correct," it has been held a federal court sitting in that state will conform thereto. Cornette v. Baltimore, etc., R. Co., (C. C. A. 3d Cir. 1912) 196 Fed. 59, 115 C. C. A. 81.

44. Trial of Issues

Whether all or a part of the issues in any action should be tried at one time is held by the state courts to be a question of justice and convenience, and in conformity to that rule a trial of a plea in bar will first be ordered so that the defendant will not be put to the costs, expense, and trouble of a trial on the merits until the determination of a trial issue. Norton v. Portsmouth, (C. C. N. H. 1897) 31 Fed. 326.

And in Rosenbach v. Dreyfuss, (S. D. N. Y. 1880) 2 Fed. 23, it was held that a notice of fourteen days, required by state statute, for the trial of an issue of law, as a hearing upon a demurrer, should be followed in the federal courts. See Osborne v. Detroit, (E. D. Mich. 1886) 29 Fed. 385.

45. Venue

The granting or denial of a change of venue is a matter within the discretion of the court. Kennon v. Gilmour, (1859) 131 U. S. 22, 9 S. Ct. 696, 33 U. S. (L. ed.) 110.

A state statute provides that a defendant, when sued in the wrong county, may on proper application have the cause transferred at costs of plaintiff to the county where defendant could rightfully have been sued. A defendant sued in the state court cannot, after removal of the cause into the federal court on its application, have the cause removed into another federal district. By electing to remove the cause into one federal court the defendant thereby deprived itself of whatever right it might have exercised in the state court of removal under the state statute. O'Donnell v. Atchison, etc., R. Co., (S. D. Ia. 1892) 49 Fed. 690. See Lee County v. Rogers, (1868) 7 Wall. 175, 19 U. S. (L. ed.) 162; East Tennessee, etc., R. Co. v. Atlanta, etc., R. Co., (S. D. Ga. 1892) 49 Fed. 608; Scott v. Hoover, (S. D. Cal. 1900) 99 Fed. 247.

46. Verdicts

Form and effect of verdicts in actions at law are matters in which the federal courts are governed by the practice of the courts of the state in which they are held. Glenn v. Sumner, (1889) 132 U. S. 162, 10 S. Ct. 41, 33 U. S. (L. ed.) 301. See also Fitzpatrick v. Flannagan, (1882) 106 U. S. 649, 1 S. Ct. 305, 27 U. S. (L. ed.) 211; Mexican Nat. R. Co. v. Slater, (C. C. A. 5th Cir. 1902) 115 Fed. 593, 53 C. C. A. 239.


So where in an action under the federal Employers' Liability Act the general verdict and the special findings were taken pursuant to the state practice prescribed by certain sections of the Code permitting the trial judge to instruct the jury, if they render a general verdict, to find upon particular questions of fact to be stated in writing, and providing that "when a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly," the court said: "Whether under the Conformity Act (R. S. sec. 914) the trial court was required to adhere to the state practice governing the effect of the general verdict and the special findings may not be free from doubt. . . . We find it unnecessary to decide the question of practice, and laying aside all technicalities will assume, in favor of plaintiff in error, that the verdict is to be interpreted according to the local rule; that is, by reading the special findings in the light of the issues and the evidence, but in the light also of the general verdict, so as to arrive at the true intent and meaning of the jury." Spokane, etc., R. Co. v. Campbell, (1916) 241 U. S. 497, 36 S. Ct. 883, 60 U. S. (L. ed.) 1125. But see Spokane, etc., R. Co. v. Campbell, (C. C. A. 9th Cir. 1914)
217 Fed. 518, 133 C. C. A. 370, holding that federal courts will not be bound by the rules obtaining in local courts for interpreting verdicts.

But a federal court will not necessarily comply, in respect to the form of a verdict, with technical rules of procedure applicable in the local courts of a state. General Fireproofing Co. v. Wallace, (C. C. A. 8th Cir. 1910) 175 Fed. 650, 99 C. C. A. 204.

So where a company was charged by the verdict of the jury with the duty of responding in damages to the full amount reasonably necessary to be expended by plaintiff to repair and replace a defectively constructed building, it had contracted to erect, in precisely the same condition it would have been if that company had in all respects fully performed its contract, and the jury in its general verdict deducted from this sum the balance unpaid on the contract and at the general verdict in such amount, and thus made its general verdict conform to the special finding, and in so doing all parties were placed in the same position as though the contract had been fully carried out and performed by the defendant, it was held that the judgment was fair, just and right, and should be affirmed, and this notwithstanding an argument made as to the technical rules of procedure applicable in the local courts of the state. General Fireproofing Co. v. Wallace, (C. C. A. 8th Cir. 1910) 175 Fed. 650, 99 C. C. A. 204.

One good count.—A state statute providing that "whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration shall be sufficient to sustain the verdict," governs proceedings in cases tried in the federal courts within that state. Bond v. Duskin, (1884) 112 U. S. 604, 5 S. Ct. 296, 28 U. S. (L. ed.) 535. See also Townsend v. Jenison, (1849) 7 How. 706, 12 U. S. (L. ed.) 880.

Disposition of cause where verdict set aside.—So long as the practice in the United States courts in actions at law must conform to the practice in the state court of the state where the trial is had so far as may be, the disposition of cases where a verdict is set aside by the trial court for the reason it is not supported by the evidence must be made in accordance with the rules declared by the highest court of such state. In New York the practice and rule is well settled. Johnson v. Cadillac Motor Car Co., (N. D. N. Y. 1912) 197 Fed. 485.

47. Wills

A statutory proceeding to contest the validity of a will, which provides for the issue to be tried by a jury if either party demand such a trial, is a suit at law, and falls under this statute. Sawyer v. White, (C. C. A. 5th Cir. 1903) 122 Fed. 223, 58 C. C. A. 587.

Wherever, by the law obtaining in a state, customary or statutory, suits in equity may be maintained in the courts of such state to set aside the probate of a will, similar suits may be maintained by original process in a federal court, where the requisite diverse citizenship and other necessary conditions exist. Carrus v. O'Calligan, (C. C. A. 9th Cir. 1903) 126 Fed. 657, 60 C. C. A. 547.

48. Witnesses

The competency of persons as witnesses in the federal courts in any civil action, suit, or proceeding "shall be determined by the laws of the State or Territory in which the court is held." Act of June 29, 1906, ch. 3606, 34 Stat. L. 618, amending R. S. sec. 858, and set forth and annotated in title WITNESSES.

Exemption from service of process.—The privilege of suitors and witnesses from service of process in a suit in a federal court is extended upon any suit at law of a state, and, as it is a question of general jurisprudence, a definition of the common-law privilege, it is the duty of this court to decide the question by the exercise of its independent judgment. Roscheniatski v. Hale, (D. C. Neb. 1913) 201 Fed. 1017.

Indictment: names of witnesses on indictment.—State statutes which require that the names of witnesses shall be indorsed upon an indictment are not controlling in the United States court. U. S. v. Aviles, (S. D. Cal. 1915) 222 Fed. 474.

Contradiction by testimony on former trial.—Where by the practice in a state the testimony of a witness at a former trial may, without his attention having been called to the statements then made, be introduced for the purpose of contradicting his testimony, a federal court sitting in that state will be controlled thereby. American Agricultural Chemical Co. v. Hogan, (C. C. A. 1st Cir. 1914) 213 Fed. 416, 130 C. C. A. 52.

49. Writs and Process

a. Form and Contents


be commenced by the issue of a summons in the name of the plaintiff’s attorney.

And a substantial compliance with the requirements of a state statute as to the form of summons shall be upheld when, to set it aside, would tend to defeat the ends of justice. (Schwaebacher v. Reilly, (1873) 2 Dill. 127, 21 Fed. Cas. No. 12,601, as to service by a martial or deputy.)

Where there is no provision of the federal statute governing the service of notice or subpoena, the statute of the state on the subject where the federal court is held will govern, even in an equity action, if reasonable and adapted to the purpose; and where the federal court has applied the state statute, finding it sufficient to confer jurisdiction, the state courts will not reach a contrary conclusion. (Hollister v. Vermont Bldg. Co., (1909) 141 Ia. 160, 110 N. W. 626).

When the fact of the presence of the defendant is not in dispute, and only the mode or manner of the service is in question, a service in accordance with the requirements of the state statutes is a good service. (Nickerson v. Warren City Tank., et al., (E. D. Pa. 1915) 223 Fed. 843).

And the adoption of a general rule regulating the service of process, in substantial conformity with the state statute then in force, was held to be within the authority of the District Court of the United States, and that court had the right to maintain the rule notwithstanding changes in the state law as to the time within which the writ is returnable. (Shepard v. Adams, (1898) 168 U. S. 615, 18 S. Ct. 214, 42 U. S. (L. ed.) 602. See also Ewing v. Burnham, (C. C. Vt. 1898) 74 Fed. 384).

A rule of court, adopted while the law of the state was in a condition of uncertainty, for the purpose of securing uniformity in the service of process, which required the marshal in all civil actions to deliver a copy of the summons to each one of the defendants, was held to be in force, as it was not in violation of this section, and includes the state mode of procedure. (Lowry v. Story, (W. D. N. C. 1887) 31 Fed. 760).

Service of summons.—The validity of the service of a summons is not determined by a federal court on general principles of jurisprudence, in the absence of any statute or established judicial rule in the state to render the federal conformity statutes applicable. (Kaufman v. Garner, (W. D. Ky. 1900) 173 Fed. 550).

It has also been held that this section applies only to matters of practice and procedure, and does not appertain to jurisdiction, or the mode of obtaining jurisdiction of the person in actions brought in the federal courts. (Wells v. Clark, (C. C. Mont. 1905) 136 Fed. 482).

So it has been said that the mode of serving process comes under the category of practice, and the state court custom may therefore be followed. (Am. v. Watertown, (1989) 120 U. S. 301, 9 S. Ct. 530, 30 U. S. (L. ed.) 948. But there is a wide difference between the method of serving a summons and the effect of such service when made. The first relates to the “form, manner, and order of conducting and carrying
on suits." The effect of the formal act called "service" is not a question of practice. It turns on the courts of jurisdiction; and jurisdiction in turn must be tested by substantive law. Sewchulas r. Lehigh Valley Coal Co., (C. C. A. 2d Cir. 1916) 233 Fed. 422, 147 C. C. A. 358.

In this connection it has also been decided that in the federal court it is proper practice to try the question of the sufficiency of the service of a summons by motion to quash the return, supported by affidavit, and in the absence of statute a federal court is not required by the Act of Conformity to follow the state practice of trying this question. Higham r. Iowa State Travelers' Ass'n, (W. D. Mo. 1911) 183 Fed. 845.

Again, it is said that the question of the insufficiency of the service of summons involves no substantial right, and may be raised by a motion to quash, supported by affidavit. Wall v. Chesapeake, etc., R. Co., (C. C. A. 7th Cir. 1899) 95 Fed. 308, 37 C. C. A. 129.

But see Rubel r. Beaver Falls Cutlery Co., (N. D. Ill. 1884) 22 Fed. 282, in which case the court said that the question whether the person on whom the summons was served as agent of defendant was or was not at the date of the service an agent of defendant on whom service of process against defendant could lawfully be made was a question of fact that could only be raised by plea in abatement, unless the grounds of the motion to quash appeared on the face of the record.

Application of doctrine.—So, as Congress has not laid down any rule with regard to the mode of serving process upon corporations, the state law and practice must be followed. Amy v. Watertown, (1889) 130 U. S. 301, 9 S. Ct. 530, 32 U. S. (L. ed.) 946; Lemon v. Imperial Window Glass Co., (N. D. W. Va. 1912) 199 Fed. 927.

And where the state statute authorizes the plaintiff or the plaintiff's attorney to issue not a summons, but a notice, as a method of instituting a litigation, an action may be instituted by such a notice in a federal court in accordance with the state practice. Lea r. Merriman, (W. D. Va. 1904) 132 Fed. 510.

And where a summons is directed to the defendant as is permitted in New York state it need not be served by a United States marshal, but may, except in special instances, be served by any person other than a party to the action. U. S. v. Mitchell, (E. D. N. Y. 1915) 223 Fed. 805.

Again, where there is a code provision that the civil actions are commenced by the filing of a complaint, on which the clerk must indorse the day, month and year that it is filed, and that at any time within a year thereafter the plaintiff may have a summons issued, if the summons is issued within a year as specified in the act, the fact that it is not delivered to the marshal for service until after the expiration of the year is not material. Perris Irrigation Dist. v. Escher, (C. C. A. 9th Cir. 1914) 215 Fed. 562, 132 C. C. A. 74; Perris Irrigation Dist. v. Escher, (C. C. A. 9th Cir. 1914) 215 Fed. 566, 132 C. C. A. 78.

c. Service by Publication


d. On Foreign Corporations

In general.—It is the established rule that a mode of service prescribed by state laws for obtaining jurisdiction over foreign corporations, which is by the local courts recognized as valid, will obtain recognition in the federal courts, subject to the fundamental principle that no one shall be condemned unheard, or compelled to answer a complaint in a foreign jurisdiction except upon such notice of the proceeding as is 'fair and reasonable, and the federal courts must judge for themselves whether the mode of service prescribed by the laws of a particular state satisfies these requirements. McCord Lumber Co. r. Doyle, (C. C. A. 8th Cir. 1889) 97 Fed. 22, 38 C. C. A. 34. See also to same effect Toland r. Sprague, (1838) 12 Pet. 306, 9 U. S. (L. ed.) 1093; New York Life Ins. Co. v. Bangs, (1880) 103 U. S. 425, 26 U. S. (L. ed.) 580; Pomroy r. New York, etc., R. Co., (1857) 4 Blatchf. 120, 19 Fed. Cas. No. 11,261; Main r. Chicago Second Nat. Bank, (1874) 5 Bisa. 26, 16 Fed. Cas. No. 8,976; Dalimeyer r. Farmers', etc., Fire Ins. Co., (1877) 4 Cent. L. J. 464, 6 Fed. Cas. No. 3,546; Leonard r. Lycoming Fire Ins. Co., (1877) 10 Chicago Leg. N. 22, 15 Fed. Cas. No. 8,258; Bentif r. London, etc., Finance Corp., (S. D. N. Y. 1890) 44 Fed. 667; Atlas Glass Go. r. Ball Bros. Glass Mfg. Co., (N. D. N. Y. 1899) 87 Fed. 418.

Courts of the United States determine for themselves the fact of the presence of the defendant within the jurisdiction, and in determining it they may or may not follow the rulings of the state courts. The statutes of the states creating a constructive presence within the jurisdiction for process service, such as acts providing for service upon the registered agents of foreign corporations, are held to include service of process by the courts of the United States. Nickerson r. Warren City Tank, etc., Co., (E. D. Pa. 1915) 223 Fed. 843.
Therefore, while service of subpoena from a federal court in equity upon a nonresident defendant is not controlled by state statutes, yet, where there is no applicable provision of a federal statute, the procedure of the state statute, if deemed proper and reasonable, will be followed, as, for instance, when the state statute declares what persons shall represent the corporation in receiving service of process. Toledo Computing Scale Co. v. Computing Scale Co., (C. C. A. 6th Cir. 1906) 142 Fed. 919, 74 C. C. A. 89.

So the mode of service prescribed by the laws of a state for obtaining jurisdiction over foreign corporations, which is by the local courts recognized as valid, obtains similar recognition in the federal courts, in so far as the same affects property of foreign corporations within such state. Brown-Ketcham Iron Works v. George B. Switt Co. (1915) 53 Ind. App. 630, 100 N. E. 584, 880.

And where the officers of a domestic corporation, residents of another state, absent themselves from the state and provided no place of business therein, and the federal court in a suit to dissolve the corporation and appoint a receiver, in the absence of a federal statute, adopted the state statute as to service of notice on corporations and determined that it had acquired jurisdiction thereby, the judgment will be given effect in the state court and the receiver permitted to sue therein. Hollister v. Vermont Bldg. Co., (1909) 141 La. 160, 119 N. W. 626.

On the other hand, service of summons on the officer of a nonresident corporation may be set aside in a federal court though good under a state statute. Ostrander v. Deerfield Lumber Co., (N. D. N. Y. 1915) 208 Fed. 540.

The question also whether a federal court acquired jurisdiction over a foreign corporation defendant by the service made is one of general jurisprudence, to be determined by the federal law, and which cannot be affected by a state statute. New Haven Pulp, etc., Co. v. Downingtown Mfg. Co., (C. C. Conn. 1904) 130 Fed. 605.

So the question whether a summons can be served within a district, not whether it has been properly served, is not determined by the law of the state, but the state law of the United States. Colosimo v. Pittsburgh, etc., R. Co., (E. D. Pa. 1914) 210 Fed. 550.

Thus service upon the president of a foreign corporation temporarily in a state, but a citizen and resident of another state, cannot give jurisdiction over the corporation, organized and existing under the laws of such other state and carrying on business in that state only, having no place of business, officer, agent, or property in the state in which such service was made. This section applies only to cases of which the court has jurisdiction according to the Constitution and laws of the United States. Goldey v. Morning News, (1895) 156 U. S. 518, 15 S. Ct. 559, 39 U. S. (L. ed.) 617.

And where an Ohio railroad corporation was sued in Georgia on a transitory cause of action arising in Kentucky, defendant having no tracks in Georgia and doing no business in that state, except that it had a commercial agent, whose only duty was to solicit freight and passenger business, without authority to issue bills of lading, sell passenger tickets, or make contracts, it was held that defendant was not doing business in Georgia so that service on such commercial agent would confer jurisdiction over the corporation so far as the federal courts were concerned, though the state courts had decided the contrary. West v. Cincinnati, etc., R. Co., (N. D. Ga. 1900) 170 Fed. 349.

Cases removed.— If actions are started in a state court and removed into a federal court, the sufficiency of the service under the state law is still tested by the necessities required to give jurisdiction in an action instituted at the outset in the federal court. Goldey v. Morning News, (1895) 156 U. S. 518, 15 S. Ct. 559, 39 U. S. (L. ed.) 517. But when an action is started in the United States court, the statutes creating jurisdiction and relating to the service of papers now embodied in Judicial Code, §§ 24 to 27 and 40 to 48, can in no way be superseded by the laws of the state. The provisions of R. S. sec. 914 do not enlarge the specific enforcements of the sections mentioned. On the contrary, they are merely applicable, so far as they may be used, to carry out those sections. Vitkus v. Clyde Steamship Co., (E. D. N. Y. 1916) 232 Fed. 288.

And where a case is removed from a state court, and the defendant, a foreign corporation, appears specially, for the purpose of removal only, and objects to the sufficiency of the service, the federal court must determine such objection for itself, and will not necessarily be controlled by the state law. West v. Cincinnati, etc., R. Co., (N. D. Ga. 1909) 170 Fed. 349.

And in another case it is held that where a case against a foreign corporation has been removed from a state to a federal court, the latter court must determine for itself the validity of a service of process, whatever may be the law of a state, or its interpretation by the courts of a state, under which a valid service of process may be claimed. Cady v. Associated Colonies, (N. D. Cal. 1902) 119 Fed. 420. See also cases cited in notes to Judicial Code, §§ 38, supra, this title, vol. 5, p. 460, under 5. Service on Foreign Corporations.

e. Return of Service

As to the effect of the return of an officer in executing mesne or final process, the settled law of the state, that the return of a sheriff showing that he has served the
writ in the manner prescribed by the statute, for the purpose of giving the court jurisdiction, is conclusive against collateral attack, will be followed. Joseph v. New Albany Steam Forge, etc., Co., (C. C. Ind. 1892) 53 Fed. 180.

In Wall v. Chesapeake, etc., R. Co., (C. C. A. 7th Cir. 1899) 95 Fed. 398, 37 C. C. A. 129, the court said: "Upon examination of a great many American cases, we believe the general rule in this country, with some dissenting cases like those in Illinois, to be this, that the sheriff's return stands in the first instance as the affidavit of the sheriff, but is subject to be disputed by affidavits on the part of the defendant showing to the satisfaction of the court, upon motion to quash, that the return is not true in point of fact, or, as in the case at bar, is insufficient in law." Citing Stout v. Sioux City, etc., R. Co., (1881) 3 Mc Cary (U. S.) 1, 8 Fed. 794; Rowe v. Table Mountain Water Co., (1858) 10 Cal. 442; Wemple v. Clark, (1907) 6 Conn. 334; Bond v. Wilson, (1871) 8 Kan. 228, 12 Am. Rep. 466; Crosby v. Farmer, (1888) 39 Minn. 305, 40 N. W. 71; Walker v. Lutz, (1883) 14 Neb. 274, 16 N. W. 352; Wendell v. Mugridge, (1848) 19 N. H. 109; Van Rensselaer v. Chadwick, (1852) 7 How. Pr. (N. Y.) 297; Wallis v. Lott, (1857) 15 How. Pr. (N. Y.) 567; Carr v. Commercial Bank, (1862) 16 Wis. 50.

Return of state officer not conclusive.—Even though it is provided by state law that the sheriff's return in the state court concludes the parties, a federal court will not be controlled thereby in a case removed from the state to the federal court. Mechanical Appliance Co. v. Castleman, (1910) 215 U. S. 437, 30 S. Ct. 125, 54 U. S. (L. ed.) 272.

Presumptions in aid of defective service. — A question as to whether presumptions will be made in aid of a defective return of substituted service is a question of general law, with reference to which decisions of the highest state courts are not conclusive on the federal courts. King v. Davis, (W. D. Va. 1903) 137 Fed. 198.

Amendment of return.—Whether a return of substituted service of process in federal courts can be amended is a question of the power of the court, with reference to which it is not bound by state decisions. King v. Davis, (W. D. Va. 1903) 137 Fed. 198.

Return day.—This section does not necessitate altering a rule of a federal Circuit Court as to the return day for process, adopted under the authority of R. S. sec. 918, infra, p. 77, in conformity with the state practice then existing, so as to conform to a change in such practice made by subsequent state legislation. Boston etc., R. Co. v. Crewe, (1905) 210 U. S. 155, 28 S. Ct. 657, 52 U. S. (L. ed.) 1002; Kinney v. U. S. Fidelity, etc., Co., (E. D. Pa. 1910) 182 Fed. 1005, affirmed (C. C. A. 3d Cir. 1911) 186 Fed. 477, 108 C. C. A. 455.

f. Indorsements

Indorsements upon the copy of summons in actions for penalties brought in the name of "The United States" shall correspond with the requirements of state statutes in like cases brought by the state in the name of "The People," etc. U. S. v. Rose, (S. D. N. Y. 1882) 14 Fed. 681. See also Miller v. Gages, (1848) 4 McLean 438, 17 Fed. Cas. No. 9,571; U. S. v. O'Brien, (C. C. Mass. 1903) 120 Fed. 446, as to extension of time for entering a writ.

Sec. 915. [Attachments.] In common-law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process: Provided, That similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy. [R. S.]


Attachment in postal suits, see ATTACHMENT, vol. 1, p. 483 et seq.

Remedies on judgments, by execution or otherwise, see R. S. sec. 916, infra, p. 70.

"Circuit" courts, mentioned in the text section, were abolished by Judicial Code, § 289, supra, this title, vol. 5, p. 1082.

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I. Operation in General

Purpose and effect of statute.—It was not the purpose of the provisions of this section and of R. S. sec. 933 (title ATTACHMENT, vol. 1, p. 486) in common-law causes, to give to the nonresident creditor any unfair advantage over the resident creditor.

Construction.—It is an elementary principle that statutes giving the ancillary right of attachment should be strictly construed, they should be confined to those causes of action which are clearly within the language of the statute. Dixon v. Corinne Runkel Stock Co., (E. D. N. C. 1914) 214 Fed. 418, wherein it was held that in a suit for the infringement of a copyright, the complainant is not entitled to an attachment, such suit not being a “common law cause” within the meaning of this section.

In using the term “common-law causes” in this section it must be assumed that Congress had in mind the distinction between a right of action given by the common law from one dependent upon a statute and intended that such distinction should be observed. It is not allowable to disregard it or by interpretation to explain it away. Dixon v. Corinne Runkel Stock Co., (E. D. N. C. 1914) 214 Fed. 418; Brown v. Fletcher, (S. D. N. Y. 1877) 18 Fed. 223.

Discretion of federal courts.—By this section and R. S. secs. 914, 916, and 918, it is sufficiently made to appear “that while it was the purpose of Congress to bring about a general uniformity in federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the federal courts exercised in the form of general rules adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.” Shepard v. Adams, (1898) 105 U. S. 618, 21 S. Ct. 214, 42 U. S. (L. ed.) 602.

Scope against national banks.—R. S. sec. 5242 (title NATIONAL BANKS) provides that no attachment shall be issued against a national banking association before final judgment. “It was suggested in argument that the prohibition extended only to the use of the remedy by state courts, and that the remedy itself still remained to be resorted to in the courts of the United States. But we do not so understand the law. In our opinion the effect of the Act of Congress is to deny the state remedy altogether so far as suits against national banks are concerned, and in this way it operates as well on the courts of the United States as on those of the states.” Pacific Nat. Bank v. Mixter, (1888) 124 U. S. 721, 8 S. Ct. 118, 31 U. S. (L. ed.) 567. See also Hower v. Weiss Malting, etc., Co., (C. C. A. 2d Cir. 1893) 55 Fed. 356, 14 U. S. App. 210, 5 C. C. A. 129.

Arrest.—This section does not appear to apply to the case of an arrest. Its operation is confined to the remedy by attachment or other process—probably like process—only against the property of the defendant and not against his person. U. S. v. Griswold, (1877) 5 Savy. 25, 26 Fed. Cas. No. 15,266.

II. JURISDICTION

The right of a federal court to issue an attachment under this section is not a matter going to the jurisdiction of the court, but merely a question as to the right of the plaintiff to the extraordinary relief, and if the federal court err in granting such relief it would be simply a matter of error, and not one of jurisdiction. Schunk v. Moline, etc., Co., (1893) 147 U. S. 500, 13 S. Ct. 416, 37 U. S. (L. ed.) 255.

Personal service or appearance.—Personal service upon the defendant, or his personal appearance in the action, is a prerequisite to the issuance of an order of attachment against his property. Big Vein Coal Co. v. Read, (1913) 226 U. S. 31, 32 S. Ct. 30, 56 L. ed. 1053. In cases where the defendant cannot be sued and jurisdiction acquired over him personally, the auxiliary remedy by attachment cannot be had, as attachment is not a means of acquiring jurisdiction. Ex p. Des Moines, etc., Co., 103 U. S. 786, 26 U. S. (L. ed.) 610.

Foreign attachment.—"This Act does not confer upon the United States courts jurisdiction to entertain suits by the process of foreign attachment, and... the statute and any rule adopting the state laws do not give a Circuit or District Court power thus to acquire jurisdiction over a person not a resident of the district nor served with process therein." Central Trust Co. v. Chattanoogas, etc., R. Co., (C. C. S. D. (1895) 68 Fed. 685. See also Chittenden v. Darden, (1875) 2 Woods 437, 5 Fed. Cas. No. 2,688; Nazro v. Cragin, (1873) 3 Dill. 474, 17 Fed. Cas. No. 10,062; Anderson v. Shaffer, (S. D. Ohio 1881) 10 Fed. 266; Boston Electric Co. v. Electric Lighting Gas Co., (C. C. Mass. 1865) 23 Fed. 835; Harland v. United Lines Tel. Co., (C. C. Conn. 1889) 40 Fed. 308.

It is to be noted, in respect to this enactment, in the first place, that although its terms cover the case of a foreign attachment, properly so called, being process in rem against the goods and lands of a nonresident or absenting debtor, yet no such process can, in fact, issue unless the defendant can be personally served with summons in the district in which the suit is brought; for by section 739 R. S. [now Judicial Code, § 51, supra], this title, vol. 5, p. 4861, no suit can be brought against an inhabitant of the United States residing in any district than that of which he is an inhabitant or in which he is found at the time of serving the writ, except in the case of absent defendants under section 738 [now Judicial Code, § 57, supra], this title, vol. 5, p. 529, when suit is brought to enforce a lien upon personal property and the cases specified in sections 740, 741, and 742 [now Judicial Code, §§ 52, 54, 65, respectively, supra], this title, vol. 5, pp. 618, 633, 624], when defendants reside in separate districts, though in the same state, or the suit is of a local nature, and the subject, or the subject and the defendant, are in different districts contained in the same state. The attachment proceeding, then, covered by section 739 of the United States has altogether a different character from that proceeding in rem in common use in the states, the object of which is either to enforce the appearance of the absent defendant or to subject his property to the payment of his debts. In the federal courts there must be jurisdiction over the person of the defendant and of a subject-matter independent of the proceeding in attachment, and without which no attachment can be effectual." Erstein v. Rothschild, (E. D. Mich. 1884) 22 Fed. 61. See also Lovejoy v. Hartford F. Ins. Co., (N. D. Ill. 1882) 11 Fed. 63; cases cited in notes to Judicial Code, § 24, supra, this title, vol. 4, at p. 998, under sidehead The Conformity Acts. It is conceded that the person against whom this suit was brought in the Circuit Court of the United States for the district of Iowa was an inhabitant of the state of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not subject in the Circuit Court of the district of Iowa, and unless he could be sued no attachment could issue for that court against his property. Ex p. Des Moines, etc., R. Co., (1880) 103 U. S. 794, 26 U. S. (L. ed.) 610. See also Toland v. Sprague, (1838) 12 Pet. 300, 9 U. S. (L. ed.) 1093.

But in Guillou v. Fontain, (1875) 11 Fed. Cas. No. 5,861, the court said that the federal courts are invested with undoubted authority to proceed against nonresident persons by attachment of their property, as may be done by the laws of the state.

Suits removed from state courts.—In actions commenced in federal courts, this section is intended only to apply to the ancillary warrant of attachment when issued and levied upon the property of a nonresident defendant after he had been properly served with process in personam, or had made a general appearance and pleaded to the merits of the action. This rule does not apply to attachment suits commenced in the state courts and removed to the federal courts. Lackett v. Rumbaugh, (W. D. N. C. 1891) 45 Fed. 23. See also Crocker Nat. Bank v. Payer-stecher, (C. C. Mass. 1890) 44 Fed. 705, and cases cited in notes to Judicial Code, § 28, supra, this title, vol. 5, p. 55.

Motion to quash.—A nonresident defendant over whom personal jurisdiction has not been obtained may appear specially in a suit in a federal court for the sole purpose of moving to quash the service of writs of attachment and garnishment upon its property in the district, on the
ground that such property was not subject to attachment or garnishment. Davis v. Cleveland, etc., R. Co., (1910) 217 U. S. 157, 30 S. Ct. 463, 54 U. S. (L. ed.) 708, 27 L. R. A. N. S. 285, 16 Ann. Cas. 907. In determining when and how the benefit of the remedy is lost, is to be looked for in the state law. Russia Cement Co. v. Le Page Co., (1899) 174 Mass. 349, 55 N. E. 70.

Successive attachments in federal and state courts.—This statute is ample to authorize and sanction the practice of permitting a constructive levy by attaching creditors under state process upon the property in possession of the marshal and their intervention in proceedings in the federal courts for the same district where, as between state courts of concurrent jurisdiction, a similar method of acquiring and adjusting conflicting rights is prescribed. Gumbel v. Pitkin, (1888) 124 U. S. 131, 8 S. Ct. 379, 31 U. S. (L. ed.) 374. See also Bates v. Days, (W. D. Mo. 1883) 17 Fed. 167, (W. D. Mo. 1882) 11 Fed. 529. In matters of attachment the federal and state courts are courts of co-ordinate jurisdiction, administering the same laws of the state. When the property is already in the custody of the law by virtue of a prior levy of a writ of attachment issued from a state court, to make a valid levy of a writ of attachment issued by a federal court sitting in that state, actual seizure is not necessary. Under such circumstances the property may be constructively seized by the marshal when the law of the state provides for successive levies as well as for the method of settling all priorities of the attachments of the several plaintiffs. Brooks v. Fry, (W. D. Ark. 1891) 45 Fed. 778.

Effect of matters arising under other statutes.—"Wherever attachments in the state courts . . . are affected after issuance by matters arising under other laws of the state, the Circuit Courts would be bound to give the same effect to such matters as would be given them in the courts of the state in similar cases, and therefore where an attachment would be stayed or dissolved by a subsequent cession under the insolvent laws prior to final judgment in the state courts, the same effect would necessarily follow in the Circuit Courts of the United States." Shwartz v. H. B. Clafin Co., (C. C. A. 5th Cir. 1893) 60 Fed. 676, 13 U. S. App. 707, 9 C. C. A. 204. See also Mather v. Nesbit, (C. C. Minn. 1892) 13 Fed. 872; Neufeld v. Neufeld, (S. D. Cal. 1899) 27 Fed. 560.

Questions of priority.—The provisions of a state attachment law, providing a mode whereby questions of priority may be determined, are an important part of the state law upon the subject of attachment, and are binding in the federal courts. Bates v. Days, (W. D. Mo. 1883) 17 Fed. 167. See also Bankers', etc., Tel. Co. v. Chicago Carpet Co., (N. D. Ill. 1886) 28 Fed. 398.

Rights of other creditors.—Under a state statute regulating the process of

III. ADOPTION OF STATE LAWS
Presumption of adoption of state statutes.—The federal courts are not governed by any separate attachment law, but are required to administer the remedy in attachment provided in the laws of the state in which the courts are held. Perez v. Fernandez, (1906) 292 U. S. 80, 28 S. Ct. 561, 50 U. S. (L. ed.) 942.

The effect of this section is to make the state statutes in that regard laws of the United States. Files v. Davis, (E. D. Ark. 1909) 118 Fed. 465; Loewe v. Union Sav. Bank, (D. C. Conn. 1915) 228 Fed. 294. "When parties seek attachments, garnishments, executions, provisional remedies of various kinds, in the courts of the United States, it is not the habit of counsel or of the court to search the statutes of a quarter of a century ago and to conform the proceedings of the federal courts to those then in force in the courts of the several states, but they adopt and use the remedies prescribed by their state statutes in force at the time they act. A general and uniform practice becomes a general and established rule of the court, and in the absence of convincing evidence to the contrary the presumption in the appellate court is that the remedial statutes in force in the states at the time when proceedings under them were taken in the federal courts had been adopted by those courts, either by written rule or by general practice." Logan v. Goodwin, (C. C. A. 8th Cir. 1900) 104 Fed. 490, 43 C. C. A. 658. See also Fullerton v. U. S. Bank, (1828) 1 Pet. 604, 7 U. S. (L. ed.) 280; Russell v. Ashley, (W. D. N. C. 1847) 1 How. 54; 18 Fed. Cas. No. 12,150; Lowry v. Story, (W. D. N. C. 1887) 31 Fed. 769; Bank v. Farwell, (C. C. A. 5th Cir. 1893) 56 Fed. 570, 12 U. S. App. 409, 6 C. C. A. 24.

The method to be followed in making an attachment, in prosecuting it to effect, and in the exercise of this jurisdiction necessarily draws to itself everything properly incidental, even though it may bring into the court for the adjudication of their rights parties not otherwise subject to its jurisdiction. Gumbel v. Pitkin, (1888) 124 U. S. 131, 8 S. Ct. 379, 31 U. S. (L. ed.) 374. See also Bates v. Days, (W. D. Mo. 1883) 17 Fed. 167, (W. D. Mo. 1882) 11 Fed. 529. In matters of attachment the federal and state courts are courts of co-ordinate jurisdiction, administering the same laws of the state. When the property is already in the custody of the law by virtue of a prior levy of a writ of attachment issued from a state court, to make a valid levy of a writ of attachment issued by a federal court sitting in that state, actual seizure is not necessary. Under such circumstances the property may be constructively seized by the marshal when the law of the state provides for successive levies as well as for the method of settling all priorities of the attachments of the several plaintiffs. Brooks v. Fry, (W. D. Ark. 1891) 45 Fed. 778.

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Rights of other creditors.—Under a state statute regulating the process of
attachment, providing that after the institution of the suit and before final judgment any creditor of the defendant might file a bill to prove his claim, with the right to participate in the distribution of the proceeds of the attached property, it was held that in an action rightly instituted in the Circuit Court, in which the property of the common debtor was attached, all other creditors might appear in pursuance of the state law and share in the distribution, although citizens of the same state with the defendant, and although the amounts due them were less than the jurisdictional amounts. Krippendorf v. Hyde, (1884) 110 U. S. 278, 4 S. Ct. 27, 25 U. S. (L. ed.) 145. See Rice v. Adler-Goldman Commission Co., (C. C. A. 8th Cir. 1895) 71 Fed. 151, 36 U. S. App. 266, 18 C. C. A. 15.

Where warrant of attachment may run.-A warrant of attachment issued from a federal court may run against property of the defendant in any court of the state. Tredwell v. Seymour, (E. D. N. Y. 1890) 41 Fed. 579.

Hearing motion in vacation.—As the federal courts do not derive their jurisdiction, nor its judges their powers, from the state legislation, a state statute which authorizes a judge to hear in vacation a motion to discharge attached property has no application, and can have none, to the federal court or its judges. Claffin v. Steinberg, (1871) 2 Dill. 324, 5 Fed. Cas. No. 2,777.

Rules adopting state laws need not be in writing.—This section does not require that the general rules adopting the state laws relating to remedies by attachment, passed subsequently to that Act, shall be in writing. Citizens' Bank v. Farwell, (C. C. A. 8th Cir. 1893) 56 Fed. 570, 12 U. S. App. 409, 6 C. C. A. 24. See also U. S. v. Stevenson, (1889) 1 Abb. 405, 27 Fed. Cas. No. 16,395.

IV. DECISIONS OF STATE COURTS

In general.—Ordinarily the decisions of the highest state court as to the construction and effect of the attachment laws are in general binding upon the federal courts. In this connection, in the early case of Beach v. Viles, (1829) 2 Pet. 675, 7 U. S. (L. ed.) 559, the court stated that the construction of such a statute by the state courts is entitled to great respect, and ought, in conformity to the uniform practice of this court, to govern its decisions. And see in general notes to R. S. sec. 721, supra, this title, vol. 5, at pp. 1217-1219.


And that this is likewise as to the question of the measure of damages in an action on such a bond, see L. Bucki, etc., Lumber Co. v. Fidelity, etc., Co., (C. C. A. 5th Cir. 1901) 109 Fed. 393, 48 C. C. A. 436, affirmed (1903) 189 U. S. 136, 23 S. Ct. 582, 47 U. S. (L. ed.) 744.

Intervention.—Also it has been held that the federal courts should follow the state decisions as to the right of intervention in attachment proceedings. Rice v. Adler-Goldman Commission Co., (C. C. A. 8th Cir. 1895) 71 Fed. 151, 36 U. S. App. 266, 18 C. C. A. 15.

Garnishment proceedings.—In case of garnishment proceedings it has been held that the federal court should follow a decision of the highest court of the state as to the applicability of a statute with reference to allowance to a garnishee. Tefft v. Stern, (C. C. A. 6th Cir. 1896) 74 Fed. 735, 43 U. S. App. 442, 21 C. C. A. 73, reaffirming (C. C. A. 6th Cir. 1896) 75 Fed. 201, 43 U. S. App. 145, 21 C. C. A. 187. In this case it was held that the state court decision would be followed by the Circuit Court of Appeals, although it necessitated the reversal of an order of the federal Circuit Court rendered before the state court decision and while the question was an open one; on which point see, in general, cases cited in notes to R. S. sec. 721, supra, this title, vol. 5, at p. 1142.

And it has been held specifically that the federal courts are bound by the decisions of the state courts upon statutory questions as to the effect of an order directing a garnishee to pay a judgment creditor. Atlantic, etc., R. Co. v. Hopkins, (1876) 94 U. S. 11, 24 U. S. (L. ed.) 48. The sufficiency of notice served upon a garnishee is to be determined by the reference to the state statute. Logan v. Goodwin,
V. ATTACHMENTS IN EQUITY

The fact that attachments in common-law suits are provided for by this section does not warrant the conclusion that there can be no attachment against property in a suit in equity in a federal court. Steam Stone Cutter Co. v. Jones, (C. C. Vt. 1882) 13 Fed. 507. See also Steam Stone-Cutter Co. v. Sears, (C. C. Vt. 1881) 9 Fed. 8.

In Bucyrus Co. v. McArthur, (M. D. Tenn. 1914) 219 Fed. 266, the court said: "Ancillary attachment of the defendant's property is a purely statutory remedy, in derogation of the common law. It is entirely unknown to the immemorial practice and usage of courts of equity, either in England or in the United States, and is essentially a legal remedy, which, in the absence of statutory authority, is not available in equity. There is, however, no statutory authority for the issuance of such an attachment in an equity cause in a federal court. Section 915 of the Revised Statutes, adopting in the federal courts the laws of the several states in relation to attachments against the property of defendants, is specifically limited to 'common-law causes;' and section 914 of the Revised Statutes, providing that the practice and procedure in federal courts shall conform to those of the state courts, specifically excludes 'equity causes.' Neither has the Supreme Court of the United States, in promulgating the Rules of Equity Practice in the District Courts, under the authority vested in it by section 917 of the Revised Statutes, provided for such ancillary writs of attachments. Nor is provision made therefor by any rule of this court; although it may well be that this could be done in accordance with the 79th Rule of Equity Practice (198 Fed. xii, 115 C. C. A. xii), and under the various statutory provisions cited in Steam Stone-Cutter Co. v. Sears, (C. C. Vt. 1881) 9 Fed. 8, and Steam Stone-Cutter Co. v. Jones, (C. C. Vt. 1882) 13 Fed. 507." This section does not embrace remedies in equity by an independent suit which may have been given by the statutes of a state, but is limited by the phrase "in like causes" to remedies provided in actions at law wherein judgments were recovered. Hudson v. Wood, (N. D. Ky. 1903) 119 Fed. 764.

VI. UNDERTAKING

In general.—A plaintiff seeking an attachment in a federal court against property in the state is required to furnish security in the same manner as to amount and the qualification and residence of the sureties that he would have to furnish if he were proceeding in the state court. Singer Mfg. Co. v. Mason, (1879) 5 Dell. (U. S.) 488, 22 Fed. Cas. No. 12,902. See also Feltis v. Cockrem, (1879) 101 U. S. 301, 25 U. S. (L. ed.) 954.

Action on bond.—An action on the attachment bond may be maintained in a federal court upon the ground that jurisdiction in these subordinate and ancillary proceedings rests upon the jurisdiction acquired in the original action. Files v. Davis, (E. D. Ark. 1902) 118 Fed. 465.

Counsel fees as element of damages covered by indemnity bond.—In an action on a statutory bond given by the plaintiff in a delinquent suit unsuccessfully prosecuted in a federal court reasonable counsel fees incurred by the defendant in defending the suit are not recoverable as an element of the damages covered by the bond. National Surety Co. v. Fletcher, (1914) 186 Ala. 605, 65 So. 150, Ann. Cas. 1916D 872, wherein the court said: "It is a firmly established rule of the federal courts, in the absence of any special statute to the contrary, that a successful defendant cannot recover such counsel fees, even where the plaintiff has wrongfully invoked special process and given a bond of indemnity to the defendant. . . . The argument for the appellee is that this general rule does not apply where the damifying action, though brought in the federal court, is prosecuted under the authority of and in accordance with the provisions of state statutes, and not under a law or laws of the United States, that the delinquent writ and proceedings here involved were founded solely upon Alabama statutes, and that an indemnity bond given pursuant thereto has been held by the Alabama court to include counsel fees as an element of recoverable damages. Hence the (alleged) conclusion that such a bond must be so construed when filed in an action brought in the federal court. In Tulloch v. Mulhine, (1902) 184 U. S. 497, 22 S. Ct. 372, 46 U. S. (L. ed.) 657, an injunction bond had been given in a suit in the federal court, and the obligee had brought an action for damages thereon in the state court, and on appeal the state Supreme Court had held that counsel fees were recoverable as an element of damage. (1897) 58 Kan. 622, 50 Pac. 897; (1900) 61 Kan. 650, 60 Pac. 749. On error to the Supreme Court of the United States it was held that the measure of liability on the bond was a federal question, as involving an assertion by plaintiff in error of 'an immunity from liability depending on an authority exercised under the United States;' and, applying the federal law that counsel fees are not a part of recoverable damages, the judgment of the Kansas court was reversed. The decision seems to be founded primarily on the theory that the bond in
question was exacted under the authority of practice rule No. 90, which merely adopts the English rule of practice whereby convenient of application and other express provision has not been made. Some weight seems to have been given, also, to the general consideration that, if 'the bond given in a federal court is not to be construed with reference to the rules of law applicable to such bonds in such court, then there can be no certain general rule by which to determine the liability of the obligors upon the bond.' (1802) 184 U. S. 505, 22 S. Ct. 375, 46 U. S. (L. ed.) 657. As finally stated by the opinion, the principle affirmed was 'that a bond given in pursuance of a law of the United States was governed, as to its construction, not by the local law of a particular state, but by the principles of law as determined by this court, and operative throughout the courts of the United States,' citing especially Bein v. Heath, (1851) 12 How. 168, 178, 13 U. S. (L. ed.) 939. This principle being thus settled, it only remains to determine whether the delay here involved was executed and given under 'a law of the United States.' Section 916 of the United States Revised Statutes provides that judgment creditors in federal courts 'shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held,' etc. Section 915, immediately preceding, provides that the plaintiff in common-law causes 'shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state,' etc., with the proviso that 'similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party instituting such attachment or other remedy.' In Cooke v. Avery, (1893) 147 U. S. 375, 13 S. Ct. 340, 37 U. S. (L. ed.) 209, it was held that the lien of a federal court judgment, and the remedies thereon, though in accordance with the provisions of the Texas statutes, existed by virtue of section 916, and it was said that the disposition of the issue 'depended upon the laws of the United States and the rules of the Circuit Court, and their construction and application were directly involved.' See also Files v. Davis, (E. D. Ark. 1902) 118 Fed. 465; Leslie v. Brown, (C. C. A. 6th Cir. 1896) 90 Fed. 171, 61 U. S. App. 727, 32 C. C. A. 556; Sowles v. Witters, (C. C. Vt. 1891) 46 Fed. 497. So, under section 915, it cannot be seriously doubted that, in administering remedies similar to those provided for state courts, the federal court does so, not by authority of a state law, but solely by virtue of the federal statute, which adopts them and authorizes their use. The proviso that 'similar security as is required by state laws' shall be given before the issuance of the writ very clearly relates to the form and substance of the bond, and not to the elements of damage that may be recognized by the state courts as a part of their general jurisprudence. And we think it must be presumed that, when a federal court grants an extraordinary writ at the suit of a plaintiff, on the bonded condition that for a wrongful resort thereto he shall indemnify the defendant for such damages as he may suffer, the damages intended are only such as are recognized by the law of the forum."

VII. AMENDMENTS

Where no local statute or rule of local law is involved the power to amend is the same in attachment suits as in others. Tilton v. Coffield, (1876) 93 U. S. 163, 23 U. S. (L. ed.) 858. See also Matthews v. Densmore, (1883) 109 U. S. 216, 3 S. Ct. 126, 27 U. S. (L. ed.) 912. "It is the settled doctrine of the Supreme Court of Arkansas that the proceeding by attachment, like any other civil action, may be amended in matter of substance as well as form at every stage of the case, and that every error or defect in the proceedings which does not injuriously affect the substance of the cause of action or the attachment will be discharged." People's Sav. Bank, etc., Co. v. Batchelder Egg Case Co., (C. C. A. 8th Cir. 1892) 51 Fed. 130, 4 U. S. App. 603, 2 C. C. A. 126. See also Wolf v. Cook, (E. D. Wis. 1889) 40 Fed. 432, as to amendment of the writ, and Singer Mfg. Co. v. Mason, (1879) 5 Dill. 488, 22 Fed. Cas. No. 12,903, as to amendment of the bond.

Sec. 916. [Execution in common-law causes.] The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the State in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such State laws as may hereafter be in force in such State in
relation to remedies upon judgments, as aforesaid, by execution or otherwise.

(R. S.)


“Circuit” courts, mentioned in this section, were abolished by Judicial Code, § 289, supra, this title, vol. 5, p. 1082.

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I. CONSTITUTIONALITY

“It is the settled doctrine of this court, as established and explained by these authorities, that the power of Congress, under the Constitution, as well as that of the courts of the United States, acting under its authority, extends to the adoption of the laws of the several states, not only as to the nature and form of writs of execution for the enforcement of judgments, but also as to all proceedings thereupon.” Ex p. Boyd, (1881) 106 U. S. 547, 26 U. S. (L. ed.) 1209.

II. REMEDIES UNDER STATE LAWS

Scope of provision.—This statute adopts both the form and effect of executions as established by the state laws. Koning v. Bayard, (1829) 2 Pains 251, 14 Fed. Cas. No. 7,924.

Judgments at law.—Only “judgments at law” are in terms referred to in this section, and the remedies made available by it are such as are provided by the laws of the state “in like causes” by “execution or otherwise.” While this gives the court ample powers in actions at law, it is not meant to affect, in any manner, remedies in equity, which are to be governed by other rules. Hudson v. Wood, (W. D. Ky. 1903) 119 Fed. 764.


Nor judgments in admiralty.—The Blanche Page, (1879) 16 Blatchf. 1, 3 Fed. Cas. No. 1,024.

Nor judgments in criminal cases.—Clark v. Allen, (W. D. Va. 1802) 114 Fed. 37.

Common-law causes.—Where the state law provided that “in a writ of fieri facias on a judgment or decree against one liable to the commonwealth, real estate might be levied on,” the right to such levying being given only as against certain public officers, it was held that an execution from a federal court in Virginia may not be levied on real estate there though the judgment is in favor of the United States, since the phrase “in like causes” does not give the government the rights of the state, but, as applicable to Vir- ginia, which is not a code state, means “common-law causes.” Clark v. Allen, (W. D. Va. 1902) 117 Fed. 609.

Enforcing judgment.—This section empowers a federal court to use a similar remedy to that provided by a state statute to enforce its judgments, but does not require it to follow the method prescribed by a state statute in serving a writ of scire facias to revive a judgment on a nonresident defendant if it deems such method insufficient. Collin County Nat. Bank v. Hughes, (C. C. A. 8th Cir. 1907) 155 Fed. 389, 83 C. C. A. 661.

Where a judgment creditor is only entitled to an execution by leave of court, his right is only established when he obtains an order of court directing that execution issue. General Electric Co. v. Hurd, (C. C. Ore. 1909) 171 Fed. 984.

Collateral regulations and restrictions.—“Writs and executions issuing from the courts of the United States in virtue of these provisions are not controlled or controllable in their general operation and effect by any collateral regulations and restrictions which the state laws have imposed upon the state courts to govern them in the actual use, suspension, or superseding of them. Such regulations and restrictions are exclusively addressed to the state tribunals, and have no efficacy in the courts of the United States unless adopted by them.” Boyle v. Zacharie, (1832) 6 Pet. 635, 8 U. S. (L. ed.) 527. But see Georgia v. Atlantic R. Co., (1879) 3 Woods 434, 10 Fed. Cas. No. 5,361; Merchants’ Bank v. Evans, (1873) 51 Mo. 335.

State laws unconstitutional.—“Although such state laws may have been so adopted, yet they are inoperative and of no force if in conflict with the Constitution or an Act of Congress.” Bronson v. Kinzie, (1843) 1 How. 311, 11 U. S. (L. ed.) 143.

Rights of mortgagees and mortgageor.—When a mortgage on real property is given to secure a debt, the existing state laws create and define the legal and equitable obligations of the mortgage contract. A law of the state passed afterward, doing nothing more than change the remedy upon such contracts, would be liable to no constitutional objection; but one which, upon foreclosure, gives to the mortgagee, and to the judgment creditor, an equitable estate in the premises, which neither of them would have been entitled to under the original contract, unquestionably impairs its obligations, and is prohibited by the Constitution. Bronson v. Kinzie, (1843) 1 How. 311, 11 U. S.
Restriction on power of sale.—The court cannot adopt a state law which provides that “when any property shall be levied on and appraised in the manner required by this Act, and the same shall be susceptible of a division, no greater quantity thereof than will be sufficient to pay the amount of the execution or executions thereon levied, together with the proper costs, at two-thirds of the valuation thereof, shall be offered for sale by the officer in whose hands such execution or executions may have been placed for collection,” as the appraisement therein directed, with the prohibition to sell at less than two-thirds of the valuation, is repugnant to the Constitution of the United States. McCracken v. Hayward, (1844) 2 How. (U. S.) 608, 11 U. S. (L. ed.) 397. See U. S. Bank v. Halstead, (1825) 10 Wheat. 51, 6 U. S. (L. ed.) 264.

Supremacy of federal law.—A state statute taking away the right to a writ of error, in the case of a forthcoming bond forfeited, can have no influence whatever in regulating writs of error to the Circuit Courts of the United States, as an Act of Congress authorizes a writ of error on final judgment; and a rule of court adopting the statute as a rule of practice would, therefore, be void. Amis v. Smith, (1842) 16 Pet. (U. S.) 303, 10 U. S. (L. ed.) 973. See Wayman v. Southard, (1825) 10 Wheat. (U. S.) 1, 6 U. S. (L. ed.) 253.

Supplementary proceedings.—An examination of a judgment debtor, supplementary to execution, upon the question as to his title to and possession of property applicable to the payment of a judgment against him, and of the fact and particulars of any disposition he may have made of it, may be had under this section. The power thus extends to the ademption of the laws of the several states, not only as to the nature and form of writs of execution for the enforcement of judgments, but also as to all proceedings thereupon. While such a proceeding belongs historically, as to its form, to the administration of Chancery Courts, yet so far as it is authorized by statute, and relates merely to the discovery of the judgment debtor's assets, it is a collateral and auxiliary remedy, and if the discovery results in ascertaining the existence of property, subject to levy under execution, then the remedy at law is perfectly restored. Ex p. Boyd, (1881) 105 U. S. 647, 26 U. S. (L. ed.) 1200. See also Quantity Manufactured Tobacco, (1879) 10 Ben. (U. S.) 447, 20 Fed. Cas. No. 1203. See Badger v. Yoder, (1858) McAll. 443, 4 Fed. Cas. No. 2, 206.

A United States court, proceeding under the laws of the state providing for proceedings supplementary to execution, as authorized by this section, is not affected by a provision of such laws that a witness cannot be compelled to attend in such proceedings at a place without the county of his residence or place of business; but such court may issue subpoenas for witnesses within its district or to compel the attendance of witnesses from other districts who live within one hundred miles, as provided by R. S. sec. 876 (title WITNESSES). Meyer v. Consolidated Ice Co., (E. D. N. Y. 1908) 163 Fed. 400.

Garnishment.—Garnishment proceedings had to reach the property of the judgment debtor are covered by the provisions of this section, where such proceedings were authorized generally by state law. And a state law making it unlawful to issue any writ of execution against a particular city may be of force as to suits in the courts of the state, but it is not an exception which operates proprio vigore in the federal court. Canal, etc., St. R. Co. v. Hart, (1885) 114 U. S. 654, 5 S. Ct. 1127, 29 U. S. (L. ed.) 226; Hart v. New Orleans, (E. D. La. 1882) 12 Fed. 292. See also New Orleans v. Morris, (1877) 3 Woods 115, 18 Fed. Cas. No. 10,183; Randolph v. Tandy, (C. C. A. 5th Cir. 1900) 98 Fed. 939, 39 C. C. A. 351; Pearce v. Winter Iron-Works, (1858) 32 Ala. 68.

Mandamus.—A writ of mandamus to compel the respondents as justices of the County Court to make an assessment and levy a tax to satisfy a judgment in favor of the relator against the county, being an ancillary proceeding and partaking of the nature of an execution, may be issued, unless a writ of fi. in ai, in aid of which the writ of mandamus is issued, is barred by the state statute of limitations. Stewart v. Justices, (W. D. Mo. 1891) 47 Fed. 482. See also U. S. v. Keokuk, (1867) 6 Wall. (U. S.) 514, 18 U. S. (L. ed.) 343; R. v. Richmond County, (1867) 6 Wall. (U. S.) 166, 18 U. S. (L. ed.) 708; Moran v. Elizabeth. (C. C. N. J. 1881) 9 Fed. 72. But see President v. Elizabeth. (C. C. N. J. 1889) 40 Fed. 799.

Body Execution.—The plaintiff moved for an adjudication by the court that the cause of action arose from the wilful and malicious acts of the defendants, and that they ought to be confined in close jail, and for a certificate thereon upon the execution, according to the statutes of the state. The court said that it would be sufficient in its power entitling the party recovering a judgment in a common-law cause to similar remedies upon it to those of the said state "to reach the property of the judgment debtor," applies to the property and not to the person. Mathew v. Gilmings, (C. C. Vt. 1902) 119 Fed. 438. The remedy given to a judgment creditor by a state law, by the arrest and imprisoning of the defendant on a showing of fraudulent removal or concealment of his property,
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is one "to reach the property of a judgment debtor," within the meaning of this section, and is available in the federal courts. Ex. p. Crawford, (C. C. A. 3d Cir. 1907) 154 Fed. 769, 53 C. C. A. 479, affirming (M. D. Pa. 1907) 154 Fed. 761, wherein it was said that a state statute authorizing arrest of a judgment debtor on certain grounds after the return of an execution unsatisfied is to be regarded as a writ, which, although not specifically provided for by Act of Congress, is capable of being adopted as necessary for the full and complete exercise of the jurisdiction of the federal courts, within the meaning of this section. It stands in fact much the same as a capias ad satisfaciendum, of which it may be considered as only another form. Of course, it goes into the federal law at all, with all its essential incidents, and the method of procedure marked out with regard to it by the state statute has therefore to be substantially followed.

Penalties prescribed.—This statute does not intend to adopt the state law entirely; when the process and modes of proceeding are adopted, the provision does not carry with it the penalties that may be prescribed to enforce their performance. "The recovery of the penalty could with quite as much propriety have been on conviction by indictment as on a summary motion; and in neither mode can it be plausibly contended that the courts of the United States could inflict the penalty on its marshal; the motion and assessment of the fine being distinct from the process and mode of proceeding in the cause of which the execution was part, on which the false return was made. This being an offense against the state law, the courts of the state alone could punish its commission; the courts of the United States, having no power to enforce the penal laws of the individual states." Gwin v. Breedlove, (1844) 2 How. 29, 11 U. S. (L. ed.) 167.

Proceeding to enforce forfeiture.—A proceeding to enforce a forfeiture of bonded property seized for violation of the internal-revenue laws is a "common-law cause" within the meaning of this statute, as such a proceeding is a suit to enforce legal as distinguished from equitable rights, though authorized wholly by statute and provided for by a statute, procedure not according to the forms of the common law. Quantity Manufactured Tobacco, (1879) 10 Ben. 447, 20 Fed. Cas. No. 11,499.


A claim to the benefits of the homestead rights is not a question upon the mode of proceeding upon an execution. It does not involve the inquiry how the levy upon such real estate should be made, and the duties of the marshal as to the mode of appraisal, advertisement, and sale, but goes directly to the rule of property. It relates not to the proceeding but to the property proceeded against. "The law of exemption has a direct operation upon property, and has as much force as the law which gives effect to a title in fee simple when obtained by deed. It confers a right which it is not in the power of Congress by legislation, nor within the province of the federal courts, by rules, to divest." Manufacturers', etc., Bank v. Bayless, (1859) Brun. Col. Cas. 8, 16 Fed. Cas. No. 9,050. See also Kerr v. South Park Com'r's, (1878) 8 Biss. 276, 14 Fed. Cas. No. 7,733; Naumburg v. Hyatt, (W. D. N. C. 1885) 24 Fed. 898.

State law excepting state government.—In the state of Virginia real estate cannot be levied on and sold under execution in favor of an individual, but may be levied on under fieri facias on judgments in favor of the state of Virginia. The language of this section, "similar remedies, by execution or otherwise, as are now provided by the laws of the state in like causes," cannot be construed as giving to the federal government the same rights as are given by the state law to the state government. Clark v. Allen, (W. D. Va. 1902) 117 Fed. 498. See Clark v. Allen, (W. D. Va. 1902) 114 Fed. 374.

Failure to docket judgment.—Failure to docket a judgment in accordance with a state law does not release the lien of the judgment as against a subsequent purchaser without notice. "The decisions of the United States courts have been in nothing more uniform, unvarying, and consistent than in holding that where rights once attach under laws of Congress adopting laws of the respective states, these rights are not divested by a non-compliance with conditions, restrictions, or limitations contained in those state laws, where a compliance with the latter would depend upon a resort in any way to state officials, or to the machinery of the state judiciary." U. S. v. Humphreys, (1879) 3 Hughes 201, 26 Fed. Cas. No. 15,422. See also Masingill v. Downs,
III. ADOPTION OF STATE LAWS


But in Logan v. Goodwin, (C. C. A. 8th Cir. 1900) 104 Fed. 490, 43 C. C. A. 665, the court said: "When parties seek attachments, garnishments, executions, provisional remedies of various kinds, in the courts of the United States, it is not the habit of counsel or of the court to search the statutes of a quarter of a century ago, and to conform the proceedings of the federal courts to those then in force in the courts of the several states, but they adopt and use remedies prescribed by their state statutes in force at the time they act. A general and uniform practice becomes a general and established rule of the court, and in the absence of convincing evidence to the contrary the presumption in the appellate court is that the remedial statutes in force in the states at the time when proceedings under them were taken in the federal courts had been adopted by those courts, either by written rule or by general practice."


Rule altering state law.—A court has no power to make a rule purporting to adopt a state law but altering it in some respects. It is legislation in effect by prescribing a new rule unknown to any Act of Congress or the state law professedly adopted. McCracken v. Hayward, (1844) 2 How. 608, 11 U. S. (L. ed.) 397.

Construction of laws adopted.—"The laws of the state adopted by general rule of the court pursuant to the laws of the United States for the governing of the lien and guidance of the marshal in serving executions derived their force from the United States, and not from the state; and a suit arising upon the proper construction of those laws would seem to arise under the laws of the United States. The laws of the state were not extended over this subject, but were resorted to for expression of what the laws of the United States should be in this behalf." Sowles v. Witters, (C. C. Vt. 1891) 46 Fed. 497.

The construction by the highest court of the state of the laws of that state as reported to and made a part of the laws of the United States, "although not absolutely binding upon the meaning of the term as a part of the laws of the United States, is entitled to great and almost controlling weight." Sowles v. Witters, (C. C. Vt. 1893) 55 Fed. 169.

Subsequently enacted state laws.—This section adopted the remedies established by law in the several states at the time the section became a law, but not the subsequent state enactments regulating such remedies, they being left for adoption by rules as the federal court might deem advisable. General Electric Co. v. Hurd, (C. C. Ore. 1900) 171 99 Fed. 48.

Judgment prior to adoption of state law.—A state law, governing proceedings for the stay of executions and orders of sale, passed after the re-enactment of this section, did not govern proceedings for the stay of execution upon a judgment, or determine the liability of the sureties on the bond or undertaking given for such stay, where such judgment was rendered in the Circuit Court before the state law had been adopted by any rule of the federal court; and the act of the clerk extending that judgment against the sureties and a sale under execution of the property of one of the sureties were without authority and void. La master v. Keeler, (1887) 123 U. S. 376, 8 S. Ct. 197, 31 U. S. (L. ed.) 238. See also Mayman v. Southard, (1825) 10 Wheat. 1, 6 U. S. (L. ed.) 253; U. S. Bank v. Halstead, (1825) 10 Wheat. 51, 6 U. S. (L. ed.) 264; Smith v. Cockrill, (1867) 6 Wall. 756, 18 U. S. (L. ed.) 973; Chateau gay Ore, etc., Co., Petitioner, (1888) 128
IV. STATE LAWS AS RULES OF DECISION

Amendment of execution.—The federal courts are bound to follow the decisions of the highest state court as to the right to permit an amendment of an execution by affixing a seal after a sale therein, and as to the validity of a sale without a seal. McGoan v. Seals, (1899) 9 Wall. 23, 19 U. S. (L. ed.) 545.

Redemption.—The federal courts will also follow the state decisions as to the right of redemption from an execution sold. Burham v. Fritz, (1882) 144 U. S. 410; (C. C. Ia. 1882) 13 Fed. 368.

But in Lauriat v. Stratton, (1880) 6 Sawy. 339, 11 Fed. 107, the court refused to follow a state decision as to the effect of a sale under a decree, to extinguish a tenant's right of redemption, for the reason that there was but a single decision, and that appeared to have been made under a misapprehension of the provisions of the statute.


A claim of title based on execution sales is a question of local law, and the determination by the Supreme Court of the state will be followed by the United States Circuit Court. Southern Pac. Co. v. Western Pac. R. Co., (N. D. Cal. 1806) 144 Fed. 160.

But in Waples v. U. S., (1884) 110 U. S. 630, 4 S. Ct. 225, 28 U. S. (L. ed.) 272, it is held that the title to property sold under judicial process is not warranted by the party obtaining the judgment, and that any different rule prevailing on that subject in a state by statute can change the position of the United States courts with respect to judicial sales in proceedings instituted by them.

Body execution—Effect of Bankruptcy Act.—Whether a state statute authorizing arrest of a judgment debtor on certain grounds after the return of an execution unsatisfied has been superseded by the federal Bankruptcy Law is a federal question, as to which state decisions are merely advisory. Johnson v. Crawford, (M. D. Pa. 1907) 154 Fed. 761.

Sec. 917. [Power of the supreme court to regulate the practice of circuit and district courts.] The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees, appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts.

[R. S.]


"Circuit" courts mentioned in this section were abolished by Judicial Code, § 239, supra, this title, vol. 5, p. 1092.

See also the notes to R. S. sec. 913, supra, p. 18.


Purpose and effect of statute.—This statute was not designed to alter or enlarge the jurisdiction of the courts, but only to regulate the exercise of jurisdiction where it exists. New England Ins. Co. v. Detroit, etc., Steam Nav. Co. (1871) 13 Int. Rev. Rec. 94, 18 Fed. Cas. No. 10,154. See also In re Kirkland, (1873) 12 Am. L. Reg. 360, 14 Fed. Cas. No. 7,842.

Authority to make rules.—The Supreme Court has no authority to make any rule which would conflict with an Act of Congress. A rule providing that when an injunction is awarded in vacation it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court, cannot be construed as giving an effect to an injunction granted by a district judge in vacation that would be in conflict with R. S. sec. 719 (now Judicial Code, § 264, supra, this title, vol. 5, p. 954). Gray v. Chicago, etc., R. Co., (1884) Woolw. 63, 10 Fed. Cas. No. 5,713. The provisions of
this statute do not authorize the adoption of rules making judgments or decrees for the payment of money liens on land where no such charge is created by law, or to displace any such right where the same is conferred or recognized by an Act of Congress. Ward v. Chamberlain, (1862) 2 Black 430, 17 U. S. (L. ed.) 319.

The rules established or altered by the Supreme Court are not rules of decision, but are merely rules of practice, prospective in their operation. The Selt, (1872) 3 Bia. 344, 21 Fed. Cas. No. 12,640. See also Barron v. Locke, (1850) 2 Fed. Cas. No. 1,054.

Existing statutory regulations.—This statute does not confer authority to repeal or modify any regulation of Congress existing on the subjects referred to. The Kentucky, (1860) 4 Blatchf. 448, 14 Fed. Cas. No. 7,717.


Restraining suits in state courts.—In In re Providence, etc., Steamship Co., (1872) 6 Ben. 124, 20 Fed. Cas. No. 11,451, it was held that under the Act of Aug. 23, 1842, the Supreme Court had authority to establish a rule authorizing a District Court to make an order restraining the prosecution of suits in state courts against the owners of vessels, when proceedings had been begun by the owners in the District Court to obtain the benefit of a limited liability. The Supreme Court had the power to make such a rule notwithstanding section 5 of the Act of March 2, 1793, brought forward into R. S. sec. 720 (re-enacted in Judicial Code, § 265, supra, this title, vol. 5, p. 869), provided that a writ of injunction should not be granted to stay proceedings in any court of a state.

Deficiency judgment in foreclosure suit.—This section gives the Supreme Court the authority to adopt a rule giving to the federal courts jurisdiction to render a decree for any balance that may be found due to any complainant over and above the proceeds of the sale in a suit for the foreclosure of a mortgage. Grant v. Winona, etc., R. Co., (1902) 85 Minn. 422, 59 N. W. 60.

Admiralty jurisdiction.—The admiralty jurisdiction of the court is also a separate and distinct general jurisdiction, in which the practice and proceedings, under this section, are regulated by rules prescribed by the Supreme Court of the United States. Bruce v. Murray, (C. C. A. 9th Cir. 1903) 128 Fed. 306, 59 C. C. A. 494.

Process of arrest in admiralty.—In Rudge v. Bemis, (1849) 2 Am. L. J. N. S. 337, 12 Fed. Cas. No. 6,557, it was held that the Supreme Court had authority to prescribe a rule permitting the arrest of the person of the defendant at the suit of a libelant, notwithstanding imprisonment for debt had been previously abolished in the state where the breach of bond occurred. Also Hanson v. Fowle, (1871) 1 Sawy. 497, 11 Fed. Cas. No. 6,041; Marshall v. Bazin, (1849) 16 Fed. Cas. No. 9,125. And also Gaines v. Travis, (1849) Abb. Adm. 422, 9 Fed. Cas. No. 5,186, in which the court said that the Act of 1842 and a rule promulgated by the Supreme Court had the effect of repealing or modifying the Acts of 1839 and 1841 (R. S. sec. 990, title EXECUTION, vol. 3, p. 234), abolishing imprisonment for debt where by the laws of the state imprisonment for debt has been or shall be abolished. In Gardiner v. Isaacson, (1848) Abb. Am. 14, 9 Fed. Cas. No. 3,230, the court said that the Acts of 1839 and 1841 (R. S. sec. 990, title EXECUTION, vol. 3, p. 234), were limited to civil process issuing out of a court of law and did not apply to proceedings in maritime courts. But see Wall v. Hall, (1851) 1 Sprague 470, 4 Fed. Cas. No. 2,338. And see Lee v. Thompson, (1878) 3 Woods. 167, 14 Fed. Cas. No. 8,202, in which the court said: "After the abolition of imprisonment for debt this rule was amended, and now declares that in all cases of a final decree for the payment of money the libelant shall have a writ of execution in the nature of a fieri facias commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulators." The Kentucky, (1860) 4 Blatchf. 448, 14 Fed. Cas. No. 7,717.

Attachment of property of nonresident.
—A District Court, by the process of attachment, may compel the appearance of an absent defendant, as the Supreme Court has authority to frame a rule providing for such process. The limitation of section 11 of the Act of Sept. 24, 1789, providing that no civil suit shall be brought against an inhabitant of the United States by any original process in any other district than that wherein he is an inhabitant, has no application to proceedings in admiralty. Atkins v. Fibre Disintegrating Co., (1873) 18 Wall. 272, 28 U. S. (L. ed.) 841. See also The Bremen v. Card, (D. C. S. C. 1889) 38 Fed. 144; Cushing v. Laird, (1870) 4 Ben. 70, 6 Fed. Cas. No. 3,508; Bouysson v. Miller, (1802) Bee Adm. 186, 3 Fed. Cas. No. 1,700. But see New England Ins. Co. v. Detroit, etc., Steam Nav. Co., (1871) 15 Int. Rev. Rec. 94, 18 Fed. Cas. No. 10,154.

Bail.—Under this section the Supreme Court has power to regulate the manner of proceeding or “mode of process” in taking bail, upon writs of error from the Supreme Court to the District Court in civil or criminal cases. Hudson v. Parker, (1895) 156 U. S. 277, 15 S. Ct. 450, 39 U. S. (L. ed.) 700. But see U. S. v. Hudson, (W. D. Ark. 1894) 65 Fed. 68.

Cited.—This section is cited in the case of In re Louisville, etc., Packet Co., (E. D. Ky. 1915) 223 Fed. 185.

Sec. 918. [Practice in the several courts to be regulated by their own rules.] The several circuit and district courts may, from time to time, and in any manner not inconsistent with any law of the United States, or with any rule prescribed by the Supreme Court under the preceding section, make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings. [R. S.]


This section is mentioned in the note to Judicial Code, § 79, supra, this title, vol. 5, at p. 562.

“Circuit" Courts mentioned in this Act were abolished by Judicial Code, § 289, supra, this title, vol. 5, p. 1082.

Effect and purpose of section.—The authority conferred by this section is a power held in trust for the benefit of litigants, and it is the duty of the court to exercise it in proper cases by adapting its procedure to the practical needs of justice. The Alert, (S. D. N. Y. 1889) 40 Fed. 536.

From this section and R. S. secs. 914, 915, and 916, supra, pp. 21, 64, and 70, it appears “that while it was the purpose of Congress to bring about a general uniformity in federal and state proceedings in civil cases, and to confer upon suitors in courts of the United States the advantage of remedies provided by state legislation, yet that it was also the intention to reach such uniformity often largely through the discretion of the federal courts, exercised in the form of general rules adopted from time to time, and so regulating their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings.” Shepard v. Adams, (1898) 168 U. S. 618, 16 S. Ct. 214, 28 U. S. (L. ed.) 602. Concluded with R. S. sec. 914.—This section and R. S. sec. 914, supra, p. 21, are to be construed together, and “the general provision of the one as to practice, pleading, and forms and modes of procedure applies to systems of judicial procedure as matters of separate study, and not to details of methods of doing the business of courts. . . . These are left to be provided for by rules of court under the other section, and the returning of writs is there specially mentioned as a subject of such rules, which are within the power of the court, and valid when made.” Ewing v. Burnham, (1896) 74 Fed. 384; Importers’, etc., Nat. Bank v. Lyons, (E. D. Pa. 1905) 134 Fed. 510. See Mutual Bldg. Fund, etc., Sav. Bank v. Bossieux, (1877) 1 Hughes 386, 17 Fed. Cas. No. 9,977.

As the text section was taken from old laws long previous to the Act of 1872, from which R. S. sec. 914, supra, p. 21, was taken, the latter, so far as it applies, should be construed to overrule the provisions of this section, and the manner of entering and recording judgments will be controlled by R. S. sec. 914, above cited, as such matters are parts of the form and mode of proceeding in a cause. Monson v. Bernard, Jp., (C. C. N. J. 1888) 35 Fed. 400; Kinney v. Plymouth Rock Squab Co., (C. C. A. 1st Cir. 1914) 214 Fed. 766, wherein it was held that the Circuit Court having the
text section adopted a rule conforming to
to the early state practice, it was not bound
to follow the rule to conform to sub-
sequent alterations made in the state prac-
tice. See Wayman v. Southard, (1825) 10

Expediting trial of issues of law.—
Construing this section and R. S. sec. 914,
supra, p. 21, it is clear that where there is
no state statute and no rule of court on
the subject it is within the power of the
court to adopt a rule providing that issues of
law may be heard within five days, and
that the parties are not compelled to wait
until the next term of court. Osborn v.

Power to make rules.—Powers as am-
ple as legislation can give are conferred by
this section and R. S. sec. 913, supra,
p. 18, on the District Court in cases of
admiralty and maritime jurisdiction as to
the "forms and modes of proceeding," rules
such as alterations thereto,
as the said courts shall in their discretion
dem expedient," and "to regulate the
practice as shall be fit and necessary for
the advancement of justice," subject only
to any existing provisions of law or the
rules established by the Supreme Court.
The Hudson, (E. D. N. Y. 1883) 15 Fed.
161. See also Louisiana Ins. Co. v. Nick-
erson, (1874) 2 Lowell 310, 16 Fed. Cas.
No. 8,559.

This section and R. S. secs. 913,
917, supra, pp. 18, 75, "the forms of mesne
process in equity, and the forms and modes of
proceeding therein, are to be according to
the usages of courts of equity, except as
otherwise provided by statute or by rules
of court made in pursuance of statute.
But any Circuit Court may alter and add
to such forms and modes subject to the
right of the Supreme Court to regulate the
matter for such Circuit Court. The Su-
preme Court has power to prescribe the
forms of writs and process and to regu-
late the whole practice in suits in equity
in the Circuit Courts, but any Circuit
Court may, in any manner not inco-
sistent with any law of the United States
or with any rule prescribed by the Su-
preme Court, regulate its own practice
to advance justice." Steam Stone Cutter
567. See alsoorman v. Clarke, (1841)
2 McLean 568, 15 Fed. Cas. No. 8,516.

Rules adopted cannot change rules of law.
—By virtue of this section the court may
make rules of practice, but it cannot create
rules of law. It cannot divest or displace
rights or liens which owe their existence
not to its process, but to the general mar-
itime law, and a District Court has no au-
 thority to promulgate a rule providing in
part that "among admiralty claims of
otherwise equal dignity the one first libel-
ing shall be first paid, and petitioners
shall be paid pro rata." Rates acquired
under the statutes of the United States, or
under the general maritime law, which
these courts are created to administer, are
rules of property, and it is beyond the po-
tency of judicial power to alter them or
take them away by rules of practice.
Saylor v. Taylor, (C. C. A. 4th Cir. 1896)
77 Fed. 475, 42 U. S. App. 206, 23 C. C.
A. 273.

Rules have force of law.—The equities
rules prescribed by the Supreme Court
and the rules promulgated by the Circuit
Courts (subject to alteration by the Su-
preme Court) have the force and effect
of law, unless they are inconsistent with
the statutes of the United States. Amer-
ican Graphophone Co. v. National Phono-
349.

Taking evidence.—This section does not
give a Circuit Court the authority to
make rules touching the mode of taking
evidence. Randall v. Venable, (W. D.
Tex. 1883) 17 Fed. 162. See R. S. sec.
862, title EVIDENCE, vol. 3, p. 171.

Proof of execution of note.—Under this
statute a Circuit Court may adopt a rule
that in actions upon bond, bill, or note it
shall not be necessary for the plaintiffs on
trial to prove the execution unless the
defendant shall have filed with his plea
an affidavit that such instrument was not
executed by him. Mills v. U. S. Bank,
(1856) 11 Wheat. 451, 6 U. S. (L. ed.)
512.

Order requiring printing and filing of
brie—An order of a Circuit Court re-
quiring the parties in a pending case to
file printed briefs was an order regulating
the practice in the same, within the pur-
view of this section, and the expense may
be taxed. Neff v. Pennoyer, (1876) 3
See also Jordan v. Agawam Woollen Co.,
7,516.

Appeals from courts of admiralty.—
When no statute provides for appeals
from District Courts sitting as courts of
admiralty these courts may by rule pre-
scribe the times and modes of making
them. Norton v. Rich, (1824) 3 Mason
443, 18 Fed. Cas. No. 10,352.

Redemption by mortgagor.—The mode
or manner of payment belongs, so far as
the federal court is concerned, to the
domain of practice, the power to regulate
which is harmonious with the laws of the
United States and the rules of the Su-
preme Court, as might be necessary and
convenient for the administration of jus-
tice, is expressly given by this statute to
Ins. Co. v. Cushman, (1882) 108 U. S.

Suits in rem and in personam in admi-
ralty.—If successive suits in admiralty
upon the same demand may be maintained
in personam, or in rem, or vice versa, until
satisfaction is obtained, it is wholly a ques-
tion of practice whether the two may
be brought concurrently or whether the second suit should not be allowed until the remedy in the first shall be exhausted. That question must be determined with reference to the convenient administration of justice. The Normandie, (S. D. N. Y. 1889) 40 Fed. 590. See also The Zenobia, (1847) Abb. Adm. 48, 30 Fed. Cas. No. 19,208.

Setting aside proceedings for fraud.—A sale of a vessel in admiralty may be set aside where there has been fraud or misconduct in the purchaser, fraudulent negligence or misconduct in any other person connected with the sale, or surprise or misapprehension created by the conduct of the purchaser, or by some other person interested in the sale, or by the officer who conducts it. This section gives a wide power to entertain a proceeding to correct any fraud perpetrated through its process upon its suitors. The Columbia, (E. D. N. Y. 1900) 100 Fed. 890.

In a suit for partition, while the federal court will recognize all rights secured by the state laws to tenants in common, it will not conform to the form and mode of securing those rights prescribed by those statutes. "The mode or manner of ascertaining and securing the right belongs, so far as the federal court is concerned, to the domain of practice, and the power to regulate the practice in harmony with the laws of the United States and the rules of the Supreme Court is expressly given by statute to the Circuit Court." McClaskey v. Barr, (S. D. Ohio 1891) 48 Fed. 130.

Rule regulating special appearance.—A rule regulating special appearance of a party in a cause is within the power of the court to prescribe under this section and valid. Mahr v. Union Pac. R. Co., (E. D. Wash. 1905) 140 Fed. 921.

A rule requiring instructions to be presented to the court at the close of the evidence, and before argument, is within this section. Atchison, etc., R. Co. v. Hamble, (C. C. A. 9th Cir. 1910) 177 Fed. 644, 101 C. C. A. 270; Baltimore & O. R. Co. v. Wood, (C. C. A. 3d Cir. 1916) 228 Fed. 825, 143 C. C. A. 147.

Forty day harbor rule.—This section is cited in The Samuel Little, (C. C. A. 2d Cir. 1915) 221 Fed. 306, 137 C. C. A. 136, as authority for the inherent power of the court to establish the so-called forty-day rule fixing the period of time a maritime lien shall retain its preference or priority.


Sec. 919. [Suits for duties, impotts, taxes, penalties, or forfeitures.] All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, shall be brought in the name of the United States. [R. S.]


Suit to recover a penalty.—Under R. S. sec. 4465 (title STEAM VESSELS), imposing certain penalties and giving them " to any person suing for the same," the private party who proceeds to enforce the penalties has the right to sue in his own name. Hatch v. The Steam-Boat Boston, (W. D. Pa. 1884) 3 Fed. 607.

A suit to recover a penalty for the alleged violation of R. S. sec. 3982 (title POSTAL SERVICE), cannot be brought by a private prosecutor, but is maintainable only by and in the name of the United States. Williams v. Wells Fargo, etc., Express, (C. C. A. 8th Cir. 1910) 177 Fed. 302, 101 C. C. A. 328, 55 A. S. R. 1034, 21 Ann. Cas. 699.

Sec. 920. [Consolidation of revenue seizures.] Whenever two or more things belonging to the same person are seized for an alleged violation of the revenue laws, the whole shall be included in one suit; and if separate actions are prosecuted in such cases, the court shall consolidate them. [R. S.]

Sec. 921. [Orders to save costs, and consolidation of causes of a like nature.] When causes of a like nature or relative to the same question are pending in court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so. [R. S.]


Reasonableness as determining question of consolidating.—In Ætna Life Ins. Co. v. Moore, (1913) 231 U. S. 543, 34 S. Ct. 186, 58 U. S. (L. ed.) 356, wherein it appeared that the case was consolidated by the court below against objection, and this action of the lower court was assigned as error, the Supreme Court said: "We doubt if it was reasonable to consolidate the cases. We need not, however, pass on that point, as we direct a new trial on other grounds."

Causes which may be consolidated.—"Causes of a like nature," between the same parties, may be consolidated, it appearing reasonable, under this section. Frank v. Geiger, (S. D. N. Y. 1903) 121 Fed. 126.

Separate actions by separate plaintiffs.—Where separate actions are brought by separate plaintiffs against the same defendants, pending in the same court, for personal injuries sustained in the same accident, depending upon the same evidence, with the only difference in the extent of the injuries to the respective plaintiffs, the causes are properly consolidated for trial. Denver City Tramway Co. v. Norton, (C. C. A. 8th Cir. 1905) 141 Fed. 599, 73 C. C. A. 1.

Where the plaintiff in each of two actions was injured in the same accident, and the same evidence, except as to the extent of the injuries, was determinative of both cases, it was a proper exercise of the trial court's discretion to consolidate the cases for trial over defendant's objection relating only to the disparity between the injuries of the two plaintiffs. American Window Glass Co. v. Noe, (C. C. A. 7th Cir. 1908) 158 Fed. 777, 86 C. C. A. 133.

A federal court has power in its discretion to consolidate for trial separate actions brought against a railroad company to recover for the death of persons who were killed at the same time and in the same manner. Diggs v. Louisville, etc., R. Co., (C. C. A. 6th Cir. 1907) 156 Fed. 584, 84 C. C. A. 330, 14 L. R. A. N. S. 1029.

A court of admiralty may properly permit a large number of passengers to join in a single libel in rem against a vessel to recover damages alleged to have been sustained by them severally by reason of the failure to keep the vessel in a cleanly condition during a voyage, and to supply suitable accommodations and a sufficient quantity of wholesome food and provi"dions. The Oregon, (C. C. A. 9th Cir. 1904) 133 Fed. 609, 68 C. C. A. 603.

The consolidation of two or more actions in admiralty is based upon the fact that such actions are ordinarily in rem against the common res, a proceeding which necessitates a seizure of the libeled vessel to bring her within the custody and control of the court. The Rochester, (W. D. N. Y. 1915) 227 Fed. 203.

Other authorities for the joinder of parties libelant where claims were asserted against a common res are: Salmon Falls Mfg. Co. v. The Tangier, (1852) 3 Ware 110, 21 Fed. Cas. No. 12,267; Rich v. Lambert, (1851) 12 How. 347, 13 U. S. (L. ed.) 1017; The Prinz Georg, (E. D. L.a. 1884) 19 Fed. 653, affirmed (E. D. La. 1884) 23 Fed. 906.

Suits arising out of collision.—This statute gives the District Courts, sitting in admiralty, the necessary authority, in cases of collision, to combine the suits arising thereon into a single proceeding, and where both parties are found to be in fault, to make a single decree, in accordance with their rights and obligations resulting from the law. The North Star, (1882) 106 U. S. 17, 1 S. Ct. 11, 27 U. S. (L. ed.) 91. See also Th. v. Eliza Line, (C. C. A. 8th Cir. 1894) 61 Fed. 308, as to the consolidation of libels for salvage, cargo freight, etc.
Suits against different defendants.—In Seawell v. Berry, (S. D. Ohio 1893) 55 Fed. 731, five cases, brought by the same plaintiff against different defendants, but involving substantially the same questions of fact and of law, were consolidated for trial, under this section.

Actions for libel brought against different public newspapers, when the principal issues for the jury in each of the cases are substantially identical, may be tried together notwithstanding that the elements with reference to the damages to be assessed in the several cases may appear at the trial to be different, and materially so. Butler v. Courier-Citizen Co., (C. C. Mass. 1904) 127 Fed. 1015.

Suits for infringement of design patents of like nature and between the same parties may be consolidated, and when consolidated, one recovery on the liability can be decreed. Frank v. Geiger, (S. D. N. Y. 1903) 121 Fed. 128.


Cross-actions.—A federal court may in its discretion consolidate cross-actions between the same parties for breach of the same contracts. American Trust, etc., Bank v. Zeigler Coal Co., (C. C. A. 7th Cir. 1908) 165 Fed. 34, 91 C. C. A. 72.

Treating injunction as a cross-bill.—A suit in equity in aid of an execution at law may be consolidated with a bill filed to enjoin the enforcement by execution of an attachment lien; the injunction suit may be treated as a cross-bill in the former suit. Lant v. Morgan, (C. C. A. 6th Cir. 1890) 75 Fed. 636, 43 U. S. App. 640, 21 C. C. A. 466.

Consolidation of distinct suits on petition of interveners.—In Central Trust Co. v. Virginia, etc., Steel, etc., Co., (W. D. Va. 1893) 55 Fed. 709, it was held that a cause would not be consolidated on the petition of interveners where it appeared that the interests involved in the several suits pertained to separate and distinct corporations, that the parties were different, that the complainant in one of the causes appeared as defendant in another of the causes, and that the complainant in two other causes brought suit against separate and distinct defendants in each of said causes.

Defendants brought into antagonism by consolidation.—Causes may be consolidated notwithstanding that the defendants may be brought into antagonism with each other. Keep v. Indianapolis, etc., R. Co., (E. D. Mo. 1880) 10 Fed. 464.

Consolidation on motion of defendant.—Whether a consolidation of separate causes would be warranted only on motion of the defendant, quere. Summerlin v. Frontier Silver Min., etc., Co., (W. D. Tex. 1890) 41 Fed. 249.

Effect of consolidation on cause of action.—Although defendants may lawfully be compelled at the discretion of the court to try the cases together, the causes of action remain distinct, and require separate verdicts and judgments; and no defendant can be deprived, without consent, of any right material to the defense, whether by way of challenge of jurors or of objection to evidence, to which the defendant would be entitled if the cases were tried separately. Mutual L. Ins. Co. v. Hillmon, (1902) 146 U. S. 265, 12 S. Ct. 909, 39 U. S. (L. ed.) 707.

The record of each suit is that of an independent cause, except in so far as the evidence in one is, by order of court, treated as evidence in both. The consolidation does not change the rules of equity pleading, nor the forms of the parties, as those rules must still turn on the pleadings, proofs, and proceedings in their respective suits. Toledo, etc., R. Co. v. Continental Trust Co., (C. C. A. 6th Cir. 1890) 85 Fed. 497, 86 C. C. A. 155.

Forms of judgment.—Whether one judgment may be given for all or a separate judgment in each case will depend upon the special circumstances. If it is necessary to the due administration of the law and the protection of the rights of the parties that the integrity of original causes shall be so far preserved as to secure the proper result in each case, to the end that the party aggrieved may not be embarrassed thereby in seeking relief against the judgment, or for any other sufficient reason, the court will direct the proceedings accordingly. The statute is one for convenience in saving expense to the parties and the time of the court. U. S. v. Baltimore, etc., R. Co., (C. C. A. 6th Cir. 1908) 159 Fed. 33, 86 C. C. A. 223.

Discontinuance.—Leave may be granted to discontinued the suit without prejudice, as to part of the causes of action, after consolidation of several causes has been ordered. Young v. Grand Trunk R. Co., (E. D. Wis. 1881) 9 Fed. 348.


Sec. 922. [When the marshal or his deputy is a party in a cause.] When the marshal or his deputy is a party in any cause, the writs and precepts therein shall be directed to such disinterested person as the court
or any justice or judge thereof may appoint, and the person so appointed may execute and return them. [R. S.]


Scope of section.—The provisions of this section appear to extend only to process issued in causes in court and are not applicable to a writ of attachment for a contempt. Ez p. Benedict, (1862) 3 Fed. Cas. No. 1,202.

Purpose of section.—The object of this enactment is to make sure that a marshal or deputy interested cannot by a false return deprive the opposing party of his day in court. Barnes r. Western Union Tel. Co., (E. D. Ga. 1903) 120 Fed. 555.

Deputy defined.—The word "deputy," as used in this rule, clearly means a "deputy marshal," an officer known to the law as such, who equally with the marshal may do all that is to be done under the process. It cannot mean a person specially deputed to execute a process or arrest a vessel. The E. W. Gorgas, (1879) 10 Ben. 460, 8 Fed. Cas. No. 4,585.

Duties of appointee.—The person so appointed would by the rule be required to do all that the marshal would otherwise be required to do under a process to arrest a ship, not only to arrest the ship, but to keep it in custody, give the notice required by the monition, and make a return of the process to the court in his own name. The E. W. Gorgas, (1879) 10 Ben. 460, 8 Fed. Cas. No. 4,585.


R. S. sec. 923 relates to seizures for forfeiture under revenue laws, and is given in FINES, PENALTIES, AND FORFEITURES, vol. 3, p. 324.

R. S. secs. 924-933 relate to attachment in postal suits, and are given in ATTACHMENT, vol. 1, p. 483.

R. S. sec. 934 provides that property taken under revenue laws shall be irrepleviable, and is given in title REFLEXION.

R. S. secs. 935-937 relate to garnishment, and are given in GARNISHMENT, vol. 3, p. 417.

R. S. secs. 938 and 939 relate to bailing and sale of property seized under customs and shipping laws, and are given in FINES, PENALTIES, AND FORFEITURES, vol. 3, p. 325.

R. S. sec. 940 provides for the bailing in vacation of property seized, and is given in FINES, PENALTIES, AND FORFEITURES, vol. 3, p. 327.

Sec. 941. [Delivery bond in admiralty proceedings — permanent bond by vessel owner.] When a warrant of arrest or other process in rem is issued in any cause of admiralty jurisdiction, except in cases of seizures for forfeiture under any law of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libelant, with sufficient surety, to be approved by the judge of the court where the cause is pending, or, in his absence, by the collector of the port, conditioned to answer the
decree of the court in such cause. Such bond or stipulation shall be returned to the court, and judgment thereon, against both the principal and sureties, may be recovered at the time of rendering the decree in the original cause. And the owner of any vessel may cause to be executed and delivered to the marshal a bond or stipulation, with sufficient surety, to be approved by the judge of the court in which he is marshal, conditioned to answer the decree of said court in all or any cases that shall thereafter be brought in said court against the said vessel, and thereupon the execution of all such process against said vessel shall be stayed so long as the amount secured by such bond or stipulation shall be at least double the aggregate amount claimed by the libelants in such suits which shall be begun and pending against said vessel; and like judgments and remedies may be had on said bond or stipulation as if a special bond or stipulation had been filed in each of said suits. The court may make such orders as may be necessary to carry this section into effect, and especially for the giving of proper notice of any such suit. Such bond or stipulation shall be indorsed by the clerk with a minute of the suits wherein process is so stayed, and further security may at any time be required by the court. If a special bond or stipulation in the particular cause shall be given under this section, the liability as to said cause on the general bond or stipulation shall cease. [R. S.]


The above provisions were substituted by Act of March 3, 1890, ch. 441, 30 Stat. L. 1354, for the section as originally enacted in the Revised Statutes. The amendment consisted in the addition of all matter after the words "at the time of rendering the decree in the original cause."

H. R. Rep. No. 1891, Fifty-fifth Congress, third session, accompanying this bill, states that its object "is to prevent the blackmailing of vessels by seizing them just as they are leaving port on their way, at some lonely place or unusual time, sometimes on a Saturday afternoon or evening, in order to force the payment of unjust claims," and permits the filing of a permanent bond to answer any action that may be brought.—Compiler's note, 2 Supp. R. S., p. 1104.

The only change from the Act of March 3, 1847, ch. 55, 9 Stat: L. 181, made by the revision of this statute was removing the limitation of the amount of costs. The Madgie, (S. D. Ala. 1887) 31 Fed. 926.

As to delivery of prize property to claimants on stipulation, deposit, or other security, see R. S. sec. 4625 in title Prize.

R. S. secs. 942-944 relate to bail and are given in BAIL AND RECOGNIZANCES, vol. 1, p. 488.

R. S. sec. 945 relates to taking bail and affidavits by United States commissioners, and is given in JUDICIAL OFFICERS, in vol. 4, p. 772.

R. S. secs. 946 and 947 relate to bail, and are given in BAIL AND RECOGNIZANCES, vol. 1, p. 489.

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I. CONSTRUCTION AND OPERATION GENERALLY

The object of the law in permitting the release of the vessel to the owner is to enable him to save himself from the indirect consequences of the seizure, which may be deeply injurious to him, through no fault of his, without any benefit to the cause of justice or to the proceedings in court. The Haytian Republic, (D. C. Ore. 1893) 57 Fed. 508.
Scope of section.—All seizures are embraced in terms of this section without regard to the cause of action, and the owners are empowered to retain possession on giving security in all such cases. The Poconoket, (E. D. Pa. 1894) 61 Fed. 106. The Act, however, relates exclusively to the conditions to be complied with to entitle a claimant to avoid an arrest of the property, or to obtain its discharge after it shall have been arrested, and not to conditions necessary to entitle a party to intervene, pendente lite, to participate in the distribution of proceeds, or to protect any interest he may have in the subject matter of the litigation. Home Ins. Co. v. The Concord, (1870) 17 Pittab. Leg. J. 148, 12 Fed. Cas. No. 6,659.

And this statute does not assume to interfere with the powers of a court of admiralty to regulate the execution of its process and the stipulations it is authorized to take conformable to general principles of procedure in those courts or the particular equities of each case. Peru v. The North America, (1853) 19 Fed. Cas. No. 11,017a.

Nor does it extend to delivery on bail, on seizures under other Acts. The Brig Struggle, (1813) 1 GALL. 476, 23 Fed. Cas. No. 13,550.

And the release on bond of a vessel charged with liability to forfeiture under R. S. sec. 5283 (now Penal Laws, sec. 11, in Penal Laws) before answering or hearing, and against the objection of the United States, is not contemplated by this section. The Three Friends, (1897) 166 U. S. 1, 17 S. Ct. 495, 41 U. S. (L. ed.) 897.

II. GIVING OF BOND OR STIPULATION IN GENERAL

Authority to take stipulation.—The clerk is not authorized to take such stipulation, but it may be taken by a judge in court, or at chambers, or before a United States commissioner. The Jeanie Laddies, (D. C. Ore. 1883) 17 Fed. 91.

Time of giving.—At any time before default, property in custody may be bonded in pursuance of this section without any other condition than is prescribed therein. The Sloop Martha C. Burnite, (1878) 10 Ben. 196, 16 Fed. Cas. No. 9,147.

In the English admiralty, a settled practice is adopted to enable stipulations to be given without acquiring custody of the property proceeded against. So the provision for bonds to the marshal looks to enabling a proceeding in rem to be prosecuted without a seizure of the vessel. The Ferryboat Roalyn, (1877) 9 Ben. 119, 20 Fed. Cas. No. 12,068.

Notice to marshal.—Where a stipulation has been given in court, notice by supersedeas should be immediately issued to the marshal; if taken before a commissioner, similar notice should be given by an order to the same effect. The Jeanie Laddies, (D. C. Ore. 1883) 17 Fed. 91.

Stay of process.—This statute makes it the duty of the marshal to stay the execution of the process upon receiving the statutory bond and compels him to receive a bond when tendered in pursuance of the Act, in lieu of a seizure of the vessel. The City of Washington, (1876) 13 Blatchf. 410, 5 Fed. Cas. No. 2,772.

The provision of this statute, that in case the vessel is libeled for a forfeiture no bond can be accepted, is only a limit upon the power of the marshal to stay admiralty process and does not affect the action of the court. The Three Friends, (S. D. Fla. 1897) 78 Fed. 173.

Effect as to parties of giving bond.—A discharge of a vessel under a bond given to a marshal for double the amount of the claim does not convert the suit in rem, to which all the world are considered parties, into a proceeding in personam, to which no one is or can become a party except the original libellant and the parties in the stipulation. The Oregon, (D. C. Ore. 1891) 45 Fed. 63.

Where, in a suit in rem against a vessel, she was discharged on the usual stipulation for value, and afterward during the pendency of the case in this court on appeal, the respective proctors consented in writing to a return of the vessel into the custody of the marshal and to her sale by that officer, and she was sold, and an order was obtained from the circuit judge directing the clerk to enter an order according to such consent, it was held, on a motion made to vacate such order by a person who claimed to have had an interest in the vessel, and who was not a party to the suit, that the judge had no jurisdiction or power to make the order. The White Squall, (1857) 4 Blatchf. 103, 29 Fed. Cas. No. 17,570.

Where a bond is given to the marshal which provides for only double the amount of the particular claim in suit, it is not fixed with any reference to the amount of other claims or the value of the vessel, and it cannot be deemed given for the benefit of all claims up to the full value of the vessel. Bailey v. Sundberg, (S. D. N. Y. 1891) 44 Fed. 807.

Effect of failure to give bond.—Where a seizure occurs the owner may protect himself against the loss of the use of the vessel by giving security and retaining the vessel, but if he does not give such security and suffers injury, his injury is self-inflicted. The Poconoket, (E. D. Pa. 1894) 61 Fed. 106.

Effect of death of libellant.—Where an action in rem has been brought against a steamship to recover damages for personal injury sustained by the neglect of the vessel's servants while the libellant was at
work, it has been held that, in case of the death of the libellant, a bond given by the claimant of the vessel will not be canceled. The court said: "It seems to me that this right and remedy that has been chosen to enforce it are inseparable, and that the administrator does no more than take the place of the decedent in order to carry on the suit as the latter would have carried it on if he had not died. The seizure of the ship and the claimant's bond are intended to provide security that the right shall be satisfied; and, since the right is preserved by the statute, I do not know upon what ground the security is to be taken away."


Vessel in commission.—Where a schooner is in commission, it will not, in a suit between the owners for partition, be seized and held by the marshal under expense until the final decree of the court, if the respondent gives a satisfactory bond that he will deliver the vessel to the marshal upon decree of court. The Emma B., (D. C. N. J. 1905) 140 Fed. 770.

III. BOND AS WAIVER

Waiver of seizure.—The execution of a delivery bond under this Act is a waiver of the objection that a seizure of the vessel should precede the filing of the libel and that no seizure has been made. The Lewellen, (1888) 4 Biss. 156, 167, 15 Fed. Cas. Nos. 8,307, 8,308.

And it is a common practice adopted for convenience and the saving of expense, to give a stipulation to secure the debt upon simple notice of the filing of a libel. A stipulation under such circumstances is valid, although in fact the vessel sought to be proceeded against is not and never was in custody. Munks v. Jackson, (C. C. A. 9th Cir. 1895) 66 Fed. 571, 29 U. S. App. 482, 13 C. C. A. 641; The Berkeley, (E. D. S. C. 1893) 58 Fed. 920.

IV. BOND AS SUBSTITUTE FOR PROPERTY

General doctrine.—According to the general rule, a vessel cannot be arrested a second time, for the same cause of action, after she has been released on a bond given to secure the demand of the libellant, except where the release has been obtained by fraud or mistake, and a proviso in an order dismissing a suit without prejudice can have no other effect than to prevent the decree of dismissal from being set up in bar of subsequent suits in personam against the master or owners of the vessel. The Cleveland, (D. C. Wash. 1899) 98 Fed. 631. See also to same effect Allison v. The Steamer Lavelle Young, (1903) 2 Alaska 104.

The court said: "The claimant availed himself of the benefit of the decision allowing the decree and sale to stand, and must accept its burden. He secured the release of the vessel by giving the bond as security for the claim of the libelants. It was the plain meaning of the decision that the decree and sale should not prejudice their lien, and that a bond sufficient to secure it should be given as a condition of the release of the vessel; in other words, that to the extent the bond was a substitute for the vessel it should stand for the vessel unaffected by the decree and sale. The claimant cannot now be heard to allege the contrary." The New York, (C. C. A. 2d Cir. 1902) 113 Fed. 810, 51 C. C. A. 482.

V. AMOUNT OF BOND

In general.—Where a claimant desires to secure the possession of a vessel libeled he may apply to the court for an appraisement, or if the parties agree upon a sum as the value, the court may adopt that sum and accept a stipulation for that amount. The Ann Caroline, (1884) 2 Wall. 538, 17 U. S. (L. ed.) 833.

And the fact that a bond is larger than required does not affect its validity as to the obligation to pay at least the amount required by statute. The Haytian Republic, (D. C. Ore. 1893) 57 Fed. 508.

Reduction of amount of bond.—Where the amount of a bond is determined between the parties themselves, it will not be reduced by the court, but where the stipulation is executed under this section it will be reduced if the facts justify so doing. The Monarch, (D. C. S. C. 1887) 30 Fed. 283.

So where a stipulation appears to have been hastily given, without an appraisal of the vessel, and there is no suggestion that the claimant of the vessel was in any way personally liable except through his efforts to protect the vessel against the claim, it has been held that, where justice will be done the claimant and no injustice done to the libelants, the amount of the stipulation may be reduced. The court said: "No special equities, however, were brought to the attention of the court; but, where there are equities, there is every reason why an admiralty court should use, on enlarged principles, the discretion uniformly availed of even by common-law courts to reduce bail demanded before it is taken, or excessive bail after it is taken, or to relieve against excessive attachments after they are made. There is no practical or equitable reason why that discretionary power should not be extended to cases of this class. When the equities are clear, the power of the admiralty court to apply them is so manifest that authorities need hardly be cited on this proposition." The Iris, (C. C. A. 1st Cir. 1900) 100 Fed. 104. 40 C. C. A. 301.
VI. VALIDITY OF BOND
Where attachment void.—Where the attachment is void the bond necessarily fails, and the parties will not be held to it. International Grain Ceiling Co. v. Dill, (1878) 10 Ben. 92, 13 Fed. Cas. No. 7,053.

Where the warrant of arrest was issued without authority, the entering into a stipulation by the respondent can have no greater effect than a general appearance would have had and does not waive any irregularity of the proceedings, nor does it deprive him of any right of defense he had when the process was served, but the original process being void, it continued so notwithstanding the stipulation, and all the subsequent proceedings depending upon this process are coram non judice. The Berkeley, (E. D. S. C. 1893) 58 Fed. 920.

Condition not conforming to statute.—A bond, voluntarily given upon the delivery of property upon bail on application of the claimant, is good, although the condition does not exactly conform to this section. The Brig Struggle, (1813) 1 Gall. 476, 23 Fed. Cas. No. 13,550.

A bond in the general form of a common-law bond, given for the release of a vessel, comes clearly within the provisions of this statute, although given before the vessel was actually seized. Munks v. Jackson, (C. C. A. 9th Cir. 1895) 66 Fed. 571, 29 U. S. App. 482, 13 C. C. A. 641.

Absence of condition in bond.—The conditions upon which the obligation in a bond becomes absolute are contained in the statute, and the fact that a bond, obviously intended to be given in pursuance of this section, contains no condition, does not invalidate it. The Haytian Republic, (D. C. Ore. 1893) 57 Fed. 508.

Power of court where bond defective.—Even if defective bonds were void the court would, by attachment, enforce a redelivery of the property by the claimant. The Brig Struggle, (1813) 1 Gall. 476, 23 Fed. Cas. No. 13,550.

In U. S. v. Four Part Pieces Woollen Cloth, (1825) 1 Paine 435, 25 Fed. Cas. No. 15,149, proceedings by libel were instituted upon a seizure of goods and a bond given for their apprised value on the delivery of the goods to the claimant. Afterwards the libel was, by amendment, changed to an information, and the goods were condemned. On an application for an attachment against the obligors in the bond, it was held that, although the case was not regularly within this section, yet a compliance with the stipulations in the bond might be enforced by attachment against the obligors.

Estoppel to contest validity.—Where the claimant voluntarily accepts a delivery on bail, it is an estoppel of his right to contest the validity of the security. The Brig Struggle, (1813) 1 Gall. 476, 23 Fed. Cas. No. 13,550.

VII. LIABILITY GENERALLY OF CLAIMANT
One who voluntarily appears claiming to be the owner of a vessel, gives bond therefor, and takes possession of the vessel, thus makes himself a party to the proceeding and is bound by a default decree. In a case where a stranger pursued such a course it was said: “Briggs was not a party to the original libel proceedings,—he was not known to the court,—but for some reason he gave bond, claiming to be the owner of the launch, which claim he never, as far as the record shows, attempted to prove; but he took possession of the vessel, and presumably used it, for it is alleged in the bond that it was necessary for him in his business. The condition of the bond was for the restoration of the property as the court should direct, together with damages for the use and detention, ‘and to perform any other judgment which the court may render in said cause, and pay all costs and damages which may be awarded against him by said court,’ etc. Briggs thus made himself a party to the proceeding as effectually as if process had been regularly issued against and served on him.... The original bond having been adjudged sufficient for the detention of the launch, and appellant having paid the cost in the district court, the judgment here is that the decree appealed from be affirmed, and that appellee recover his costs in this court expended. This cause is remanded to the court below, with instructions that a decree be entered against appellant, and the sureties on his bond, for such damages as may be proper on account of the detention of the said vessel by said George S. Briggs.” Briggs v. Taylor, (C. C. A. 4th Cir. 1898) 54 Fed. 681, 42 U. S. App. 681, 28 C. C. A. 518.

VIII. SURETIES
1. Sufficiency of Sureties
In general.—Where claimants in actions in rem substitute personal security for the property in the hands of the court by way of a stipulation for value, they assume to maintain their stipulation good in the matter of the sureties. The Hartford, (S. D. N. Y. 1882) 11 Fed. 89.

Discretion of court.—It is within the discretion of the court to determine what shall be sufficient surety and to require one or more sureties according to the circumstances of the case. The Hartford, (S. D. N. Y. 1882) 11 Fed. 89.

Additional security.—A court in admiralty has the power to require additional security where that previously given has become insufficient or worthless,
and may also abate exorbitant security. The Hartford, (S. D. N. Y. 1882) 11 Fed. 89.

And it is said that the only remedy in a case where the sureties become insolvent would seem to be in an application to the court for an order requiring new security to be given. Home Ins. Co. v. The Concord, (1870) 17 Pittal. Law J. 148, 12 Fed. Cas. No. 6,659.

So where the security has become insolvent the court may require new sureties to be given on the penalty for contempt or the denial of the right further to appear and contest the suit. The Old Concord, (1870) Brown Adm. 270, 18 Fed. Cas. No. 10,482.

And where the sureties on a stipulation have become insolvent it is proper to grant a motion that the claimant furnish a better and sufficient security and, if not furnished, that the answer be stricken out. The Fred M. Lawrence, (C. C. A. 2d Cir. 1899) 94 Fed. 1017, 36 C. C. A. 631.

2. Sureties as Parties to Suit

Such a bond is not a mere personal security given to the plaintiff, but a security given to the court. It is a pledge or substitute for the property proceeded against, and the sureties are not parties to the suit, or entitled to interfere in any way with the management of the suit. Lane v. Townsend, (1832) 1 Ware 286, 14 Fed. Cas. No. 8,054; The New York, (C. C. A. 6th Cir. 1900) 104 Fed. 561, 44 C. C. A. 38.

So the sureties upon a stipulation bond for the release of a vessel are in no such sense parties to the controversy as to require that they should be joined in an appeal taken by the owner of the vessel whose sureties they were, and unless some extraneous question arises involving the scope or obligation of the surety in such a bond, they are not necessary parties to an appeal taken by any of the parties. The Glide, (C. C. A. 4th Cir. 1897) 78 Fed. 152, 24 C. C. A. 46, (C. C. A. 1896) 72 Fed. 200, 18 C. C. A. 504; The New York, (C. C. A. 6th Cir. 1900) 104 Fed. 561, 44 C. C. A. 38.

And sureties on a stipulation in admiralty for the release of a libeled vessel do not become parties to the suit in such a sense as to require that they be joined in an appeal by the claimant from the decree entered therein, although such decree is joint in form against the claimant and the stipulators, unless some extraneous question has arisen in the suit involving their rights or obligations. Perrin v. Pacific Coast Co., (C. C. A. 9th Cir. 1904) 133 Fed. 140, 60 C. C. A. 206.

3. Liability of Sureties

In general—This section has always been held to mean that the entry of judgment against the stipulators is a matter of course, and that the stipulators have rendered themselves subject to such entry of judgment by the bare fact that they have so stipulated. Perriam v. Pacific Coast Co., (C. C. A. 9th Cir. 1904) 133 Fed. 146, 66 C. C. A. 206.

The surety on a stipulator upon the bond, with actual knowledge that it was given for the release of the vessel, is bound by the terms of the stipulation which he voluntarily signed, and thereby brought himself within the jurisdiction of the court, and is thereafter bound to "abide by and answer the decree of the court in such cause." Munks v. Jackson, (C. C. A. 9th Cir. 1896) 66 Fed. 571, 29 U. S. App. 482, 13 C. C. A. 641.

The stipulators on a bond given under this section after the final judgment against them in the suit do not stand in the relation of sureties to the libelants for the claimant, but they are then principal debtors, and the contingent or secondary liability on the stipulations is merged in the judgment recorded against them, and a stay or countermand of the execution against the principal does not discharge them. The Col. Howard V. Hayden, (1850) 17 Betts C. C. M. 70, 6 Fed. Cas. No. 3,026.

Necessity of demand.—Under a stipulation given by a claimant in admiralty conditioned that, if the stipulators fail to pay the amount of any decree against them execution against the principal may issue against both claimant and his surety, both are principals and no demand is necessary upon the claimant in order to justify a demand on the surety. The Mts. Desert, (E. D. N. Y. 1911) 196 Fed. 395.

Extent of liability.—The sureties on a bond given under this section are not liable to pay a greater sum than the penalty of the bond, and a decree authorizing the recovery of a greater sum should be modified. The Ann Caroline, (1864) 2 Wall. 528, 23 U. S. (L. ed.) 833; The Madgie, (S. D. Ala. 1887) 31 Fed. 926.

"Stipulators, like sureties, where the stipulation is for a definite sum, are bound to make good the liability or default of the principal to the amount of the stipulation; but they cannot be held to any greater sum, unless they themselves have been guilty of default, in which case they may be held liable for costs and interest, by the way of damages, to the extent that the same have arisen from the breach of their duty to comply with the terms of their stipulation." The Wanata, (1877) 95 U. S. 600, 24 U. S. (L. ed.) 461.

So the stipulators cannot be bound on their bond beyond its terms fairly understood, and where they had become sureties for the performance by a wife of any decree against her they could not be called upon to pay a decree against the husband.
Effect of waiver of libelant of further security on appeal.—Where a stipulation for value, given by the claimant of a libeled vessel, was conditioned for the payment of interest, and was broken by final decree of the trial court, “or by any appellate court if an appeal intervene, with interest,” the waiving by libelant of further security on an appeal does not release the surety on the stipulation from the further payment of interest thereon, in accordance with its terms, or of the costs of the appellate court. The Mt. Desert, (E. D. N. Y. 1911) 186 Fed. 395.

Examination concerning sureties’ property.—There is no statute of the United States which authorizes or requires sureties in stipulations or appeal bonds, in a suit in rem, in admiralty, to appear before the admiralty court after a final decree in the suit for examination concerning their property according to the laws and practice of the courts of equity. The Blanche Page, (1879) 16 Blatchf. 1, 3 Fed. Cas. No. 1,524.

Right to sequestrate sureties’ property.—A court of admiralty of the United States has no power to enforce such a decree against such sureties by the sequestration of their property according to the practice of the courts of equity. The Blanche Page, (1879) 16 Blatchf. 1, 3 Fed. Cas. No. 1,524.

Discharge when vessel cannot be held.—Where a vessel cannot be held, the sureties in the bond executed for her release are also necessarily discharged. The Monte A., (1882) 12 Fed. 331; The Berkeley, (E. D. S. C. 1893) 58 Fed. 920.

4. Sureties’ Right to Subrogation

In general.—Probably there may be a subrogation in favor of the sureties to the claim of the libelant against their principal; but this can be done only after payment of the decree, and must be confined and limited strictly to the rights of the libelant against the claimant personally. The vessel is not affected. The bond releases the vessel for all purposes of the suit. The Vigilant, (N. D. N. Y. 1909) 175 Fed. 226.

But when a libel is filed, and a vessel is seized, and the owner gives a bond, with surety, that the claim shall be paid, the bond takes the place of the vessel, the owner and surety are in place of the vessel so far at least as the claim is concerned; and the surety, having promised to pay it in case the owner does not, cannot, by taking an assignment thereof, keep it alive as a lien on the vessel as against a prior mortgage. The bond being given and the vessel released, the mortgagee has the right to assume that the claim for which she was libeled has been or will be paid by the owner or his surety.

The Vigilant, (N. D. N. Y. 1900) 175 Fed. 226.

And where the evidence does not establish the fact that a surety company accepted insurance companies, whose obligations it had taken as collateral security for its underwritings, as a substitute for the owners of a libeled vessel, it is entitled to have the decree marked to its use, and to issue execution thereon to recover the sum from its principal, upon whom rested the primary obligation of payment of the award. The White Seal, (E. D. Pa. 1909) 166 Fed. 640.

Limitation of right.—A petition by the sureties on a release bond, that they may be subrogated to the rights of the libelant to the amount they have properly paid upon a decree rendered against such bond, will be granted, but the subrogation must be limited strictly to the rights of the libelant against the claimant personally, and the vessel is not affected. The Maddie, (S. D. Ala. 1887) 31 Fed. 926.

“The surety, therefore, can only be regarded in the light of an ordinary creditor of his principal upon whose personal credit he relied when he bound himself for the payment of the bond. His right to be paid out of the proceeds of the boat which has been sold under his execution must be regarded as subordinate to the claims of the interveners who have established their liens.” The Willamette Valley, (N. D. Cal. 1896) 76 Fed. 533.

And all liens upon a vessel of every description, whether impressed by the general maritime law or local statute or created by bonds or mortgages, are completely and finally extinguished by a sale of the vessel pursuant to the decree of a court in admiralty in a suit in rem, and a surety has no claim of right to be subrogated when he has merely a lien on the owner of a vessel to extinguish liens by becoming a surety, and who did not pay any debt until after all liens for previously existing debts have been completely destroyed by an admiralty sale. The Willamette Valley, (N. D. Cal. 1896) 76 Fed. 533; The Evangell, (D. C. Wash. 1899) 94 Fed. 680.

IX. Enforcement of Judgment

The jurisdiction of the court upon the giving of such a stipulation to proceed with the cause to a decree and to enforce the stipulation according to its terms, has never been questioned. Bumette, (C. C. A. 9th Cir. 1895) 66 Fed. 571, 29 U. S. App. 482, 13 C. C. A. 641.

The form of the stipulation in admiralty was originally adopted to avoid a question of jurisdiction. A consent that execution might issue is incorporated in it, and the instrument itself subjects the stipulators to the process of the court. The Ferryboat Roslyn, (1877) 9 Ben. 119, 20 Fed. Cas. No. 15,068.
Whenever a stipulation is taken in the admiralty for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself and the stipulators are held liable to the exercise of all those authorities on the part of the court which the tribunal could properly exercise if the thing itself were still in the custody of the court. The Palmyra, (1827) 12 Wheat. 1, 6 U. S. (L. ed.) 531; The Steamer Webb, (1871) 14 Wall. 406, 20 U. S. (L. ed.) 774; The Wanata, (1877) 95 U. S. 600, 24 U. S. (L. ed.) 461; U. S. r. Ames, (1878) 99 U. S. 36, 25 U. S. (L. ed.) 286; Munks v. Jackson, (C. C. A. 9th Cir. 1885) 66 Fed. 571, 29 U. S. App. 482, 13 C. C. A. 641.

Such a stipulation stands in the place of the vessel, and its obligation is discharged by compliance with the order or decree of the court against the owner or claimant and the liability may be enforced by "judgment thereon against both the principal and sureties" at the time of the rendering of the decree in the original cause. The Belgenland, (1883) 108 U. S. 153, 2 S. Ct. 664, 27 U. S. (L. ed.) 685; The New York, (C. C. A. 6th Cir. 1909) 104 Fed. 541, 44 C. C. A. 38; The Columbus, (C. C. A. 9th Cir. 1901) 109 Fed. 660, 48 C. C. A. 596.

And the fact that the decree of a court was in excess of the penalty named in the bond does not deprive the court of jurisdiction, and the judgment is a nullity for such excess only. Munks v. Jackson, (C. C. A. 9th Cir. 1890) 66 Fed. 571, 29 U. S. App. 482, 13 C. C. A. 641.

Sec. 948. [Amendment of process.] Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues. [R. S.]


"Circuit" courts, mentioned in this section, were abolished by Judicial Code, sec. 289, supra, this title, vol. 5, p. 1062.

More comprehensive provisions for amendments are made in R. S. sec. 954 infra, p. 98. And see the notes thereto.

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I. EXTENT OF POWER GENERALLY

For amendments to writs of error, see R. S. sec. 1065, infra, p. 106.

Amendments of process and pleadings, see also R. S. sec. 914, supra, p. 21, and notes thereto, supra, at pp. 32, 33.

The power granted under this section is to amend a defect or a want of form in a process. Dwight v. Merritt, (S. D. N. Y. 1880) 4 Fed. 614.

X. FEES AND COSTS

The fact that a stipulation for costs had previously been given in a case in which a vessel was released on a release bond under this section is immaterial, as the condition of the release bond itself is to "abide by and answer the decree of the court," and the costs are a part of the decree.

The Madrig, (S. D. Ala. 1887) 31 Fed. 926.

And where the claimant of a libeled vessel has prevailed on the trial, and the libel is dismissed, he is entitled to tax as a part of his costs the premium paid by him to a surety company for a bond to obtain the release of the vessel, where it is reasonable in amount. The John D. Dailey, (E. D. N. Y. 1907) 158 Fed. 642.

So costs and interest in favor of the libellant may be allowed against the claimant of a vessel, though the damages and interest are assessed at a sum in excess of the amount of the stipulation. The Southwark, (E. D. Pa. 1904) 129 Fed. 171.

But it is the practice in suits in rem, in admiralty, when the bond for the release of the vessel or goods arrested is given to the marshal under this section, to require the delivery of the property without any payment to the marshal of his fees or costs, since the statute does not attach any such requirement to the obligation to discharge the vessel or property from arrest. The government is simply protected by the bond. The Georganna, (S. D. N. Y. 1887) 31 Fed. 463; U. S. v. Eight Cases Paper, (S. D. N. Y. 1890) 98 Fed. 416.

The power to amend thus conferred is unconditional and positive, and cannot be limited by arbitrary qualifications. Erstein v. Rothschild, (E. D. Mich. 1884) 22 Fed. 61.

Discretion as to allowance.—The granting or refusing leave to amend pleadings is ordinarily a matter of discretion, not reviewable on appeal or error in the federal courts; but where it is shown that the court refused to exercise its discretion because of supposed lack of authority, the ruling is reviewable for error. Hernandez v. American Bridge Co., (C. C. A. 9th Cir. 1909) 167 Fed. 530, 92 C. C. A. 330.
Effect of state practice.—The practice in state courts, while it may enlarge the power of amendment of a federal court, cannot diminish those which are conferred upon the federal courts by the Acts of Congress. Norton v. Dover, (C. C. N. H. 1892) 14 Fed. 106.

II. Matters in Respect to Which Amendments Allowed

Ad damnum.—Increasing the ad damnum of a summons is permissible under this section. Davis v. Kansas City, etc., R. Co., (W. D. Tenn. 1857) 32 Fed. 563.

Attachment proceedings.—It is proper to allow a defective affidavit to a writ of attachment to be amended. Erstein v. Rothschild, (E. D. Mich. 1884) 22 Fed. 61.

And a similar course has been pursued in the case of a defective affidavit for garnishment although forbidden by the laws of the state in which the proceeding was held. Booth v. Denike, (W. D. Tex. 1894) 65 Fed. 43.

And amending the distinctive and special proceedings in attachment authorized in favor of the United States against defaulting and delinquent postmasters, contractors, and other officers, agents, and employees of the post office as regulated by R. S. sec. 924 (Attachment, vol. I, p. 483) has been allowed. Erstein v. Rothschild, (E. D. Mich. 1884) 22 Fed. 61.

And the adding of a seal to a writ of attachment issued by the state court in a case properly removed from the state to a federal court has been permitted. Wolf v. Cook, (E. D. Wisc. 1899) 40 Fed. 432.

Citizenship.—Where, in a petition for removal, counsel through misinformation erroneously stated the citizenship of the plaintiff, the federal court may permit an amendment after removal accurately stating the fact so as to show that the court had jurisdiction. Wilbur v. Red Jacket Consol. Coal, etc., Co., (S. D. W. Va. 1907) 153 Fed. 662. See also to same effect Kinney v. Columbia Sav., etc., Ass'n, (1903) 191 U. S. 78, 24 S. Ct. 30, 48 U. S. (L. ed.) 103. This subject is more fully considered in notes to Judicial Code, sec. 37, supra, this title, vol. 5, at p. 418, b. As to Citizenship.


And an amendment may be made changing the date of a summons where necessary to validate the writ. Gilbert v. South Carolina, etc., Exposition Co., (C. C. S. C. 1901) 113 Fed. 523.

Where a writ of summons, dated July 16, 1903, and returnable "on the first Tuesday of October next," for want of opportunity was not served on the defendant until May 10, 1909, and through oversight the return day was not changed, the plaintiff was held to be entitled, under the liberal amendment statutes of New Hampshire, to amend the same by inserting the appropriate return date of service. Stone v. Spear, (C. C. N. H. 1910) 175 Fed. 584.

Designation of district.—Where a declaration in an action in a federal court, a copy of which was served upon defendants with the summons, was properly entitled, in the district and division of the district in which defendants resided, but through mistake the summons required them to appear in another division of the district, it was held that such fact was not ground for abatement of the suit; but that the court had power in its discretion to permit an amendment of the summons, and its re-service in the amended form. Caraway v. Kentucky Refining Co., (C. C. A. 6th Cir. 1908) 163 Fed. 189, 90 C. C. A. 59.

Description of cause of action and of parties.—The statutes extend the power of the court to allow an amendment with a view to shall correct the description of the cause of action and of the parties at any stage of the case and in respect to any proceeding in it, whether in process or pleadings, and the power should be exercised in every case where right and justice require it, and the refusal of it will prevent an injured party from obtaining redress, subject, however, to the proviso that the amendment shall work no injury to the other party. Hernan v. American Bridge Co., (C. C. A. 6th Cir. 1908) 167 Fed. 930, 93 C. C. A. 350.

Misnomer.—Changing the name of the plaintiff in a summons so as to conform to the complaint has been allowed. Gulf, etc., R. Co. v. James, (C. C. A. 5th Cir. 1891) 48 Fed. 148, 1 C. C. A. 53.

And the plaintiff may in some cases be permitted to amend the record by substituting the name of the real defendant intended. Clemmens v. Washington Park Steamboat Co., (E. D. Pa. 1909) 171 Fed. 168.

In Bainum v. American Bridge Co., (W. D. Pa. 1905) 141 Fed. 179, it appears that the plaintiff's statement, in an action for personal injury against a foreign corporation, alleged to be a corporation of New Jersey, specifically set out the facts, clearly identifying the defendant, the work in which it was engaged, and the time and place of the injury. There were in fact two corporations, closely connected and having the same name, except that one was "of New Jersey" and the other "of New York." Both had the same resident agent, on whom the process was served, and the same attorneys, who entered their joint answer, and prepared the case for trial, when it was discovered that the New York corporation was in fact the one doing the work; and it was held that the court had power, under the text R. S. sec. 948 and R. S. sec. 954,
infra, p. 98, to permit the plaintiff to amend by substituting the name of the real defendant intended, and that such power would be exercised, especially where objection was not made until such time had elapsed as would bar a new action.

Removal proceedings.—A petition and bond for removal are in the nature of process. They constitute the process by which the case is transferred from the state to the federal court and may be amended, where diversity of citizenship is not clearly shown, to make them sufficient in that respect. Kinney v. Columbia Sav., etc., Ass'n, (1903) 101 U. S. 78, 24 S. Ct. 30, 48 U. S. (L. ed.) 103.

A federal court, into which a cause has been removed, has power to permit such amendments of process or pleadings as justice requires and as are permissible under the state statutes, provided they do not offend the federal statutes or decisions on the subject. Stone v. Searce, (C. C. N. H. 1910) 175 Fed. 584.


And affirmative averments have been amended in petitions for removal of causes to a federal court by the insertion of the necessary averments or even by an entire change of the petition by alleging another ground for removal than that contained in the petition. Woolridge v. McKenna, (W. D. Tenn. 1881) 8 Fed. 650.

For further consideration of the subject of amendments in removal proceedings, see notes to Judicial Code, sec. 37, supra, this title, vol. 5, at pp. 416-421.

Returns of officers.—The general rule seems to be that the court has the discretion to allow a return to be amended in all cases, with or without notice, but that such amended return cannot affect the rights of third persons acquired in good faith prior thereto; and whenever an amendment is so made, it cannot be questioned collaterally by the parties to the suit or those claiming under them as privies. Richards v. Ladd, (C. C. Ore. 1879) 6 Savy. C. C. 40, 20 Fed. Cas. No. 11,804.

So courts have the power to permit officers to amend their returns to both mesne and final process, and the power is exercised liberally in the interest of justice, especially when the rights of third parties are not to be affected by the amendment.

In the exercise of a sound discretion they have allowed officers to amend their returns according to the real facts, after the lapse of several years, and when there is no doubt about the facts such amendments have been allowed after the officer's term has expired. Phenix Ins. Co. v. Wulf, (C. C. Ind. 1880) 1 Fed. 775.


Signature.—Where the purported signature of a deputy affixed to a writ is not his own, but has been affixed by another under an attempted but ineffectual delegation of authority, the writ is not void but voidable merely, for it may be amended by substituting the true for the purported signature of the deputy. Bryan v. Ker, (1911) 222 U. S. 107, 32 S. Ct. 26, 56 U. S. (L. ed.) 114.

Statements in summons.—Correcting an erroneous statement in a summons, where the complaint was served with the summons and the defendant knew exactly the nature of the wrong with which he was charged, and could not be misled or injured, has been held proper. Chamberlain v. Bittersohn, (C. C. S. C. 1891) 48 Fed. 42.

III. AMENDMENTS DENTED

Where no process, regular or irregular, has been issued by the proper authority the court obtains no jurisdiction of the case and there is nothing to amend by.

Middleton Paper Co. v. Rock River Paper Co., (W. D. Wis. 1884) 19 Fed. 252.

If a summons is void, or if it misleads or tends to mislead the defendant or to put him off his guard, or if an amendment would work a surprise on him, or if there be nothing in the record to amend by, the summons may not be amended. Chamberlain v. Bittersohn, (C. C. S. C. 1891) 48 Fed. 42.

Nor may a summons not signed by the clerk and not under the seal of the court be amended. Peaslee v. Haberstro, (1879) 1 Blatchf. 472, 19 Fed. Cas. No. 10,884; Dwight v. Merritt, (S. D. N. Y. 1880) 4 Fed. 614.

Sec. 949. [Priority of cases in which a state is a party.] When a State is a party, or the execution of the revenue laws of a State is enjoined or stayed, in any suit in a court of the United States, such State or the party claiming under the revenue laws of a State, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties. [R. S.]

JUDICIARY

See also the provisions for speedy hearing of applications for preliminary injunctions in certain cases, Judicial Code, § 266, as amended, supra, this title, vol. 5, p. 983, and section 17 of the Clayton Act of Oct. 15, 1914, ch. 323, infra, this title, p. 139.

Precedence on the docket of the Supreme Court of cases on writ of error to revise the judgment of a state court in any criminal case, see Judicial Code, § 253, supra, this title, vol. 5, p. 920.

Discretion of court.—This statute is not imperative. It does not provide that all the cases named in the section shall have preference over others on the docket, but only such as upon a showing the court is of the opinion should be heard out of their order. Hoge v. Richmond, etc., R. Co., (1876) 93 U. S. 1, 23 U. S. (L. ed.) 781.

And the court will not, in preference to cases pending between private parties, set down for argument a case in which the execution of the revenue laws of the state has been enjoined, unless it sufficiently appears that the operations of the government of the state will be embarrassed by delay. Hoge v. Richmond, etc., R. Co., (1876) 93 U. S. 1, 23 U. S. (L. ed.) 781.

Implied power to enjoin.—This section shows that the federal court may enjoin and stay the revenue officers of the states. Board of Liquidation v. McComb, (1875) 92 U. S. 531, 23 U. S. (L. ed.) 623; Parsons v. Marcy, (E. D. Va. 1885) 23 Fed. 113.

A motion to advance cannot under this Act be made, except in behalf of a state or by a party claiming under its laws. Ward v. Maryland, (1870) 12 Wall. 162, 20 U. S. (L. ed.) 260.

Sufficient reason is not shown for granting a preference where the only dispute is as to the liability of the property of a single owner to taxation, and the value of the property and the amount of the revenue to be derived therefrom does not appear. Hoge v. Richmond, etc., R. Co., (1876) 93 U. S. 1, 23 U. S. (L. ed.) 781.

State as nominal plaintiff.—Although a suit be nominally by a state as the plaintiff, yet where the real plaintiffs are individuals (as, for instance, in quo warranto proceedings, where the state is plaintiff ex relatione) the court will not advance it even by consent of counsel on both sides. Miller v. The State, (1870) 12 Wall. 159, 20 U. S. (L. ed.) 259.

A suit against a tax collector for alleged wrongs done the plaintiff in the collection of taxes due a state is not a suit to which the state is a party, and where no injunction is issued restraining the execution by the collector of any of his official duties such suit is not entitled to a hearing in preference to others under the provisions of this section. Carter v. Greenhow, (1883) 109 U. S. 64, 3 S. Ct. 8, 27 U. S. (L. ed.) 860.

And cases in which the revenue laws of the state have been enjoined or stayed are to be advanced only on motion of the state or the party claiming under such laws, or when it is shown that the operations of the government of a state will be embarrassed by delay. Central R. Co. v. Bourbon County, (1886) 116 U. S. 538, 6 S. Ct. 601, 29 U. S. (L. ed.) 725.

The ordinances of municipal corporations levying taxes cannot be classed as revenue laws of a state.—Congress seems to have intended to give to the state the right to preference in hearing when itself a party to a cause pending in this court, and a like preference when the execution of the revenue laws of a state is enjoined or suspended, to any party claiming under such laws. This preference is given, plainly enough, because of the presumed importance of such cases to the administration and internal welfare of the states, and because of their dignity as equal members of the Union. The reasons for preference do not apply to municipal corporations, more than to railroad and many other corporations. Davenport City v. Dows, (1872) 15 Wall. 380, 21 U. S. (L. ed.) 96.

Sec. 950. [Notice of case for trial.] In all civil actions in the courts of the United States either party may notice the same for trial. [R. S.]


See, in general, R. S. sec. 914, supra, p. 21.

R. S. sec. 951 relates to claims for credits in suits by United States against individuals, and is given in CLAIMS, vol. 2, p. 211.

R. S. sec. 952 relates to claim for a credit in suits under postal laws and is given in CLAIMS, vol. 2, p. 215.

A fourteen days' notice for trial required by statute practice has been adopted in the trial of causes in a federal court sitting in that state, such notice being regarded as a matter of practice, within the meaning of R. S. sec. 914, supra, p. 21. Rosenbach v. Dreyfuss, (S. D. N. Y. 1880) 2 Fed. 23.

Sec. 953. [Bill of exceptions.] That a bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of
the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto. And in case the judge before whom the cause has heretofore been or may hereafter be tried is, by reason of death, sickness, or other disability, unable to hear and pass upon the motion for a new trial and allow and sign said bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in such cause has been or is taken in stenographic notes, or if the said judge is satisfied by any other means that he can pass upon such motion and allow a true bill of exceptions, shall pass upon said motion and allow and sign such bill of exceptions; and his ruling upon such motion and allowance and signing of such bill of exceptions shall be as valid as if such ruling and allowance and signing of such bill of exceptions had been made by the judge before whom such cause was tried; but in case said judge is satisfied that owing to the fact that he did not preside at the trial, or for any other cause, that he can not fairly pass upon said motion, and allow and sign said bill of exceptions, then he may in his discretion grant a new trial to the party moving therefor. [R. S.]


This section was amended so as to read as above by the Act of June 5, 1900, ch. 717, § 1, 31 Stat. L. 270, entitled "An Act relating to the allowance of exceptions."

Originally this section was as follows:

"SEC. 953. A bill of exceptions allowed in any cause shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof, if more than one judge sat on the trial of the cause, without any seal of court or judge being annexed thereto."

A general power to grant new trials, in cases where there has been a trial by jury, is conferred upon federal courts by Judicial Code, sec. 269, supra, this title, vol. 5, p. 1047.

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I. IN GENERAL


The District Court of the United States for Porto Rico is within the terms of this statute. Guardian Assur. Co. of London v. Quintana, (1913) 227 U. S. 100, 33 S. Ct. 236, 57 U. S. (L. ed.) 437.

The clerk is without authority to certify up anything, except that made of record by the orders of the court. Rupert v. U. S. (C. C. A. 8th Cir. 1910) 181 Fed. 87, 104 C. C. A. 255.

This section adds nothing to the powers of the appellate court with reference to bills of exceptions when once allowed. It is thoroughly settled that the appellate tribunal has no power to remodel a bill of exceptions. Murphy v. Milford, etc., St. R. Co., (C. C. A. 1st Cir. 1913) 210 Fed. 135, 126 C. C. A. 840.

For a summary of the rules to be observed in the preparation and presentation of bills of exception see Scaife v. Western North Carolina Land Co., (C. C. A. 4th Cir. 1898) 87 Fed. 308, 59 U. S. App. 28, 30 C. C. A. 661, and cases there cited.

II. WHAT CONSTITUTES BILL OF EXCEPTIONS

Where a statement is made and signed by the judge as to the facts in the case and the rulings on them, it may be sufficient evidence of their truth. But this does not amount to a bill of exceptions so that a writ of error lies unless it appears that the party objected at the trial to the rulings and wished the exceptions noted and reduced to a bill. It must appear further that the exceptions were persisted in. U. S.

In Herbert v. Butler, (1877) 97 U. S. 319, 24 U. S. (L. ed.) 958, the court said: "Is there a bill of exceptions? The document relied on by the plaintiff in error as constituting such a bill, and certified from the court below as part of the record, is appended to the record of the pleadings and judgment, and commences as follows: 'The following case and exceptions is agreed on by the attorneys for Jasper K. Herbert, plaintiff, and Benjamin F. Butler, defendant.' Then follows the title of the cause, a record of the proceedings had, and the evidence given at the trial, including the rulings of the judge and the exceptions thereto; and the case thus presented closes with the judge's certificate, as follows: 'Settled as within, pursuant to the above consent. Sept. 10, 1875. (Signed) Charles L. Benedict.' If this paper had been entitled a 'bill of exceptions,' instead of a 'case and exceptions,' there could not be any doubt that it would be a sufficient bill. It has all the requisites of a bill, except the mere name. A seal is not required, being expressly dispensed with by the act of 1872 (17 Stat. 197; Rev. Stat. sec. 953); and we had before decided that a seal is not essential in the courts of the United States. Generes v. Campbell, (1871) 11 Wall. 193, 20 U. S. (L. ed.) 110. It has the sanction and signature of the judge, and, though settled after the trial, it was agreed upon by the parties; and hence it is free from objections which have prevailed in other cases. Generes v. Bonnemer, (1869) 7 Wall. 564, 19 U. S. (L. ed.) 227; Graham v. Bayne, (1855) 18 How. 60, 15 U. S. (L. ed.) 265. We think it is a sufficient bill of exceptions."

III. SIGNATURE

1. In General


The section provides that when more than one judge sits at a trial, and one or more of the sitting judges may authenticate the bill of exceptions. New York, etc., R. Co. v. Hyde, (C. C. A. 1st Cir. 1893) 56 Fed. 188, 5 U. S. App. 443, 5 C. C. A. 461.


In Warren v. U. S., (C. C. A. 8th Cir. 1910) 183 Fed. 718, 106 C. C. A. 156, 38 L. R. A. (N. S.) 800, the court said: "What purports to be a bill of exceptions in the record is not authenticated by the certificate of the trial judge, and the proceedings at the trial are therefore not open to review."

In Malony v. Adair, (1899) 175 U. S. 281, 20 S. Ct. 115, 44 U. S. (L. ed.) 163, before the passage of the amendment, it was held that under the original section of the Revised Statutes a bill of exceptions not signed by the judge who tried the case, but by his successor in office, was not sufficiently authenticated.

2. Agreement of Counsel

A bill of exceptions unauthenticated by the trial judge cannot be given validity by the consent of the counsel, stipulating as to its correctness. Malony v. Adair, (1899) 175 U. S. 281, 20 S. Ct. 115, 44 U. S. (L. ed.) 163.

If the trial judge is able officially to sign the bill of exceptions, it is not competent for the counsel to dispense with his action and rely upon an agreed statement of the facts and the law of the case as tried, nor can they agree that another than the trial judge may perform his function in that regard. Malony v. Adair, (1899) 175 U. S. 281, 20 S. Ct. 115, 44 U. S. (L. ed.) 163.

"A bill of exceptions can be signed only by the judge who actually tried the case, and . . . the signature of the trial judge cannot be waived by counsel consenting that the bill as presented is correct." German Ins. Co. v. Manning, (S. D. Ind. 1900) 100 Fed. 581.

3. Time of Signing

This section neither in terms nor by implication limits the time within which exceptions shall be filed or allowed, nor does it aid in determining that question. New York, etc., R. Co. v. Hyde, (C. C. A. 1st Cir. 1893) 56 Fed. 188, 5 U. S. App. 443, 5 C. C. A. 461.

Nor has it any reference to an application to extend the time to make, file, and serve a bill of exceptions. Talbot v. Press Pub. Co., (S. D. N. Y. 1897) 80 Fed. 567.

Generally speaking, however, a bill of exceptions should be signed at the term in

After the term has expired, without the court’s control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in the Supreme Court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end. Michigan Ins. Bank v. Eldred, (1891) 143 U. S. 293, 12 S. Ct. 450, 36 U. S. (L. ed.) 162.

A bill of exceptions cannot be considered by an appellate court unless it was duly presented to and allowed by the trial judge during the term at which the trial was had, or within the time as extended by an order made during such term, or where there is a rule of court on the subject during the time so fixed, or an extension granted before its expiration. Oxford, etc., R. Co. v. Union Bank, (C. C. A. 4th Cir. 1907) 153 Fed. 723, 82 C. C. A. 609.

But in Pacific Bank v. Hannah, (C. C. A. 9th Cir. 1898) 90 Fed. 723, 32 C. C. A. 523, the court said: “A motion has been made to dismiss the writ of error on the ground that the bill of exceptions, although filed within the time at which judgment was rendered, was not presented to, and allowed by, the judge of the court below until after the expiration of the term. We think that the fact that the bill of exceptions was filed within the term at which judgment was rendered is sufficient to preserve the rights of a party in presenting the bill of exceptions for allowance and settlement.”

By agreement of the parties made during the term, a bill of exceptions may be signed after the expiration of the term. Waldron v. Waldron, (1895) 156 U. S. 361, 15 S. Ct. 383, 39 U. S. (L. ed.) 453. See to the same effect Schmidt v. Standard Steel Car Co., (C. C. A. 2d Cir. 1913) 202 Fed. 1023, 129 C. C. A. 664, wherein the court said: “The parties having stipulated reasonably for settlement of the bill of exceptions, we are satisfied that the trial judge should have signed it, even though the term had expired.”

Where a bill of exceptions was not signed by the trial judge, but was signed by the district judge then presiding at that circuit after the trial judge had left the circuit, the bill was not sufficiently authenticated, but as the counsel presenting the bill had done all that he could and the district judge should have extended the time for signing the bill instead of signing it himself, it was permitted that the trial judge might sign the bill nunc pro tunc at a subsequent term held by him in the same district. Western Dredging, etc., Co. v. Heldenmaier, (C. C. A. 7th Cir. 1902) 116 Fed. 179, 53 C. C. A. 625.

The allowance of an appeal from a decree, together with the approval of a superseded bond and the issuance of a citation may be followed by the settling and signing of a bill of exceptions where the bill was presented for settlement before such allowance and during the term at which the decree was rendered. Cook v. Klonos, (C. C. A. 9th Cir. 1908) 164 Fed. 529, 90 C. C. A. 403, modified on a different question in (C. C. A. 9th Cir. 1909) 108 Fed. 700, 94 C. C. A. 144.

No bill of exceptions is sufficiently authenticated unless signed by a judge who sat at the trial within the time required by law. The omission or failure to sign the same cannot be cured by a certificate of the judge that it was allowed, settled, and signed within such time. Oxford, etc., R. Co. v. Union Bank, (C. C. A. 4th Cir. 1907) 153 Fed. 723, 82 C. C. A. 609.

4. Where Signed

Where the United States district judge for the district of Porto Rico left the jurisdiction before signing a bill of exceptions, he should return to Porto Rico and sign it; but in case that cannot be done, the bill of exceptions should be prepared and agreed upon by counsel on both sides, and counsel should stipulate that it is correct and that the judge may allow and sign the same outside of his district. (1910) 29 Op. Att’y-Gen. 321.

5. How Signed

It cannot be regarded as a proper signature by a judge to a bill of exceptions or as a sufficient authentication where the signature is by the initials only of the judge. Price v. U. S., (1888) 125 U. S. 240, 8 S. Ct. 848, 31 U. S. (L. ed.) 743, followed in U. S. v. U. S. Fidelity, etc., Co., (1911) 222 U. S. 283, 32 S. Ct. 101, 56 U. S. (L. ed.) 200, wherein the court said: “The paper in the record styled ‘Exceptions to the charge to jury,’ initialed ‘J. B. McP.,’ trial judge,’ and signed by the plaintiff, is not a bill of exceptions.”

Proper signature assumed.—Where a bill of exceptions is signed by the district judge for the Circuit Court, and where it does not appear that the circuit justice and circuit judge were present at the trial, it will be assumed that the trial was had before the district judge alone. Cooke v. Avery, (1893) 147 U. S. 375, 13 S. Ct. 340, 37 U. S. (L. ed.) 200.

IV. SEALING

Sealing of the bill of exceptions is no longer necessary; but this does not render the other requisites any the less

V. Death

Where the judge of a federal court dies, leaving a pending motion for a new trial undecided, and there is no record from which his successor can fairly pass upon the motion and allow and sign a bill of exceptions, his only authority under the statute is to grant a new trial. Penn Mut. Life Ins. Co. v. Abee, (C. C. A. 8th Cir. 1908) 145 Fed. 593, 76 C. C. A. 283, 7 Ann. Cas. 491.

But on the death of a federal judge before whom a criminal cause was tried, before a motion for new trial has been passed on, his successor has power, under this section, to pass upon and overrule such motion where the evidence has been taken and preserved in stenographic notes, and, having such power, he has further power to proceed in the case and to render judgment on the verdict. Meldrum v. U. S., (C. C. A. 9th Cir. 1907) 151 Fed. 177, 80 C. C. A. 545, 10 Ann. Cas. 324.

"In cases wherein a deceased party is deprived of the opportunity to secure a bill of exceptions without fault upon his part the remedy lies in granting him a new trial; ... the motion for a new trial may be entertained, although not filed until after the lapse of a year or more from the date of the judgment." German Ins. Co. v. Manning, (S. D. Ins. 1900) 100 Fed. 581.

In Guardian Assur. Co. v. Quintana, (1913) 227 U. S. 100, 33 S. Ct. 236, 57 U. S. (L. ed.) 437, a motion to dismiss a writ of error for failure to file the record was denied without prejudice to renewal of the same for further lack of diligence, where the plaintiff in error opposed the motion because the bill of exceptions was yet unsettled in the hands of the court, and the facts showed that, while there had been a delay in the settlement of the bill, the trial judge had died since the trial, neither party had moved for settlement, and there had been doubt as to the applicability of this section to the case which was decided in the District Court of Porto Rico.

VI. Disability

Resignation.—"Disability" as used in this section means incapacity to do a legal act and includes a resignation. McIntyre v. Modern Woodmen of America, (C. C. A. 8th Cir. 1912) 200 Fed. 1, 121 C. C. A. 1.

In Sanborn v. Bay, (C. C. A. 8th Cir. 1911) 194 Fed. 37, 114 C. C. A. 57, it appeared that the case was tried and judgment rendered on November 1, 1910, at the October term of the Circuit Court for the district of South Dakota, by Judge Carland, then district judge for that district. After Judge Carland's appointment as circuit judge and designation to serve a term in the Court of Commerce, Judge Willard, the district judge for the district of Minnesota, was by order of the senior circuit judge of that circuit designated and appointed to act as district judge for the district of South Dakota until the appointment and qualification of Judge Carland's successor. On March 24, 1911, at the instance of the plaintiff in error, Judge Willard, who was then presiding in the Circuit Court pursuant to his designation and appointment, allowed and signed a bill of exceptions in the case which both parties had agreed to as correct. In the Circuit Court of Appeals it was claimed that Judge Willard had no power to perform those acts and a motion was made to suppress the bill of exceptions and dismiss the writ of error. On this question the court said: "Was there any such disability on the part of Judge Carland as authorized his successor, Judge Willard, to sign and allow the bill of exceptions in question? When Judge Carland was appointed and confirmed Circuit Judge and accepted the position, he ceased to be District Judge of the court over which he presided when this case was tried. This seems to be conceded. The only question is: Did he by becoming a Circuit Judge retain the jurisdiction which before that time he had over the case? By the act approved June 18, 1910 (chapter 306, 36 Stat. pt. 1, p. 539) the Court of Commerce was created. The President was authorized, by and with the advice and consent of the Senate, 'to appoint five additional Circuit Judges ... who shall hold office during good behavior and who shall be from time to time designated and assigned by the Chief Justice of the United States for service in the Circuit Court for any district, or Circuit Court of Appeals for any Circuit or in the Commerce Court.' These judges were, in the first instance, to constitute the new Court of Commerce for terms from one to five years each respectively. They were not appointed to be Circuit Judges of any particular circuit. On the contrary, they were appointed to be Circuit Judges, subject to assignment from time to time by the Chief Justice for service either in some Circuit Court, some Circuit Court of Appeals, or in the Court of Commerce. It does not appear that Judge Carland has
ever been assigned for service in the Circuit Court for the District of South Dakota, and certainly it does not appear that he had been so assigned prior to March 24, 1911, when Judge Willard allowed and signed the bill of exceptions in this case. We therefore conclude he then had no power to act judicially in any matter pending or requiring consideration in the court over which he formerly presided; and inasmuch as the allowance and signing of the bill of exceptions is a judicial act (Maloney v. Adair, (1899) 175 U. S. 281, 20 S. Ct. 115, 44 U. S. (L. ed.) 183), he had no power to allow or sign it in this case. The remaining question is: Did this want of power or disqualification amount to a 'disability' within the meaning of the act of June 5, 1900, which enabled Judge Willard, his actual successor, to allow and sign the bill of exceptions in this case? The latter was authorized and empowered to do so only in case the judge who tried the case was 'by reason of death, sickness or other disability unable to allow and sign the same.' It is contended by defendant in error that the 'other disability' here referred to means a disability of like character to that arising from 'death or sickness' which immediately precede the words 'other disability,' and they cite the case of American Bonding, etc., Co. v. Takanashi, [C. C. A 9th Cir. 1901] 40 C. C. A. 257, 111 Fed. 126, in support of their contention. This case involved the question whether the casual or temporary absence of the trial judge from his circuit authorized a judge, assigned to aid or assist him, to allow and sign a bill of exceptions in a case tried before the regular judge himself. It was held in that case that such casual absence did not amount to the 'disability' contemplated by the amended act of June 5, 1900, and some expressions are found in the opinion sustaining the contention of the defendant in error in this case. While we might well agree with the conclusion reached in that particular case, we cannot think the act of 1900 was intended by Congress to limit the 'disqualification' referred to, to one occasioned by physical or mental ailment. This in our opinion would be too narrow a construction. It would not seem to accomplish the legislative purpose or afford the relief which Congress intended to afford by the language actually employed. Inability to perform duty occasioned by death or sickness was obviously not the only disability Congress had in mind. It employed a comprehensive term sufficient to cover all disqualifications, and we do not think the artificial rule noscitur a sociis invoked by the counsel was ever intended to be employed to thwart an obvious purpose. Nothing in fact could create a more effective 'disability' than an utter disqualification of the presiding judge to perform the act which Congress attempted to provide for. We accordingly hold that a voluntary resignation of his office (which is practically the situation in this case) by a trial judge is an effective disqualification within the meaning of the act of 1900.'

Absence from district.—The disability of a judge under this section means a physical or mental disability arising from either death, sickness, insanity, or disorder of a like character by reason of which the judge would be disabled from the performance of judicial function. The mere absence from the district or circuit in which the case was tried is not such a disability as to allow the signing of a bill of exceptions by a judge other than the trial judge. Western Dredging, etc., Co. v. Heldmaier, [C. C. A 7th Cir. 1901] 111 Fed. 125, 49 C. C. A. 284.

Effect.—An order for a new trial, when the application for it is made in due time, is the proper remedy for the incapacity of the judge who tried the case to settle and sign the bill of exceptions. Manning v. German Ins. Co., [C. C. A 8th Cir. 1901] 107 Fed. 52, 48 C. C. A. 144.

In Brent v. Chas. H. Lilly Co., [W. D. Wash. 1913] 202 Fed. 332, the court said: "There was a full stenographic report of the proceedings of the trial, the notes of which have now been extended. The defendant is therefore not entitled, on account of the resignation of the trial judge prior to the ruling on the motion for a new trial and settlement of the bill of exceptions, to a new trial and settlement as a matter of right."

VII. OBSERVANCE OF RULES OF COURT

A party who has not presented to a succeeding judge a bill of exceptions containing a transcript of the evidence, as required by a rule of court, because of his failure to pay the reporter's fees, is not entitled to a new trial as of course. Thorndyke v. Gunnison, [C. C. A 9th Cir. 1909] 174 Fed. 137, 98 C. C. A. 171.

Sec. 954. [Defects of form—amendments.] No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets
down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe. [R. S.]


See the general provision for "amendment of any process," etc., in R. S. sec. 948, supra, p. 90.

Amendment of pleadings in suits at law or in equity, so as to obviate an objection that such suit was not brought on the right side of the court, is authorized by Judicial Code, § 274a, supra, this title, vol. 5, p. 1059.

Amendment in the District Court or in the Appellate Court of a defective averment of diverse citizenship in a suit brought in or removed to the District Court is authorized by Judicial Code, § 274c, supra, this title, vol. 5, p. 1061.

For amendments of writs of error, see R. S. sec. 1006, and cases thereunder, infra, p. 106.

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I. PURPOSE AND SCOPE

Purpose of section.—The jurisdiction has been conferred by Acts of Congress upon the courts of the United States so to supervise the various steps in a cause as to prevent hardships and injustice, and that the merits of a cause may be fairly tried. Eberly v. Moore, (1860) 24 How. 147, 16 U. S. (L. ed.) 612.

And of the corresponding section of the Judiciary Act of 1789 (1 Stat. 91) it has been said that it "was designed to free the administration of justice in the federal courts from all subtle, artificial and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits." In re Griggs, (C. C. A. 8th Cir. 1916) 233 Fed. 243, 147 C. C. A. 249.

Scope of section.—This section is not confined to civil cases at law, but extends to all civil cases, and includes equity cases, which are as well civil cases as law cases are. Daniel v. United Shoe Machinery Co., (S. D. N. Y. 1903) 120 Fed. 839.

And it is sufficiently comprehensive to embrace causes of appellate as well as original jurisdiction. Kennedy v. Georgia State Bank, (1850) 5 How. 586, 12 U. S. (L. ed.) 1909.

Under the authority thus given amendments have been allowed by a long line of decisions of the Supreme Court covering every step in a case from the summons to the verdict and judgment. McDonald v. Nebraska, (C. C. A. 8th Cir. 1900) 101 Fed. 171, 41 C. C. A. 278, and cases there cited; In re Griggs, (C. C. A. 8th Cir. 1916) 233 Fed. 243, 147 C. C. A. 249.

And on a writ of error the declaration, pleas, and finding must be taken together, and if from these it appears that the judgment is according to the right of the cause and matter in law, then all defects of form are to be disregarded and the judgment must stand. Stockton v. Bishop, (1846) 4 How. 155, 11 U. S. (L. ed.) 918.

But the power to amend "must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or of the omission of some entry which should have been made during the progress of the case, or of the loss of some document originally filed therein. The difference between creating and amending a record is analogous to that between the construction and repair of a piece of personal property. . . . The power to recreate a record, no evidence of which exists, has been the subject of

II. Construction and Application Generally

Relation to English law.—This section, which was section 32 of the Judiciary Act of 1789, was founded on the English statute of 32 Henry VIII., and is no broader. Philipps, etc., Constr. Co. v. Seymour, (1875) 91 U. S. 646, 23 U. S. (L. ed.) 341. See also Duluth St. R. Co. v. Speaks, (C. C. A. 8th Cir. 1913) 204 Fed. 573, 123 C. C. A. 90. But compare Smith v. Jackson, (1825) 1 Paine 468, 22 Fed. Cas. No. 13,065.

The doctrine of the English courts in all cases of ordinary suits excluding fines and recoveries is that judgments and records are amendable only when the case is within the reach of some statute and where there is something to amend by. Albers v. Whitney, (1840) 1 Story 310, 1 Fed. Cas. No. 137.

Liberally construed.—Under the statutes of the United States there exists the right of liberal amendment. Northrop v. Mercantile Trust, etc., Co., (C. C. S. C. 1903) 119 Fed. 969.

And this section has been liberally construed by all the federal courts in favor of allowing amendments. Portland Gold Mining Co. v. Stratton’s Independence, (D. C. Colo. 1912) 196 Fed. 714. See also to same effect In re Royce Dry Goods Co., (W. D. Mo. 1904) 133 Fed. 100; Tenas Basin Levee Dist. v. Tenas Delta Land Co., (C. C. A. 5th Cir. 1913) 204 Fed. 736, 123 C. C. A. 40.

"This is a remedial statute, and must be construed liberally to accomplish its object. It not only enables the courts of the United States, but it enjoins it upon them as a duty, to disregard the niceties of form, which often stand in the way of justice, and to give judgment according as the right of the cause and matter in law shall appear to them." Jerman v. Turner, (1851) 12 How. 39, 13 U. S. (L. ed.) 883.

"When a party gets his cause of action, or his defense, or his appeal, before a court of competent jurisdiction, he should not be turned out before trial of the merits of the controversy, except in obedience to a clear statutory mandate, or on a showing of gross carelessness or bad faith. The absolute dismissal of a plea or an appeal, for error in a matter of mere procedure, is in reality the infliction of the severest penalty for a minor fault, and is suggestive of the excessive punishments formerly inflicted for minor offenses in the administration of the criminal law. Conformity to rules of procedure is important, but usually it may be secured by imposing as a condition of amendment the payment of costs or other penalty, short of dismissal, on the party or his counsel, as circumstances may require, for negligence or inadvertence." Bedford v. Miller, (C. C. A. 4th Cir. 1914) 212 Fed. 368, 129 C. C. A. 44.

"Form" defined.—It is defect of form whenever the defendant must of necessity be guilty of a breach of law and have incurred the penalty for which the suit was brought, if the allegation of the declaration be true. This constitutes the difference between form and substance. Jacob v. U. S., (1821) 1 Brock. 520, 13 Fed. Cas. No. 7,167.

Action brought without authority.—This statute permits amendments to be made only in a case properly instituted, and only then in matters of form, but it does not allow the court, where an action was originally brought without authority or sanction in law, to so amend the original writ and declaration as to make new parties plaintiff and thereby sustain an action that was originally brought without authority or institute the same. Lusk v. Kimball, (W. D. Va. 1898) 87 Fed. 545.

Former equity rule No. 29 (see present equity rule 28) relating to amendments was held not to entitle the complainant as of right to amend his bill after a defendant thereto has been sustained. McKenny v. Supreme Lodge, etc., (C. C. A. 6th Cir. 1910) 180 Fed. 961, 104 C. C. A. 117.

Right to special demurrer.—This section expressly gives the right of filing a special demurrer in all actions in the courts of the United States. Cage v. Jeffries, (1839) Hemst. 409, 4 Fed. Cas. No. 2,987.

Debt in the detinum only is the proper form of action against an executor if he has not made himself personally responsible by a devastavit. And it is matter of form which can be taken advantage of by special demurrer only. Childress v. Emory, (1823) 8 Wheat. 642, 6 U. S. (L. ed.) 705.

Effect of general demurrer.—The averment in an affidavit of defense that the facts alleged in the statement of the claim do not show a cause of action amounts to a general demurrer, and will not under this section be considered as in bar of the cause of action. American Alkali Co. v. Campbell, (E. D. Pa. 1902) 113 Fed. 398.

And in Brooks v. Pullman Co., (C. C. A. 1st Cir. 1914) 213 Fed. 445, 130 C. C. A. 81, the court held that a general demurrer to a declaration consisting of a narrative of facts and circumstances framed with little regard for the requirements of good pleading, mixed with conclusions of law and all so intermingled as to leave it difficult to connect that which is properly from that which is improperly alleged, could not be sustained. The proper way to raise these objections was by special demurrer.

III. Power of Court

Discretionary power of court.—The statute is not a grant of a new power but rather a declaratory definition of the power of

It grants the fullest power and discretion as to amendments to every federal court. In re Glass, (W. D. Tenn. 1902) 119 Fed. 509.


It has uniformly been held in the federal courts that the allowance or refusal of leave to amend pleadings in actions at law is discretionary with the trial court, and that its action is not reviewable except in case of gross abuse of discretion. Truckee River General Electric Co. v. Benner, (C. C. A. 9th Cir. 1914) 211 Fed. 79, 127 C. C. A. 507.

So it has been said: "The federal statute allowing amendments is liberal, and should be construed liberally to promote trials on the merits. When a demurrer is sustained to a bill, the usual order is that the plaintiff have leave to amend. It is a general rule in the federal courts that it is in the discretion of the court to allow or to refuse to allow an amendment. It is often held that this discretion will not be interfered with, except in cases of a plain abuse of it. Where it is possible to avoid it, the court should never allow justice to be defeated and wrong to triumph by a mere mistake or unskilfulness in pleading." Tenas Basin Levee Dist. v. Tenas Delta Land Co., (C. C. A. 5th Cir. 1913) 204 Fed. 736, 123 C. C. A. 40.

So all matters of amendments to the pleadings, particularly including trial amendments, are within the discretion of the trial court, and its action allowing or refusing amendments is not reviewable on writ of error. Union Cent. Life Ins. Co. v. Phillips, (C. C. A. 5th Cir. 1900) 102 Fed. 23, 41 C. C. A. 263.

But notwithstanding the general rule that, in the absence of abuse, the discretion of the court as to allowing amendments will not be interfered with by an appellate court, such courts have, in some instances, interfered and reversed decrees and remedied cases, with direction that the rejected amendments be allowed. Tenas Basin Levee Dist. v. Tenas Delta Land Co., (C. C. A. 5th Cir. 1913) 204 Fed. 736, 123 C. C. A. 40.

And there is said to be an absolute abuse of discretion where the lower court's refusal to permit an amendment is in direct conflict with the explicit language of the mandate of the Supreme Court. U. S. v. Lehigh V. R. Co., (1911) 220 U. S. 257, 31 S. Ct. 387, 55 U. S. (L. ed.) 458.

And it has been held that it was an abuse of discretion to allow an amendment during the trial, without imposing terms, by way of a continuance or otherwise, which would prevent the possibility of prejudice resulting to defendant. Great Northern R. Co. v. Herron, (C. C. A. 8th Cir. 1905) 136 Fed. 49, 68 C. C. A. 559.

Parties absent from record and beyond jurisdiction.—It is the duty of the court to exercise its discretion over amendments for the full protection of those who are absent from the record and beyond the jurisdiction of the court. Frank v. Union Cent. Life Ins. Co., (W. D. Tenn. 1904) 130 Fed. 224.


IV. REMOVED CASES

Power of court generally.—A federal court, into which a cause has been removed, has power to permit such amendments of process or pleadings as justice requires and as are permissible under the state statutes, provided they do not offend the federal statutes or decisions on the subject. Stone v. Speare, (C. C. N. H. 1910) 175 Fed. 584.

So in Kinney v. Columbia Sav., etc., Ass'n, (1903) 191 U. S. 78, 24 S. Ct. 30, 48 U. S. (L. ed.) 103, it was said that a petition and bond for removal are in the nature of process; they constitute the process by which the case is transferred from the state to the federal court, and Congress has made ample provision for the amendment of process.

For further consideration of the subject of amendments in removal proceedings see notes to Judicial Code, sec. 37, supra, this title, vol. 5, at pp. 416-421.

Defective averments in petitions for re-
moval of causes to a federal court may be amended by the insertion of the necessary averments or even by an entire change of the petition by alleging another ground for removal than that contained in the petition. Woolridge v. McKenna, (W. D. Tenn. 1881) 8 Fed. 650.

Similarly, where an action was properly removed from a state court in which proceedings at law and in equity are had, and demurrer was filed on the ground that the complaint did not state facts sufficient to constitute a cause of action, as it lacked the address, statement of citizenship and proper prayer for relief, and because it was entered erroneously on the law docket of the federal court, this is not sufficient for a dismissal of the complaint, as the defects may be amended and the cause transferred to the equity calendar. Dancel v. United Shoe Machinery Co., (S. D. N. Y. 1903) 120 Fed. 530.

So the removal of a case from a state to a federal court is not effectual to work destruction to a valid but defective process of a state court, and a writ of attachment defective by want of a seal issued by a state court may be amended by the federal court where such amendment would be authorized under the state statute. Wolf v. Cook, (E. D. Wis. 1889) 40 Fed. 432.

V. EFFECT OF STATE STATUTES


The courts of the United States are not implicitly bound by the practice and decisions of the state courts with regard to amendments. Tobey v. Claflin, (1858) 3 Sumn. 379, 23 Fed. Cas. No. 14,066.

Where Congress has legislated generally upon any such subject, the rules of the state practice in respect thereof are superseded, and the extent and limitations of the power of the United States are to be found in the congressional enactments, and not on the ground of the states. Lange v. Union Pac. R. Co., (C. C. A. 8th Cir. 1903) 126 Fed. 338, 62 C. C. A. 48.

"The right of the federal court to allow amendments under sec. 954 of the Revised Statutes of the United States is well settled. The right exists quite independently of any state statute, and may be exercised at any stage of the cause, even after submission to the circuit court to the verdict and judgment, and is as applicable to attachment suits as to any others." Bowden v. Burnham, (C. C. A. 8th Cir. 1894) 59 Fed. 752, 19 U. S. App. 448, 8 C. C. A. 248.

In one case it was said of the Conformity Act (R. S. sec. 914, supra, p. 21) which it was claimed controlled: "It was not the intention of Congress to require by the passage of the act the adoption by the circuit court of any rule of pleading, practice, or procedure enacted by state statute or announced by the decision of a state court which would restrict the jurisdiction of the federal courts, or prevent the just administration of the law in the light of their own system of jurisprudence, as defined by their constitution as tribunals and the acts of Congress relative to that subject. On the other hand, that act expressly reserves to the judges of those courts the power, and hence imposes upon them the duty, to reject any statute, practice, or decision that would have such an effect. The application to this case of the rules here invoked, which counsel claim have been adopted by some of the courts of Missouri, would sacrifice the merits of the issues which this lawsuit presents to forms of procedure, would impede the administration of justice, and fly in the face of the Act of 1789 (Rev. St. § 954) to the effect that no judgment or other proceeding in a civil cause in any court of the United States shall be arrested or reversed for any defect or want of form." St. Charles v. Stookey, (C. C. A. 8th Cir. 1907) 154 Fed. 772, 85 C. C. A. 494.

The general principle has been applied in respect to amendments in garnishment proceedings. Booth v. Denike, (W. D. Tex. 1894) 65 Fed. 43.

And it has been decided that the federal courts are not bound to follow the state courts in their construction of local statutes regulating the amendment of pleadings in suits at law. Manitowoc Malting Co. v. Fuechtwanger, (E. D. Wis. 1906) 168 Fed. 983.

This section does not perpetuate nor re-establish the system of special demurrer in states whose statutes have established different and inconsistent rules of pleading. Rosenbach v. Dreyfuss, (S. D. N. Y. 1880) 1 Fed. 391.

State practice may be followed.—A federal court may follow the state practice as to amendments where not inconsistent with federal legislation on the subject.

Thus a state law providing that "after issue joined, the plaintiff may, with the leave of the court, amend his original petition; provided the amendment does not alter the substance of his demand by making it different from the one originally brought," may be followed by a federal court. Henderson v. Louisville, etc., R. Co., (1887) 123 U. S. 61, 8 S. Ct. 60, 31 U. S. (L. ed.) 92.

So where the state statute allows an amendment at any stage of a case as a matter of right, the federal court will not exercise the discretion to deny the right. Hodges v. Kimball, (C. C. A. 4th Cir. 1899) 91 Fed. 845, 34 C. C. A. 103.

And a state statute allowing amendments introducing new causes of action, and thereby changing the decision as to what it does or does not constitute a new cause of action, will be followed. Hodges v. Kimball, (C. C. A. 4th Cir. 1899) 91 Fed. 845, 34 C. C. A. 103.

Effect of other federal enactments.—This section is in no way limited by the provisions of R. S. sec. 914, supra, p. 21, which provides that the federal practice shall conform as near as may be to that of the state courts. Kent v. Bay State Gas Co., (C. C. Del. 1899) 93 Fed. 887.

Although R. S. sec. 914 requires the District Courts of the United States in matters of practice, pleadings, and forms, in actions at law, to conform as nearly as may be to the state practice, R. S. sec. 954 contains the legislation of Congress on the subject of amendments to pleadings in the federal courts, and is paramount to the local state statute. Truckee River Power Electric Co. v. Benner, (C. A. 9th Cir. 1914) 211 Fed. 72, 127 C. C. A. 503.

This section does not repeal R. S. sec. 914, providing that federal practice should conform as nearly as possible to the practice of the respective states, but it merely provides for a system of special demurrers in states in which R. S. sec. 914 had effected no change in the system of pleading inconsistent with this section. Rosenbach v. Dreyfus, (S. D. N. Y. 1880) 1 Fed. 391.

But this section and R. S. secs. 914, 918 (supra, pp. 21, 77), are in pari materia and should be construed together. Van Doren v. Pennsylvania R. Co., (C. C. A. 3d Cir. 1899) 23 Fed. 260, 35 C. C. A. 282.

VI. TIME WHEN AMENDMENTS ALLOWED

In general.—By the common law amendments were permitted if there was anything to be gained by them, but all amendments were required to be made at the term when the error occurred. But now they may be made at any time before judgment, and in some cases afterwards. Nelson v. Barker, (1844) 3 McLean 379, 17 Fed. Cas. No. 10,101; Smith v. Jackson, (1825) 1 Paine 486, 22 Fed. Cas. No. 13,065.


So in Comings v. The Ida Stockdale, (1874) 22 Pittsb. Leg. J. (Pa.) 9, 8 Fed. Cas. No. 3,052, it was held that an amendment in substance may be made while the proceedings are in fieri, and before judgment.

And "where the record of the case, up to the time of the motion, shows jurisdiction in the particular court, but there is a defect in the allegations of the pleadings with relation to the setting forth of the grounds of that particular jurisdiction, amendment will be allowed upon motion. This may occur either before or during the taking of evidence." Thompson v. Automatic Fire Protection Co., (E. D. N. Y. 1897) 151 Fed. 945.


Allowance subsequent to judgment.—In one of the earlier cases it is held that amendments must be made before final judgment. Smith v. Jackson, (1825) 1 Paine 486, 22 Fed. Cas. No. 13,065.

The general rule, however, seems to be that after the expiration of the term at which a judgment is rendered, there is no power in a court of law to amend a record in order to make it show that which did not appear at the trial. There would be to exercise a revisory or appellate power of the court's own decisions;
but, upon proper showing, the power to correct a record by amending a judgment at a subsequent term is thoroughly well established. Bernard v. Abel, (C. C. A. 9th Cir. 1907) 156 Fed. 649, 84 C. C. A. 361.

And it is said that "the power to amend its records, to correct mistakes of the clerk or other officer of the court, inadvertencies of counsel, or to supply defects or omissions in the record, even after the lapse of the term, is inherent in courts of justice." Gagnon v. U. S., (1904) 193 U. S. 451, 24 S. Ct. 510, 48 U. S. (L. ed.) 745.

And in this connection the Circuit Court of Appeals says: "The decisions of the Supreme Court are controlling authority in this court. A careful examination and review of them discloses the fact that the uniform rule of that court is that judgments at law cannot be vacated or substantially modified by the courts which rendered them, subsequent to the expiration of the terms at which they were entered, in the absence of motions or proceedings for that purpose during such terms; and the only exceptions to that rule are that clerical mistakes, such mistakes of fact not put in issue or passed upon as may be corrected by writ of error coram vobis or on motion in lieu of that writ, and mistakes in the dismissal of a case, may be corrected after the expiration of the terms." Manning v. German Ins. Co., (C. C. A. 8th Cir. 1901) 107 Fed. 32, 49 C. C. A. 144.

Courts have the power to amend their judgments, upon proper showing, within a reasonable time, when no such change of circumstances has occurred as would make an amendment unjust to third persons or to the parties themselves. It happens sometimes, for instance, that applied for verdicts are granted even after error has been brought. Such amendments have often been allowed upon the judge's notes of the evidence at the trial, or upon other evidence clearly establishing the justice of the proposed amendments. Bernard v. Abel, (C. C. A. 9th Cir. 1907) 156 Fed. 649, 48 C. C. A. 361.

This power is one to make the record speak the truth. It is salutary, and enables courts to prevent injustice through mere mistake or inadvertence of the judge, or counsel, or the clerk. Bernard v. Abel, (C. C. A. 9th Cir. 1907) 156 Fed. 649, 48 C. C. A. 361.

But this power to amend "must not be confounded with the power to create. It presupposes an existing record, which is defective by reason of some clerical error or mistake, or the omission of some entry which should have been made during the progress of the case, or by the loss of some document originally filed therein." Gagnon v. U. S., (1904) 193 U. S. 451, 24 S. Ct. 510, 48 U. S. (L. ed.) 745.

And generally a record cannot lawfully be amended after the term unless there are minutes of the clerk, notes of the judge, or other official evidence by which to amend. Brown v. U. S., (C. C. A. 7th Cir. 1892) 30 Fed. 415, 116 C. C. 357.

On appeal—This section forbids a federal court on appeal to notice objections taken there for the first time on mere technical ground. Babbitt v. Burgess, (1873) 2 Dill. 109, 2 Fed. Cas. No. 693.

And the federal courts on appeal have power to allow any amendments of defects in form occurring in the courts below which could have been amended there, or to disregard them in giving judgment. Smith v. Jackson, (1825) 1 Payne 486, 22 Fed. Cas. No. 13,065.

Thus an appellate court has authority to allow amendments in revenue cases or proceedings in rem brought by appeal from the District Court. Anonymous, (1812) 1 Gall. 22, 1 Fed. Cas. No. 444.

So an appeal will not be dismissed on the ground that none was ever lawfully taken, because a receiver of the plaintiff became the surety in the appeal bond on an appeal taken in the name of the plaintiff, but the receiver will be substituted as the plaintiff under the power of amendment authorized by this section. Bowden v. Johnson, (1895) 107 U. S. 251, 2 S. Ct. 246, 27 U. S. (L. ed.) 356.

Similarly where one of two defendants dies after the submission of a case to an appellate court, which subsequently affirms a decree in favor of the deceased, its failure to make a substitution for the deceased party is not a substantial error or defect, and it may be disregarded and corrected in a higher court on an appeal from the judgment of affirmance. Wil¬bite v. Skelton, (C. C. A. 8th Cir. 1906) 149 Fed. 67, 78 C. C. A. 635.

But this power does not extend to defects in substance. Such defects may, however, be amended in the lower court on terms. Smith v. Jackson, (1825) 1 Payne 486, 22 Fed. Cas. No. 13,065.

And it is a defect not curable by amendment where a petition for appeal was entitled William A. Freeborn & Co., and prayed for appeal in that name, and those constituting the company nowhere appeared in the proceedings on appeal, and the original action was filed in the name of William A. Freeborn, James F. Freeborn, and Henry P. Gard¬ner. The Protector, (1870) 11 Wall. 82, 20 U. S. (L. ed.) 47 (two justices dissenting).

On a writ of error the declaration, plea and finding must be taken together; and if from these it appears that the judgment is according to the right of the cause and matter in law, then all defects in form are to be disregarded and the judgment must stand. Stockton v. Bishop, (1846) 4 How. 155, 11 U. S. (L. ed.) 918.
VII. SUMMONS

A summons not signed by the clerk and not under the seal of the court is not amendable. Dwight v. Merritt, (S. D. N. Y. 1880) 4 Fed. 614.

In an action to recover penalties under the federal act relating to copyrights, a reference to the statute under which the penalties sued for were incurred must be inserted on the summons, and the omission of such indorsement is a defect of substance and is not amendable under this section. Brown v. Pond, (S. D. N. Y. 1880) 5 Fed. 31.

Nor can this section be held to be broad enough to permit an amendment of process effectual for the purpose of giving jurisdiction over the person of the defendant, which the process as served was ineffectual to do, where he has not submitted himself to the jurisdiction. Brown v. Pond, (S. D. N. Y. 1880) 5 Fed. 31.

But it has been held that a summons of a District Court bearing the test of the chief justice is defective, but under this section may be amended. U. S. v. Turner, (D. C. S. C. 1892) 50 Fed. 734.

And the court may, after a plea in abatement, allow a summons and declaration to be amended by striking out "administrator, etc.," and inserting "executor, etc." Randolph v. Barrett, (1842) 16 Pet. 138, 10 U. S. (L. ed.) 914.

VIII. PLEADINGs

1. IN GENERAL

Power of court.—"Conformably to the spirit of this statute, the courts have always been and should be liberal in the allowance of any form of pleading to meet the ends of justice and prevent mere technical objections, to defeat justice." In re Royce Drey Goods Co., (W. D. Mo. 1904) 133 Fed. 100.

Under this section it is permissible to the court to permit an amendment of the pleadings so as to conform to the same kind of remedy which the court holds appropriate to the case and when amended to permit the cause to be transferred to the proper docket. U. S. Bank v. Lyon County, (N. D. Ia. 1892) 48 Fed. 632.

And every error or mistake in the pleadings which does not affect the substantial rights of the adverse party may be cured by amendment. McDonald v. Nebraska, (C. C. A. 8th Cir. 1900) 101 Fed. 171, 41 C. C. A. 278.

But "amendments to a pleading can only state facts in existence at the time that the original pleading was made. A plaintiff cannot, therefore, introduce by an amendment to his complaint facts occurring subsequent to the commencement of the action." Northrup v. Mercantile Trust, etc., Co., (C. C. S. C. 1903) 119 Fed. 969.

Signature to libel.—A libel defective because unsigned except by the proctors as proctors may be amended. Hardy v. Moore, (S. D. N. Y. 1880) 4 Fed. 843.


On writ of error.—The fact that no replication is put in as to two of three special pleas raising distinct defenses is not a matter for reversal by the Supreme Court, the case having been tried below as if the pleadings had been perfect and in form. Laber v. Cooper, (1868) 7 Wall. 565, 19 U. S. (L. ed.) 151.

And defects of form in a writ or declaration not pointed out by demurrer are not good cause for reversing a judgment brought to the Supreme Court by writ of error. Ewing v. Howard, (1868) 7 Wall. 499, 19 U. S. (L. ed.) 293.

Remanding cases for amendment.—On reversal for a defect in pleading a case is to be remanded to a court of original jurisdiction for further proceedings, and there the pleadings may be amended. Garland v. Davis, (1846) 4 How. 131, 11 U. S. (L. ed.) 907.

2. Declaration, Complaint or Bill in Equity

a. IN GENERAL


So, where a complaint contains any allegation of a ground of recovery, although only inferential, it is within the discretion of the court to permit the defect to be cured by amendment. Great Northern R. Co. v. Herron, (C. C. A. 8th Cir. 1905) 136 Fed. 49, 85 C. C. A. 509.

And a federal court may, in the exercise of judicial discretion, permit an amendment, after trial, of the ad damnum clause of plaintiff's complaint, so as to raise the amount sued for to conform to the proof. Manitowoc Matting Co. v. Fuechswanger, (E. D. Wis. 1908) 169 Fed. 983.

And the fact that an amendment of a complaint was allowed by consent, on application by the plaintiff, after he had sold the cause of action and before the substitution of the purchaser, does not invalidate such amendment. Franklin v. Comrades' Stanford Co. (C. C. A. 8th Cir. 1905) 137 Fed. 737, 70 C. C. A. 171.

An amendment to a pleading which sets forth no new cause of action relates back to the filing of the pleading amended, and the case stands as though the amendment had been then filed. Armstrong Cork Co. v. Merchants' Refrigerating Co. (C. C. A. 8th Cir. 1910) 184 Fed. 199, 107 C. C. A. 93.

Where no objection was made to the declaration until the close of the evidence, and everything that defendant claimed
should have been alleged was proved, and the jury found the facts in favor of the plaintiff, a judgment on the verdict will not be set aside for defects in the declaration. Canadian Pac. R. Co. v. Elliott, (C. C. A. 2d Cir. 1905) 137 Fed. 904, 70 C. C. A. 242. See also Chicago, etc., R. Co. v. Voelker, (C. C. A. 8th Cir. 1904) 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

b. Bill in Equity Generally

A bill in equity containing a general prayer for relief which is sufficient to maintain it in its true character may be amended to conform its special prayer to its real purpose. Partee v. Thomas, (W. D. Tenn. 1882) 11 Fed. 769.

So a court of equity may allow an amendment of a bill after deciding against the bill and allowing a demurrer on argument. Hunt v. Roumaniere, (1821) 2 Mason 342, 12 Fed. Cas. No. 6,898.

And where a suit was brought in equity, and upon demurrer it was held that the complaint was not an adequate remedy at law, the cause may be transferred to the law docket with leave to amend the proceedings to conform therewith. U. S. Bank v. Lyon County, (N. D. Ia. 1892) 48 Fed. 632. And see now Judicial Code, sec. 274a, supra, this title, vol. 5, p. 1059.

c. Parties

Character or capacity in which plaintiff claims.—Where the plaintiff sued in the wrong capacity the pleadings may be amended on permission granted to prosecute the action in the right capacity. Van Doren v. Pennsylvania R. Co., (C. C. A. 3d Cir. 1890) 93 Fed. 280, 35 C. C. A. 298. See to the same effect Regardan v. Balaklala Consol. Copper Co., (N. D. Cal. 1912) 193 Fed. 189; St. Louis, etc., R. Co. v. Herr, (C. C. A. 5th Cir. 1912) 193 Fed. 950, 113 C. C. A. 578.

An amendment which, without modifying or changing the facts upon which an action is based, in effect merely indicates the capacity in which the plaintiff is to prosecute the action is clearly within the section. Missouri, etc., R. Co. v. Wulf, (1913) 226 U. S. 570, 33 S. Ct. 135, 57 U. S. (L. ed.) 355. Ann. Cas. 1914B 134.

Thus, an omission to show in a declaration, in an action brought by a person as heir at law, how the plaintiff is heir, is not bad on general demurrer. Day v. Chism, (1825) 10 Wheat. 449, 6 U. S. (L. ed.) 363.


And a plaintiff, suing as widow to recover for her husband's wrongful death, may be permitted to amend her declaration to change the relation in which she sue's from that of widow to that of ad-


Again, where the complaint in an action on a note alleged that the note was delivered to the plaintiff, it was held proper to amend it so as to read that the note was given to the plaintiff as agent. Pleitman v. McKinnon, (C. C. A. 2d Cir. 1916) 236 Fed. 99, 151 C. C. A. 174.

Residence of party.—An amendment of plaintiff's petition, after verdict and judgment thereon, with no further proceedings taken, by inserting the words "and is a citizen of said state and of the United States of America," after the allegation therein that "plaintiff resides in El Paso, in El Paso county, state of Texas," may be allowed. Mexican Cent. R. Co. v. Duthie, (1903) 189 U. S. 76, 23 S. Ct. 610, 47 U. S. (L. ed.) 715.

And it is permissible to allow the defendants after they had put in a plea in bar to plead in abatement that the plaintiffs were in reality citizens of the same state with themselves although alleging otherwise. Eberly v. Moore, (1860) 24 How. 147, 16 U. S. (L. ed.) 612.

Adding additional party plaintiff.—Leave will not be granted to amend the writ, before the appearance of the defendant or the service of the writ and the filing of pleadings in the cause, by inserting the name of a third person as plaintiff suing for the use of the persons originally named as plaintiffs, where such third person is not before the court nor within the jurisdiction, and cannot be served with notice of the application, even though it is proposed to reserve to him the right to object to the order, such an order being, in form at least, an adjudication of the right so to use his name. Frank v. Union Cent. Life Ins. Co., (W. D. Tenn. 1904) 130 Fed. 224.

Substitution of real plaintiff.—A pleading may be amended by substituting the real plaintiff in the action for a nominal one in whose name the action was brought. McDonald v. Nebraska, (C. C. A. 8th Cir. 1900) 101 Fed. 171, 41 C. C. A. 278.

Substitution of real defendant.—In Clemmens v. Washington Park Steamboat Co., (E. D. Pa. 1909) 171 Fed. 105, it appeared that a ferry company, which was a corporation of New Jersey, operated a line of excursion boats from Philadelphia under the assumed name of the "Washington Park Steamboat Company." A passenger to whom it sold a ticket under such name was injured, and brought suit against the steamboat company. The attorney for the ferry company, who was also a director, accepted service for the defendant, and appeared and defended the case on the merits; the trial resulting in a judgment for the plaintiff. Neither plaintiff nor the court was informed of the true facts until after an attempt to collect the judgment failed,
and plaintiff moved to amend the record by substituting the name of the ferry company as defendant. It was held that such company, which was the real defendant, having in fact appeared and defended the suit, and there being no such person as the defendant named, the court had power to permit such amendment, under R. S. sec. 948, (supra, p. 90) and the text R. S. sec. 954, authorizing amendments to cure defects of form.


But it has been held that where the name of a party is erroneously stated in a writ, and the misdemeanor is a mistake of fact not apparent upon the record, and not to be amended by any matter apparent in any part of the record, the court is not authorized to make an amendment to cure the defect. Albers v. Whitney, (1840) 1 Story 310, 1 Fed. Cas. No. 137.

Misdescription of defendant.—Where the petition misdescribed the defendant as a corporation of New York instead of New Jersey, it was held that the New Jersey corporation was in fact the defendant, as the petition disclosed, and that service having been properly made on its agent, the court had power under R. S. sec. 948 (supra, p. 90), and the text R. S. sec. 954, to permit plaintiff to amend by correctly stating its place of incorporation. Herran v. American Bridge Co., (C. C. A. 6th Cir. 1909) 167 Fed. 930, 93 C. C. A. 330. See also Bainum v. American Bridge Co., (W. D. Pa. 1905) 141 Fed. 179.

Striking out name of party.—An amendment may be allowed striking out the name of one of two or more plaintiffs. Tyson v. Belmont, (1849) 24 Fed. Cas. No. 14,315a.

And a party will be allowed before trial to amend his writ and declaration by striking out the name of one of the defendants. Tobey v. Claflin, (1833) 3 Sumn. 379, 23 Fed. Cas. No. 14,086; Greetley v. Smith, (1844) 3 Story 76, 10 Fed. Cas. No. 5,747.

It is permissible under this section to strike out the name of one defendant where the action is against several, even though the cause of action alleged against the original defendants stated a joint liability only, but there is no authority which permits the striking out of a sole defendant and the substitution in his stead of another. Portland Gold Min. Co. v. Straton's Independence, (D. C. Colo. 1912) 166 Fed. 714.

d. Introducing New Cause of Action

An entirely new cause of action may be stated in a pleading by way of amendment. In re Glass, (W. D. Tenn. 1902) 119 Fed. 509.

So amendment to a complaint stating an additional cause of action of the same nature, and arising out of the same course of transactions alleged in the original complaint, will be allowed before the answer to prevent a multiplicity of suits and in furtherance of justice. Oliver v. Raymond, (E. D. Wis. 1901) 108 Fed. 927.


And complainant in a suit in equity in a federal court will not be given leave to file a supplemental bill after final hearing and decision on the original bill and a prior supplemental bill, to set up facts to make a new and different case, all of which, so far as appears, were known to complainant months before the hearing and before the filing of the former supplemental bill, and some of them before the filing of the original bill. Healey Ice Mach. Co. v. Green, (E. D. N. C. 1911) 184 Fed. 615.

The rule that the filing of a notice of appearance or of a general pleading, such as an answer, is equivalent to a general appearance for all purposes of the case, is limited in its application by the scope of the action in which such appearance or pleading is filed; and such an appearance does not authorize an amendment of plaintiff's pleading, so as to state a new or different cause of action upon which the defendant could not originally have been sued in that jurisdiction. Western Wheeled Scraper Co. v. Gahagan, (E. D. N. Y. 1907) 152 Fed. 646.

An amendment of a declaration changing the beneficiary of the action is in effect the bringing of a new suit. Hall v. Louisville, etc., R. Co., (N. D. Fla. 1907) 157 Fed. 464.

e. Introducing New Defense

The form of pleading may be changed so as to present a defense in a new aspect where the plea presented was by mistake or misapprehension of the defendant's attorney and it was not discovered before the trial, but defendant must under such circumstances pay all the costs which have accrued since the plea was interposed. Heye v. Lieman, (1846) 12 Fed. Cas. No. 6,445a.

But a defendant will not be allowed as a matter of course to put in new pleas in a federal court as in state courts on the trial of a case. The practice of so doing is vexatious and will be allowed only when good reason is shown and generally only upon terms. Childs v. Lenig, (1849) 1 Wall. Jr. C. 305, 5 Fed. Cas. No. 2,680.

Where a motion is made by one defendant in equity to withdraw its answer and to file the same plea and answer as filed by a codefendant in support thereof, such
motion will be granted if it is not made for the purpose of setting up a merely technical defense, nor after litigation has continued and evidence has been taken, and where it does not cause inconvenience or expense to the other side or does not introduce a new defense on a new state of facts or change the substance of the case made by the bill, and where a replication to the plea desired has been made. U. S. v. American Bell Telephone Co., (C. C. Mass. 1888) 59 Fed. 716.

f. Jurisdictional Averments

In general.—While the record still remains within control of the court it may allow an amendment to the plaintiff's pleading by inserting the necessary jurisdictional averments even after verdict and judgment or decree. Mexican Cent. R. Co. v. Duthie, (1903) 189 U. S. 76, 23 S. Ct. 610, 47 U. S. (L. ed.) 715.

Thus, where a complaint at the time the attachment was issued did not contain the necessary jurisdictional averments, it may be amended on a motion to discharge the attachment where the amendment will bring on record a jurisdictional fact existing from the commencement of the suit. Bowden v. Burnham, (C. C. A. 8th Cir. 1894) 59 Fed. 752, 19 U. S. App. 448, 8 C. C. A. 248; Nevada Co. v. Farnsworth, (C. C. Utah 1898) 80 Fed. 146.

But in a recent case it has been said by the Circuit Court of Appeals that the authority conferred by this section cannot be employed to supply a lack of jurisdiction. In re Griggs, (C. C. A. 8th Cir. 1916) 233 Fed. 243, 147 C. C. A. 249.

Amount in dispute.—So an amendment has been allowed to show that the amount requisite to give jurisdiction is involved. Thompson v. Automatic Fire Protection Co., (E. D. N. Y. 1907) 151 Fed. 945.

Diversity of citizenship.—The provisions of this section are broad enough to warrant the action of a trial judge in allowing amendments to the pleadings showing a diversity of citizenship on terms and proceeding to judgment. Maddox v. Thorn, (C. C. A. 5th Cir. 1894) 60 Fed. 217, 23 U. S. App. 180, 8 C. C. A. 574.

The objection that diversity of citizenship was not alleged in the complaint is a defect that may be cured after verdict by amendments, under the provisions of this section. Atchison, etc., R. Co. v. Gilliland, (C. C. A. 9th Cir. 1912) 193 Fed. 608, 113 C. C. A. 476.

So an amendment to show jurisdiction by reason of diversity of citizenship has been allowed after a motion in arrest of judgment on the ground that the record did not show the required citizenship. Maddox v. Thorn, (C. C. A. 5th Cir. 1894) 60 Fed. 217, 23 U. S. App. 189, 8 C. C. A. 574.

And where it appears on a writ of error that the record does not show the diversity of citizenship necessary to confer jurisdiction, while an amendment cannot be made in the Circuit Court of Appeals to cure such defect it may be made in the lower court when it gets back. Newcomb v. Burbank, (C. C. A. 2d Cir. 1910) 181 Fed. 334, 104 C. C. A. 164.

But in Smith v. Jackson, (1825) 1 Paine 486, 22 Fed. Cas. No. 13,065, it was held that an omission of the averment of citizenship is a defect in substance not cured by verdict and which cannot be amended after judgment.

g. Particular Actions or Proceedings

Application for injunction.—This section applies to defects appearing on an application for a preliminary injunction. American Steel, etc., Co. v. Wire Drawers', etc., Union, (N. D. Ohio 1898) 90 Fed. 598.

Bankruptcy proceedings.—The District Court has power to make amendments in petitions and proceedings in bankruptcy, but amendments that would introduce into the petition entirely new acts of bankruptcy will be disallowed. Reed v. Cowley, (1905) 1 Nat. Bankr. Reg. 518, 20 Fed. Cas. No. 11,644.

Specifications opposing the discharge of a bankrupt may be amended although they are entirely defective. In re Glass, (W. D. Tenn. 1902) 119 Fed. 509.

"The rule in bankruptcy declares that 'the court may allow amendments to the petition and schedules on application of the petitioner.' Neither the act of Congress nor the rule in bankruptcy excepts jurisdictional averments from the power of the court to permit amendments, and the established rule is that jurisdictional as well as other averments may be inserted or reformed by amendment." In re Plymouth Cordage Co., (C. C. A. 8th Cir. 1905) 135 Fed. 1000, 68 C. C. A. 434.

And in a case involving the effect of a failure of a voluntary bankrupt to strictly observe a form promulgated by the Supreme Court it was said: "It is true that amongst the forms promulgated by the Supreme Court is 'Schedule B (5),' in which is contained the words: 'Property claimed to be exempted by the state laws, its valuation,' etc. But, waiving the question whether in this instance the property claimed and its valuation were not stated in substantial accordance with this direction, it is enough to say that we do not understand it to be anything more than a direction. It could not have been intended to be mandatory. These forms were not designed to effect any change in the law. They are 'forms,' and nothing more. As was said by the Supreme Court (General Order 38, 89 Fed. xiv, 32 C. C. A. xxxvii), they are to be 'observed and used with such alterations as may be necessary to suit the circumstances of any particular case'; and, under the circumstances of this case, we decline to hold that the fail-
ure of the bankrupt to precisely observe one of them was fatal to his claim, because we could not do so without sub-
ordinating substance to form, and refusing a legal right, merely on account of a de-
fect in procedure, which has caused no injury to any one, and which, if requisite, might be cured by amendment." Burke v. Guarantee Title, etc., Co., (C. C. A. 3d Cir. 1905) 134 Fed. 562, 67 C. C. A. 486.

Contempt proceedings.—An application for an attachment for contempt by an as-
essor of the internal revenue against a taxpayer for not producing books and giving
evidence is not such a criminal pro-
ceeding that it may not be amended under
this section. Ir re Chadwick. (1870) 1
Lowell 430, 5 Fed. Cas. No. 2570.

Ejectment suit.—The court has juris-
diction to allow an amendment of the de-
mise in a suit in ejectment laid in a decla-
ration after judgment without notice, the
parties being presumed to be before the
court for that and all other things in the
proceedings in the court in the case of Craig v. Craig. (1840) 14 Pet. 147, 10 U. S. (L.
ed.) 303.

Informations for seizure for forfeitures under the customs laws are civil proceed-
ings in rem within the meaning of this
section, so that defects in the information
may be amended. Friedenstein v. U. S.,
(1888) 125 U. S. 224, 8 St. Ct. 838, 31

h. Other Particular Matters and Instances

Cause of action.—A complaint alleging a cause of action under the laws of one
state may be amended by alleging it was
given by the laws of another state. Will-
liams v. William B. Scaife, etc., Co., (D.

Damage not alleged in assumpsit.—
Though a count in assumpsit contain no
allegation of damage, it is not bad on
error. Bank of Metropolitan v. Guttaenheim,
(1840) 14 Pet. 19, 10 U. S. (L. ed.) 335.

Error in lapse of action.—The fact that a
declaration on a patent is not properly

Form of action.—The plaintiff may be
allowed to leave to amend his action by
changing the form from debt to covenant.

Indorsements to bill of exchange.—
Where the indorsee of a bill of exchange,
whether an agent or owner, returns it after
protest to the last indorser, the latter may
accept it in his own name and, at the
trial strike out the last indorsement al-
though it be in full. And prior blank in-
dorsements may be filled up at the trial so
as to correspond with the declaration.

And where both these were omitted to be
done the court might reverse the judg-
ment, considering it an objection
of form and cured by this section. U. S.
No. 14,517.

Statement of claim.—A statement of a
claim may be amended where the amend-
ment is entirely consistent with the
original allegation, as where, in the state-
ment that the plaintiff was the owner of
the land, the amendment merely sets out
the nature of the plaintiff's title. Leeds v.
Evans, (E. D. Pa. 1900) 90 Fed. 28.

So the statement of a claim of a corpo-
ration for calls on shares of its stock
may be amended by inserting therein an
allegation that the balance remaining due
upon its shares of stock after the first in-
stalment had been paid has not since been
paid. American Alkali Co. v. Campbell,

But a statement of a claim cannot be so
amended as to alter or vary the cause of
action, as by adding new parties or pre-
senting a new subject matter, after the
statute of limitations has become a bar.
28.

Variance.—Where the variance be-
 tween the pleading and the facts which the
pleader seeks to prove is so slight that
it is obvious that the opposing party could
not have been misled by it in the prepara-
tion of his case for trial, it is the duty of
the court to disregard it or to permit an
amendment to conform the pleading to the
proof. Derham v. Donohue. (C. C. A. 8th
Cir. 1907) 153 Fed. 385, 83 C. C. A. 637,
13 Ann. Cas. 372; United Kansas Portland
Cement Co. v. Harvey. (C. C. A. 8th
Cir. 1914) 216 Fed. 316, 132 C. C. A. 460.

An allegation of variance between the
avermements of a petition and the findings
of the court, where there is no allegation that
the findings were unwarranted by the
proofs, or that the judgment does not con-
form to the law and justice of the case as
presented by the findings, will not be sus-
tained. Such case comes within this sec-
tion. New Orleans, etc., R. Co. v. Lindsay,

Where the plaintiff's declaration, in an
action against a corporation on a contract,
purported to set out the contract verbatim,
and recited that it was signed by the de-
defendant's president and attested by its
secretary and corporate seal; but, in copy-
ing the contract, there was nothing in the
declaration to represent the seal, and when
the contract was introduced in evidence it
appeared that the corporate seal had been
attached as recited in the contract, where-
upon plaintiff was granted leave to amend
the declaration to conform to the facts, it
was held that the amendment was proper-
ly allowed in the furtherance of justice.
Mathieson Alkali Works v. Mathieson, (C.
C. A. 4th Cir. 1906) 150 Fed. 241, 80 C.
C. A. 129.

Waiver of breach of contract.—In an
action of assumpsit, in which the declara-
tion contained special counts upon a writ-
ten contract, where the proof showed a breach of the contract by the plaintiff, but also a waiver of such breach by the defendant, which constituted in effect a modification of the contract by consent of parties, a judgment for plaintiff is not reversible because such waiver was not pleaded. Schaefer Piano Mfg. Co. v. National Fire Extinguisher Co., (C. C. A. 7th Cir. 1906) 148 Fed. 150, 78 C. C. A. 293.

1. Verification of Plea

Under this section the verification to a plea may be made sufficient by taking the oath in open court at the time of the trial. Edgefield Bank v. Farmers' Cooperative Mfg. Co., (C. C. A. 8th Cir. 1892) 52 Fed. 96, 2 U. S. App. 283, 2 C. C. A. 637.

j. Bill of Particulars

Under this section a federal court may allow a defective bill of particulars to be amended. Pott v. Arthur, (1878) 15 Blatchf. 314, 19 Fed. Cas. No. 11,319. But where a bill of particulars served by the plaintiff in a suit against a collector of customs to recover duties alleged to have been illegally exacted did not contain all the items required by R. S. sec. 3012 (since repealed), it was held that an amendment would not be allowed. Sherman v. Hedden, (S. D. N. Y. 1887) 32 Fed. 757.

And the court has power under this section to allow amendments to a bill of particulars in an action to recover an excess of customs duties after the thirty days provided by statute, but that discretion will be exercised only in extreme cases, and not to the extent of making the provisions of R. S. sec. 3012 of no effect. Pott v. Arthur, (1878) 15 Blatchf. 314, 19 Fed. Cas. No. 11,319; Richard v. Barney, (S. D. N. Y. 1887) 32 Fed. 581.

But an amendment to a bill of particulars in a suit to recover duties illegally exacted by collectors of customs will not be permitted when it introduce a new cause of action, or when it would be in violation of R. S. sec. 2931 since repealed, limiting the time for such suit. Neckerhoff v. Kootenay, (S. D. N. Y. 1887) 29 Fed. 781.

IX. Verdicts

Power of court generally.—A court is authorized under this section to give a judgment as the right appears without requiring any specification or writ of error to the verdict. U. S. v. Quantity Manufacturerized Tobacco, 1872 3 beam. 635, 27 Fed. Cas. No. 18,786.

And a verdict may be amended so that a new verdict may be given, not because the court has power to set aside the judgment, but because the court is authorized by statute to give a new judgment, and the court has power to set aside the original judgment, and to the same end the power of the court under the statute of frauds, even after error brought, if within a reasonable time, such amendments may be allowed, and it is a salutary practice thus to cure mere formal defects. Murphy v. Stewart, (1844) 2 How. 263, 11 U. S. (L. ed.) 261.


The statute of limitations applies to defects in verdicts; and where the court can see from the verdict what was the substantial finding of the jury, and that it covered what was in issue, the judgment will not be reversed by reason of any defect in the form of the verdict. Parks v. Turner, (1851) 12 How. 39, 13 U. S. (L. ed.) 883.

But where a verdict is responsive to no issue made by the pleadings and under the state practice the pleadings cannot be amended, the court, if it considers the case, will make such amendment. Phillips, etc., Constr. Co. v. Seymour, (1875) 91 U. S. 646, 23 U. S. (L. ed.) 341.

Instance of amendments allowed.—A verdict and judgment upon one demurr, no notice being taken of the issues on the other, will not be reversed; it is a formal defect and cured by this section. Van Ness v. U. S. Bank, (1839) 13 Pet. 17, 10 U. S. (L. ed.) 38.

Nor is it error to allow plaintiff to remit an excess of interest found in the verdict, and then affirm the verdict so amended. Paige v. Loring, (1873) 133 Fed. 275, 16 Fed. Cas. No. 10,672.

A verdict may also be amended by changing the term "issue" from the singular to the plural. Laborer v. Cooper, (1868) 7 Wall. 563, 19 U. S. (L. ed.) 131.

And where a verdict clearly manifested the intention and finding of the jury upon the issue submitted to them, although expressed in bad English, the court rightfully gave judgment upon it. Snyder v. U. S., 1884 132 U. S. 216, 10 S. Ct. 118, 28 U. S. (L. ed.) 69.

At the time when a verdict was rendered a motion was made in arrest of judgment for a misstatement of counts, and the judgment was ordered to be arrested, but no formal judgment that the plaintiff take nothing by his writ nor evidence whatever was entered. At the second term following the court, on motion to set aside the judgment, overruled the motion, and the court was also of opinion that it was not competent to be raised on the one event to set aside the judgment and ordered the verdict to be set aside on the other event to which it appeared the evidence was adduced, and entered a judgment was then taken for the plaintiff. It was held then the power of the court, and of the record was within the power of the court under the statute of frauds.
JUDICIARY


For summary of amendments of verdict, see note to Gay v. Joplin, (E. D. Mo. 1882) 13 Fed. 450.

X. JUDGMENTS

Order for judgment.—The absence of a formal order that a bill should be taken pro confesso against a defendant is a mere defect of form which the court is required to disregard by the above section. Linder v. Lewis, (S. D. N. Y. 1880) 1 Fed. 378.

Judgments.—This section gives no authority to the courts of the United States to make any amendments in judgments except as to defects and want of form. Albers v. Whitney, (1840) 1 Story 310, 1 Fed. Cas. No. 137.

At common law no judgment was amended after the term at which it was entered. Albers v. Whitney, (1840) 1 Story 310, 1 Fed. Cas. No. 137.

Omission to enter judgment.—The omission of the clerk to enter on the record the judgment upon the demurrer, or to state its waiver if it was abandoned, would be merely a clerical mistake, and may be cured by this statute. Townsend v. Jenison, (1849) 7 How. 706, 12 U. S. (L. ed.) 880.

An omission to enter a formal judgment on one of two pleas, which was demurred to, and which showed no defense, is cured by the statute of Jeofails. Morsell v. Hall, (1851) 13 How. 212, 14 U. S. (L. ed.) 117.

Appointment of master.—The irregularity in case of consent of not specifying the consent in the decree for the appointment of a deputy clerk as a master as a special reason is a mere defect or want of form which may be supplied by amendment under this section. Fischer v. Hayes, (S. D. N. Y. 1884) 22 Fed. 92.

XI. FIERI FACIAS

A fieri facias issued in the names of two plaintiffs after one of them is dead is irregular and defective; but such defect may be amended under the authority given by this section if the matter be regularly brought before the court. Lane v. Beltzhoover, (1840) Taney 110, 14 Fed. Cas. No. 8,047.

XII. RETURNS

A return on a process served by a marshal may be amended to conform to the facts. Cushing v. Laird (1870) 4 Ben. 70, 6 Fed. Cas. No. 3,508.

The return on a summons may not be amended by a sheriff where the cause has been removed from the state court to the federal court. Tallman v. Baltimore, etc., R. Co., (S. D. Ohio 1891) 45 Fed. 156.

Return of fieri facias.—The marshal may amend his return of a fieri facias after the return day, according to the truth of the case, by stating the sale, etc., from his sales book. Linthicum v. Remington, (1839) 5 Cranch C. C. 546, 15 Fed. Cas. No. 8,377.

XIII. WRIT OF ERROR

See also R. S. sect. 1005, infra, p. 196.

A writ of error may be amended by the citation to correct a clerical error. McVeigh v. U. S., (1869) 8 Wall. 640, 19 U. S. (L. ed.) 511.

And it has been held that such a writ may be amended by bringing a new party defendant. Teel v. Chesapeake, etc., R. Co., (C. C. A. 6th Cir. 1913) 204 Fed. 914, 123 C. C. A. 210, wherein the court said: "Since the enactment of the first Judicial Act of the United States, liberal statutory provisions have been maintained for curing defects of this character wherever proceedings on error or appeal have been instituted in due time, though defectively, and could be remedied without causing injustice; and numerous illustrations may be found of a tendency in the courts to apply such legislation in the spirit in which it was evidently enacted."

XIV. APPEAL AND SUPERSEDING BONDS

A defect in appeal bond may be cured at any time before a suit is finally acted upon. Deen v. Hemphill, (1831) Hemph. 184, 7 Fed. Cas. No. 3,736a.

In Ferguson v. Dent. (W. D. Tenn. 1888) 29 Fed. 1, the court questioned the authority of a Circuit Court after appeal to allow an amendment to a superseding bond, but permitted the amendment pro forma.

Sec. 955. [Death of parties.] When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. The defendant shall answer accordingly; and the court shall hear and determine the cause and render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator, having been duly served with a scire facias from the office of the clerk of the court where the suit
is depending, twenty days beforehand, neglects or refuses to become party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party. The executor or administrator who becomes a party as aforesaid, shall, upon motion to the court, be entitled to a continuance of the suit until the next term of said court. [R. S.]

The entire Act of March 3, 1875, ch. 137, 15 Stat. L. 470, was repealed by Judicial Code, § 297, supra, this title, vol. 5, p. 1085. Section 9 of said repealed Act of 1875 provided as follows:

"SEC. 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representatives of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representative shall be served on the Supreme court, as provided in case of the death of a party after appeal taken or writ of error brought." [18 Stat. L. 475.]

Suits against public officer not to abate by his death, see the Act of Feb. 8, 1899, ch. 121, in title PUBLIC OFFICERS.

I. Survival of action, 112
II. Revival of action, 113

I. SURVIVAL OF ACTION

Purpose of section.—The enactment of this section was to provide against the abatement of actions which would otherwise abate at common law. In re Connoway, (1900) 178 U. S. 421, 20 S. Ct. 951, 44 U. S. (L. ed.) 1134.

At common law all personal actions abated on the death of the defendant, but by aid of this statute an action may be revived against the personal representative of a defendant who dies pending the suit against him. U. S. v. Bullard, (S. D. Ala. 1900) 103 Fed. 256.

Scope of section.—This statute embraces all cases of death before final judgment, and is more extensive than the English statutes, 17 Car. II., 8 & 9 William III. A death may happen before or after plea pleaded, before or after issue joined, before or after a verdict, or before or after interlocutory judgment, and in all these cases the proceedings are to be exactly as if the executor or administrator were a voluntary party to the suit. Hatch v. Eustis, (1812) 1 Gall. 160, 11 Fed. Cas. No. 6.207.

This section and the one following authorize the executor or administrator to prosecute or defend in those cases only in which the cause of action survives by law, and do not undertake to define what those cases are. Martin v. Baltimore, etc., R. Co., (1894) 151 U. S. 673, 14 S. Ct. 533, 33 U. S. (L. ed.) 311.

Real actions.—It was early said by the Supreme Court in Macker v. Thomas, (1822) 7 Wheat. 630, 5 U. S. (L. ed.) 515, that this section is confined to personal actions, as the power to prosecute or defend is given to the executor or admin-

Nature of survival.—The survivability "of the cause of action" is a right of property and not a matter of procedure as is the survivability of "a suit" pending at the time of the death. Warren v. Furnasheim, (W. D. Tenn. 1888) 35 Fed. 691, affirming Anderson v. Kissam, (S. D. N. Y. 1888) 35 Fed. 690.


II. REVIVAL OF ACTION


The survivability of "a suit" pending at the time of the death is a matter of procedure as distinguished from the survivability of the "cause of action," which is a right of property. Warren v. Furnasheim, (W. D. Tenn. 1888) 35 Fed. 691, affirming Anderson v. Kissam, (S. D. N. Y. 1888) 35 Fed. 690.

Proceedings for revivor essential.—Where, after the sustaining of a demurrer to a bill to set aside a divorce decree, with leave to amend, complainant elected to stand by his bill, after which defendant died, it was held that it was improper, without revivor, for the court, on suggestion of defendant's alleged surviving wife, who had not previously been a party to the proceedings, to render judgment of dismissal nunc pro tunc as of the day following the expiration of the time allowed the complainant to amend, and complainant's prayer for appeal having been allowed, to direct service of citation on defendant's administrator and such alleged surviving wife. McNeil v. McNell, (C. C. A. 9th Cir. 1909) 170 Fed. 298, 95 C. C. A. 486.

State law governs.—The plaintiff's right of revivor, on the death of the defendant, is governed by the law of the state where the suit is brought and prosecuted. Spaeth v. Sells, (S. D. Ohio 1909) 178 Fed. 797.

This section is governed by the statutes of limitations of the states in which the action is had. Barker v. Ladd, (1874) 3 Sawy. 44, 2 Fed. Cas. No. 990; Butler v. Poole, (W. D. Tenn. 1890) 44 Fed. 587.

Thus the right of a plaintiff, in an action at law for the infringement of a patent, to a scire facias to revive the action against the executor of a deceased defendant, as provided for by this section, is subject to the limitation imposed by the state statutes upon suits against executors, for the purpose of facilitating the settlement of estates. Green v. Barrett, (C. C. Mass. 1903) 123 Fed. 349.

The question of the revivor of actions for personal injuries, brought in a federal court or removed from a state court to a

If at the time the action is brought in a state court the statutes of the state allow a revivor of it on the death of the plaintiff before final judgment—even where the right to sue is lost when death occurs before any suit is brought—it is a case not distinctly nor necessarily covered by this section. Baltimore, etc., R. Co. v. Joy, (1899) 173 U. S. 226, 19 S. Ct. 387, 43 U. S. (L. ed.) 677. See further R. S. sec. 914, supra, p. 21.

Effect of state statutes.—A state statute cannot deprive a federal court of jurisdiction already vested in it and expressly continued by an Act of Congress; therefore it is not good cause of demurrer to a bill of revivor in a cause pending in a federal court that a state statute provided an action against an executor to be presented in one of its courts. Fitzpatrick v. Domingo, (E. D. La. 1882) 14 Fed. 216.


Revivor of judgments.—"We are not aware of any federal statute regulating the revivor of judgments, unless the process acts, giving the same remedies of execution as are known to the state laws, may be said to require us to follow the state practice in that regard." Devereaux v. Brownsville, (W. D. Tenn. 1887) 29 Fed. 742.

Competency of representative.—The section authorizing the continuance of a pending suit in the name of an executor or of an administrator refers to an executor or administrator who was competent to begin the action, and a person, whether executor or administrator, who has not taken out letters testamentary or of administration on the estate in the state in which the action is brought, is not competent to proceed to final judgment. Aspden v. Nixon, (1846) 4 How. 467, 11 U. S. (L. ed.) 4059; Stacy v. Thrasher, (1848) 6 How. 44, 12 U. S. (L. ed.) 337; Melius v. Thompson, (1858) 1 Cliff. 125, 16 Fed. Cas. No. 9405; Kropff v. Foth, (C. C. N. J. 1833) 19 Fed. 200.


Proviso executor.—A suit cannot be instituted against executors in a federal court in a state other than the one in which they have taken out letters, where jurisdiction depends on diversity of citizenship, nor can a pending suit against the testator be revived against such executors unless ancillary letters are taken out in the state where the suit is pending. Lawrence v. Southern Pac. Co., (E. D. N. Y. 1910) 177 Fed. 547.

So, in C. F. Stromeyer Co. v. Aldrich, (S. D. N. Y. 1915) 227 Fed. 960, a motion by the plaintiff to revive against the executors of the defendant was denied. It appeared that the defendant, a citizen of Rhode Island, died after service of the summons and complaint upon him, and letters testamentary upon his estate were never served on the estate in Rhode Island. The plaintiff sought to revive the action against his executors, who were citizens and residents of Rhode Island, had no assets of the estate within the state of New York and had never been served with notice of the application. The court said: "If the executors had received letters from a surrogate of New York they could be brought in as parties, irrespective of any question of their citizenship. If the court, however, has no jurisdiction of the executors because they are not qualified to sue or be sued here, there can be no revivor. It is not shown that they are so qualified under the laws of Rhode Island and they would not be at common law."

A suit in a federal court may be dismissed on motion for want of jurisdiction on the death of a defendant who is an indispensable party, where such fact plainly appears from the pleadings, and the executors of the decedent cannot be brought in; but if there is doubt on the question, and it appears that the suit may be separable, it should not be so dismissed, nor when there is a possibility of revival against the executors, until after the lapse of a reasonable time. Lawrence v. Southern Pac. Co., (E. D. N. Y. 1910) 177 Fed. 547.

Necessity of service of summons.—In those cases in which the filing of the complaint is the commencement of the suit, if a defendant dies, and no service of summons has been made upon him, but the complaint has been filed, his representative may be made a party by service facias, especially where he is not the sole defendant and the action survived as to the other defendant and service has been made upon him. In re Conway, (1800) 175 U. S. 421, 20 Law. 851, 44 U. S. (L. ed.) 196.

Pleading.—A proceeding against a representative of the deceased is but a continuation of the original action, and the
defendant upon seire facias can plead only what the intestate could have pleaded. M'Knight v. Craig, (1810) 6 Cranch 183, 3 U. S. (L. ed.) 183. 

Necessity of supplemental pleading.— The filing of a supplemental pleading showing the transfer of the original plaintiff's cause of action to a substituted plaintiff, an administrator, is not essential to recovery by such administrator. Equitable L. Assur. Soc. v. Trimble, (C. C. A. 9th Cir. 1897) 83 Fed. 86, 49 U. S. App. 565, 27 C. C. A. 404.

Time of appearance.— Under this Act the executor or administrator may come in voluntarily and instantaneously and be made a party on motion without a seire facias. Griswold v. Hill, (1825) 1 Paine 463, 11 Fed. Cas. No. 5,834.

Laches by representative.— No period of time is prescribed by this statute within which an executor or administrator must come in voluntarily and apply to be substituted; therefore no laches can be predicated of the delay of the party in the opposite party could, under the same statute, at any time, compel him to come within twenty days and be substituted. The Ship Norway, (1867) 1 Beem 493, 18 Fed. Cas. No. 10,367.

Continuance.— The executor or administrator may proceed to trial immediately if he pleases, if the cause is ready for trial, but he may have a continuance if he wishes, but no such indulgence is allowed by the Act to the opposite party, for his situation is not altered by the substitution of the representatives of the deceased party. Griswold v. Hill, (1825) 1 Paine 463, 11 Fed. Cas. No. 5,834.

Appeal.— Inasmuch as a bill of revivor is not an original suit, but is merely a continuance of an original suit, it is not clear that an order or decree thereon would be a final appealable decision. When a bill of revivor is dismissed, as this would practically determine the original cause by leaving it in a situation in which no further proceedings could be had in it, doubtless an appeal would lie in favor of the party seeking a revival; but if the revival is allowed, the order or decree allowing it does not finally dispose of the cause, and can be reviewed if it becomes necessary by an appeal from the final decree therein. Mackaye v. Mallory, (C. C. A. 9th Cir. 1897) 79 Fed. 1, 45 U. S. App. 741, 24 C. C. A. 420, citing Buckingham v. McLean, (1851) 13 How. 150, 14 U. S. (L. ed.) 90; Milwaukee, etc., R. Co. v. Souther, (1864) 2 Wall. 520, 17 U. S. (L. ed.) 900.

In Fretz v. Stoner, (1874) 22 Wall. 198, 22 U. S. (L. ed.) 769, upon an appeal from a final decree in a cause in which a bill of revivor had been brought, the court considered the defenses which had been interposed by the answer to the bill of revivor.

In Terry v. Sharon, (1889) 181 U. S. 407, 9 S. Ct. 705, 33 U. S. (L. ed.) 94, the court held that an appeal by a defendant would lie from an order reviving a suit and admitting an executor in the place of the deceased complainant. But in that case the original suit had passed to a final decree and the defendant would have had no opportunity to review the order by appealing from that decree.

Under state statutes.—As to actions surviving under state statutes, see cases under R. S. sec. 914, supra, p. 21.

Sec. 956. [When one of several plaintiffs or defendants dies.] If there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant. [R. S.]

See note to preceding R. S. sec. 955. 
R. S. sec. 957 relates to judgments at return term against delinquents for public money, unless, etc., and is given in Claims, vol. 2, p. 215.


Survival of actions.— See the notes under R. S. sec. 955, supra, p. 111.

Compliance with section — Necessity of revivor.—A suggestion on the record, either by plaintiffs or defendants, that some of the plaintiffs are dead, constitutes a substantial compliance with this section and no revivor is necessary. Thomas v. Green County, (C. C. A. 6th Cir. 1908) 159 Fed. 339, 89 C. C. A. 405, affirmed (1909) 211 U. S. 598, 29 S. Ct. 168, 53 U. S. (L. ed.) 313.

Waiter.— Where the right to proceed with the suit is absolute, the statement of the death is a matter of form which may be waived by a failure to make seasonable objection, or if objection be made, by stipulating to go to trial on the merits and
taking the chances of a judgment. Thomas v. Green County, (C. C. A. 6th Cir. 1898) 159 Fed. 339, affirmed (1909) 211 U. S. 598, 29 S. Ct. 168, 53 U. S. (L. ed.) 343. Action by joint owners of bonds—An action brought in a federal court by plaintiffs, as joint owners of bonds, does not abate by the death of one of the plaintiffs, but under this section the suit may proceed in the name of the survivors upon the suggestion of the death upon the record. Thomas v. Green County, (C. C. A. 6th Cir. 1906) 146 Fed. 969, 77 C. C. A. 487.

Action against partnership.—Where, in a cause of action that survives and is against a partnership, one of the partners dies, and his representatives, although notified, do not appear, an appeal from the final decree may proceed at the suit of the survivors. Moses v. Wooster, (1885) 115 U. S. 285, 6 S. Ct. 38, 29 U. S. (L. ed.) 391, following M'Kinney v. Carroll, (1838) 12 Pet. 66, 9 U. S. (L. ed.) 1002.

Death of joint tortfeasor.—Where a suit for infringement of a trademark was instituted against two defendants, such infringement constitutes a tort for which both were liable, so that on the death of one the suit did not abate as to the other. Northwestern Consol. Milling Co. v. Callam, (E. D. Mich. 1910) 177 Fed. 786.


Sec. 958. [Suits under postal laws—judgment at return term, unless, etc.] In suits arising under the postal laws the court shall proceed to trial, and render judgment at the return term; but whenever service of process is not made at least twenty days before the return day of such term, the defendant is entitled to one continuance, if, on his statement, the court deems it expedient; and if he makes affidavit that he has a claim against the Post-Office Department, which has been submitted to and disallowed by the Sixth Auditor, specifying such claim in his affidavit, and that he could not be prepared for trial at such term for want of evidence, the court, if satisfied thereof, may grant a continuance until the next term. [R. S.]


Sec. 959. [Suits on debentures—judgment at return term unless, etc.] In all suits for the recovery of money upon debentures issued by the collectors of customs, under any act for the collection of duties, it shall be the duty of the court to grant judgment at the return term, unless the defendant, in open court, exhibits some plea, on oath, by which the court is satisfied that a continuance is necessary to the attainment of justice; in which case, and not otherwise, a continuance until the next term may be granted. [R. S.]


Sec. 960. [Suits on bonds for recovery of duties—judgment at return term, unless, etc.] When suit is brought on any bond for the recovery of duties due to the United States, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court, (the United States attorney being present,) makes oath that an error has been committed in the liquidation of the duties demanded upon such bond, specifying the errors alleged to have been committed, and that the same have been notified in writing to the collector of the district before the said return term; whereupon a continuance may be granted until the next term, and no longer, if the court is satisfied that such continuance is necessary for the attainment of justice. [R. S.]

Act of March 2, 1799, ch. 22, § 66, 1 Stat. L. 676.
The object of this section is to secure the prompt collection of duty indisputably ascertained. When there are errors in calculating the duties, and they are alleged on affidavits, a delay of one term is allowed. Ex p. U. S., (1834) 8 Pet. 700, 8 U. S. (L. ed.) 1094.

Delay to obtain evidence.—Under this section the court is not forbidden to grant to the defendant such delay as may be necessary to obtain evidence when there is a real defense. Ex p. U. S., (1834) 8 Pet. 700, 8 U. S. (L. ed.) 1094.

Construction generally of provision.—As to this provision it is said in one of the earlier cases: "In our opinion, upon the true interpretation of this provision, the legislature intended no more than to interdict the party from an imparlance, or any other, means or contrivances for mere delay. He should not by sham pleadings, or by other pretended defenses, be allowed to avail himself of a postponement of judgment to the injury of the government, and in fraud of his obligation to make a punctual payment of the duties when they had become due. But we perceive no reason to suppose, that the legislature meant to bar the party from any good defense against the suit, founded upon real and substantial merits. And certainly we ought not, in common justice, to presume such an intention without the most express declarations. To deprive a citizen of a right of trial by jury, in any case, is a sufficiently harsh exercise of prerogative, not to be raised by implication from any general language in a statute. But to presume that the government meant to shut out the party from all defenses against its claims, however well founded in law and justice, without a hearing, would be pressing the doctrine to a still more oppressive extent. We think the language of the sixty-fifth section neither requires nor justifies any such interpretation. It merely requires that judgment should be rendered at the return term, unless delay shall be indispensable for the attainment of justice: and there is no impossibility or impracticability in the court's making such rules in relation to the filing of the pleadings, and the joining of issues in this peculiar class of cases, as will enable the causes to be heard and tried upon the merits, and a verdict found at the return of the court. It is a matter of common practice in all classes of cases at least in one of the circuits, and no inconvenience or hardship has hitherto grown out of it. Special exceptions, founded upon extraordinary circumstances, are and may be disposed of upon special application for delay." Ex p. Davenport, (1832) 8 Pet. 661, 8 U. S. (L. ed.) 537.

Delay to obtain evidence.—Under this section the court is not forbidden to grant to the defendant such delay as may be necessary to obtain evidence when there is a real defense. Ex p. U. S., (1834) 8 Pet. 700, 8 U. S. (L. ed.) 1094.

Sec. 961. [Judgment for sum due in equity on bonds, etc.] In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or non-performance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury. [R. S.]


R. S. secs. 962 and 963 relate to judgments for duties and interest on bonds for duties, and are given in Customs Duties, vol. 2, p. 1192.

R. S. sec. 964 relates to interest on balances due Post Office Department, and is given in title POSTAL SERVICE.

R. S. sec. 965 relates to interest on debentures, and is given in Customs Duties, vol. 2, p. 1132.

R. S. sec. 966 relates to interest on judgments, and is given in Judgments, vol. 4, p. 604.

R. S. sec. 967 relates to lien of judgments, and is given in Judgments, vol. 4, p. 606.

R. S. secs. 968-979, 981-984 relate to costs, and are given in Costs, vol. 2, pp. 636-646.

R. S. secs. 985-993 relate to executions, and are given in Execution, vol. 3, pp. 229-239.

R. S. sec. 994 relates to death of marshal after levy or after sale, and is given in Execution, vol. 3, p. 239.

R. S. secs. 995 and 996 relate to moneys paid into court, and are given in title MONEY PAID INTO COURT.
Relation to common law.—While the courts of the United States in actions at law undoubtedly possess the power conferred upon the courts of common law by the statute of 8 and 9 William III., and while recognition of such power was embodied in the original Judiciary Act of 1789, reproduced in this section, the duty of such courts to give effect to the plainly expressed will of the contracting parties is as imperatively necessary now as it was at common law after the adoption of the English statute. Sun Printing, etc., v. S. r. Moore. (1902) 183 U. S. 642, 22 S. Ct. 240, 16 U. S. (L. ed.) 366.

Application generally.—The rule declared by this statute is to be applied generally in proper cases in the courts of the United States. The S. Oteri. (C. C. A. 5th Cir. 1894) 67 Fed. 146, 30 U. S. App. 10, 14 C. C. A. 344..

This section, however, does not apply in cases heard on agreed facts or tried upon pleadings and proofs. Farrar v. U. S., (1831) 5 Pet. 373, 8 U. S. (L. ed.) 159; In re Merchants' Bank. (1831) 12 How. 156, 13 U. S. (L. ed.) 836.


And where there were joint and several bonds given for duties, and the United States had recovered a joint judgment against all the obligors, and then the surety died, it was held not to be allowable for the United States to proceed in equity against the executor of the decease surety for the purpose of holding the assets responsible. U. S. r. Price. (1850) 9 How. 53, 13 U. S. (L. ed.) 56.

Hearing of defendants.—Where a breach of a bond appears upon demurrer the defendants are not entitled to a hearing in equity upon the making up of the judgment on the bond under this section. Greely v. U. S., (1852) 9 Wheat. 257, 5 U. S. (L. ed.) 611.

Ascertaining amount due.—In cases where the sum is uncertain and a jury is requested by either party the court may either direct a writ of inquiry or may order a jury immediately to ascertain the sum justly due to the plaintiff. If the sum for which judgment should be rendered be not uncertain the court is to ascertain it; if uncertain, and a jury be not requested, still the court may in its discretion ascertain it or submit the matter to a jury. But under no circumstances can a final judgment be entered for the forfeiture or penalty of the bond in the cases mentioned in this section. Gurney v. How. (1860) 6 Blatchf. 499, 11 Fed. Cas. No. 5873.

The word "contemplatory," judgment is rendered on a bond with a collateral condition, the jury, if required by either party, must ascertain the damages if they be uncertain; and if not so, the court must.


If the sum for which judgment should be rendered is certain, as where the suit is upon a bill of exchange or promissory note, the computation may be made by the court, or, what is more usual, by the clerk; and the same course may be pursued even when the sum for which judgment should be rendered is uncertain, if neither party request the court to call a jury for that purpose. Aurora v. West. (1866) 7 Wall. 92, 19 L. S. (L. ed.) 42.

But where the sum for which judgment ought to be rendered is uncertain because the sums named in the condition of the bond are expressed in foreign money, the sum for which judgment should be rendered may be assessed by a jury at the request of either party. Gurney v. Hoige. (1869) 6 Blatchf. 499, 11 Fed. Cas. No. 5875.

But when an importer's redelivery bond was conditioned that the penalty of the bond should be double the value of each importation and that the value of the importation should not affect the liability in cases of violation, it was decided by the United States Supreme Court that the recovery should be for the stipulated sum and was not limited to the damages actually sustained nor affected by the provisions of this section. U. S. r. Dieckrohff. (1906) 202 U. S. 302, 26 S. Ct. 604, 50 U. S. (L. ed.) 1041.

In a suit upon a bond given to secure the performance of a contract by a certain time, in which bond it was stipulated that the sum named should be regarded as liquidated damages, it has, however, been held that, notwithstanding such stipulation, it was error to direct a verdict for the full sum and that the amount designated should be regarded as a penalty both in view of this section and also in the recent adjudications on the subject. The court said: "This rule Congress has provided for the guidance of the federal courts in all cases where it is applicable. It is just, benign, and equitable, while the rule which the court has applied in the case at bar seems harsh, inequitable, and quite unnecessary. Aside from the above statute, which defines the attitude of the government towards these cases, and prescribes the rule it is willing to abide by, we think, under the more recent adjudications of the courts, both in this country and in England, the $20,000 mentioned in the bond in this case should be construed as a penalty, rather than as stipulated damages to be recovered upon any slight breach of the contract, when nominal damages or small actual damages to be assessed by the court, would in the conditions more justly and equitably. If the parties could at will change what is essentially a penalty, and properly intended to enforce the obligations of the contract, into stipu-
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In another case where a bond was given for the care of a feeble-minded alien and it was claimed that the recovery thereon should be for the full amount of the obligation, the court said, after referring to R. S. sec. 961: "The rule is that, where the parties to a contract have agreed that a sum shall become payable on a single event, such sum may be regarded as liquidated damages, but where the sum is made payable to secure the performance of several stipulations of varying degrees of importance, it is clear the stipulated sum must be regarded as a penalty, and not as liquidated damages." A court does not, of course, hold the breach averred been in the performance of the only condition to be performed, the argument addressed to us would have force." U. S. v. Rubin, (E. D. Pa. 1915) 227 Fed. 938.

A written stipulation is not essential to a waiver of a jury to assess damages on a bond after default under this section. Brock v. Fuller Lumber Co., (C. C. A. 1st Cir. 1907) 153 Fed. 272, 82 C. C. A. 402, wherein it appears that plaintiff sued on a contractor's bond to secure performance of a written contract. On the trial, defendants' attorney stated that defendants might be defaulted, but that he "would like to be heard on the question of damages," and immediately thereafter suggested that the case be sent to an auditor. This was agreed to, and, though a jury was then present, an auditor was appointed, and no request was made for a jury trial at any time during the term, nor four months after default, and after defendants had learned that the auditor's report was unfavorable, when they applied for an assessment of damages by a jury, as authorized by this section, and it was held that the finding of the Circuit Court that the request for a jury trial was too late should not be disturbed. Liability of surety.—It is not intended by this section to enlarge the liability of a surety on official bonds. U. S. v. Hills, (1878) 4 Cliff. 618, 26 Fed. Cas. No. 15,369.

Sec. 750. [Final record, how made in equity and admiralty causes.] In equity and admiralty causes, only the process, pleadings, and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record. [R. S.]

See R. S. sec. 696, infra, p. 174, and the Act of Feb. 16, 1875, § 1, infra, p. 139.

Construction generally.—"Apparently section 750 makes a provision which is generally applicable to equity and admiralty causes for the making of a final record which shall serve the purposes of the former practice of enrolling the decree in courts of chancery, and its proper construction should be made upon due regard to the former practice in respect to the matter therein provided for. . . . By the former practice there was not customarily any enrollment if nothing was determined in the case; that is to say, if no decree or order had been entered which adjudicated any right or advantage to one party or to the other upon the matter of the pleadings. The essential purpose of the practice of enrollment was to provide a permanent memorial upon which the rights of the parties as adjudicated could be thereafter more easily preserved and certainly shown." Consolidated Store-Service Co. v. Dettenthaler, (W. D. Mich. 1899) 93 Fed. 307.

Effect of later Acts.—The Act of Feb. 16, 1875, ch. 77, infra, p. 130, limiting the review in admiralty cases, has made no change in the law prescribing what should be included in the transcript sent up on appeal. The Adriatic, (1890) 103 U. S. 730, 26 U. S. (L. ed.) 605.

Not prohibitive of sending up other papers on appeal.—The record here mentioned is the technical record on appeal. This section does not prohibit other papers or documents being sent up to the appellate court. Southern Bldg., etc., v. Carey, (W. D. Tenn. 1892) 117 Fed. 325.

What included in transcript.—Prior to the abolishment of the Circuit Court, it was said as to a transcript sent from the District to the Circuit Court, in an admiralty appeal: "The 'transcript' sent up from the District Court, when filed in the Circuit Court, becomes and is a part of the proceedings in the Circuit Court; and as it contains the 'libel,' the 'process,' and the 'pleadings' in the cause, without which the final record in the Circuit Court would not 'show the jurisdiction of the court, and the regularity of the proceedings,' it would seem such pleadings and process must be recorded, by the express provisions of sec-
to the limitation imposed by the form of prior appeal, if there has been any; and the nature of any portions omitted, even under a joint stipulation, should be indicated, so that the appellate court, which has its own interests and rights in the conduct of the transcript, may be advised concerning them. But as to the proofs, entries, and papers on the necessary on the hearing of the appeal, required by Rev. Stat. § 808, the decisions cited refer to the absence of a joint stipulation, to the selection made by the appellant. The good faith and discretion of the solicitor are necessarily the ordinary and sufficient guide in determining this matter, though, as the clerk is made by the statute the examining officer, some duty rests on him by implication, and he might well refuse to certify a transcript with such palpable and substantial omission or, in his opinion, to justify his assuming the responsibility of refusal.

In that event the appellant, assuming himself aggrieved, has his remedy by applying to the appellate court for a mandate, and perhaps by seeking summary instructions to the clerk from the judge appointed from. If the party appealed against issues the certificate of the clerk incorrect, or the transcript incomplete, his remedy is not by motion to dismiss, unless in extreme cases, but he may have ample relief by other methods, which have been usually permitted by the supreme court," Nashman, et al. R. Corp. v. Boston, etc., etc. R. Corp. C. C. A. 1st Cir. 1904. 61 Fed. 255. 20 U. S. App. 50. 9 C. C. A. 445.

Sec. 722. [Proceedings, civil and criminal, in vindication of civil rights.] The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this title, and of Title "Civil Rights," and of Title "Crimes," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are applicable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty.

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Code, § 297, supra, this title, vol. 5, p. 1082, and said paragraphs 12 and 16 were merged in Judicial Code, § 24, par. Fourteenth, supra, this title, vol. 4, p. 840.

For the provisions of Title "Civil Rights," to which the text section refers, see Civil Rights, vol. 2, p. 126 et seq.

For a reference to the provisions of the Title "Crimes," to which the text section

There is no ambiguity whatever in this section; nor can there be any question as to its general application. U. S. v. Mitchell, (C. C. Ore. 1905) 136 Fed. 886.

But it was said by Clifford, J., in Tennessee v. Davis, (1879) 100 U. S. 237, 25 U. S. (L. ed.) 648, that "examined in the most favorable light, the provision is a mere jumble of federal law, common law, and state law, consisting of incongruous and irreconcilable regulations, which in legal effect amounts to no more than a direction to a judge sitting in such a criminal trial to conduct the same as well as he can in view of the three systems of criminal jurisprudence, without any suggestion whatever as to what he shall do in such an extraordinary emergency if he should meet a question not regulated by any one of the three systems."

Reference to former text. This section has reference not to the extent or scope of jurisdiction nor to the rules of decision, but to the forms of process and remedy. In re Stupp, (1875) 12 Blatchf. 501, 23 Fed. Cas. No. 13,563.

Application of state laws. Under R. S. sec. 722 (the above text) and 800 (now Judicial Code, § 275, supra, this title, vol. 5, p. 1063) the court has the right, in every case in which there is no express provision of the federal statute, to apply laws of the state in which the court is held. U. S. v. Mitchell, (C. C. Ore. 1905) 136 Fed. 890.

Jurisdiction and procedure in habeas corpus. It was held that the jurisdiction conferred on the Circuit Court in regard to habeas corpus was to be exercised and enforced in conformity with the laws of the United States, and in extradition cases in conformity with the laws in regard to the proceedings in extradition, and with the laws in regard to the appellate jurisdiction of that court, as well as in conformity with the laws in regard to writs of habeas corpus. In re Stupp, (1875) 12 Blatchf. 501, 23 Fed. Cas. No. 13,563.

Challenges to grand jurors. Where the matter presented to the court is one affecting the regularity of the organization of the grand jury, there being no federal statute regulating challenges to grand jurors, the federal courts are authorized under this section to conform their rulings to the practice which obtains in the state court. U. S. v. Eagan, (E. D. Mo. 1887) 30 Fed. 608.

Sec. 566. [Trial of issues of fact.] The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury. In causes of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons burden or upward, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between places in different States and Territories upon the lakes and navigable waters connecting the lakes, the trial of issues of fact shall be by jury when either party requires it. [R. S.]


As explained in cases cited below in this note, this section is now qualified by the provision in R. S. sec. 649, infra, p. 130, authorizing waiver of a jury by stipulation in writing.

As to trial by jury for an advisory verdict in patent cases in equity, see the Act of Feb. 16, 1875, ch. 77, § 2, in title Patents.

As to trial by jury in causes of admiralty and maritime jurisdiction on the instance of the court, see the Act of Feb. 16, 1875, ch. 77, § 1, infra, p. 130.

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I. INTRODUCTORY


II. TRIAL BY JURY


Present rule stated.—At the present time a trial of issues of fact without a jury may be had in the District Court, but the adoption of the Judicial Code which abolished the Circuit Courts, in effect merged with the District Courts all the machinery for disposing of business which the Circuit Courts possessed, so that the former rule that a trial in the District Court without a jury was not judicial in its nature but merely as an arbitration, no longer applies. Nashville Interurban Ry. v. Barnum, (C. C. A. 2d Cir. 1914) 212 Fed. 634, 129 C. C. A. 170, wherein the court said: "Although we form the Judicial Code abolished the Circuit Courts and turned their business over to the District Courts, it seems to us that what Congress intended was a merger of the Circuit Courts into the District Courts, and that in transferring to the District Courts the business of the Circuit Courts, there was given to the District Courts, under the section of the Judicial Code above quoted, all the machinery for disposing of business which the Circuit Courts possessed. We are
unable to understand that section in any other way. It is also illuminative of this intent that Congress did not repeal the particular section which provided for trial by the Circuit Courts under writs of injunction. If the intention had been that thereafter all cases tried in the District Courts, whether original or transferred, should be tried only under the old District Court system, the section became obsolete and was without any reason for its retention. We are therefore forced to the conclusion that the present case must be treated by us precisely as it would have been treated had the trial taken place in the old Circuit Court under the practice which Congress had once approved for that court and which it has never disapproved. We must therefore accord to findings of fact, in a case tried to the court without a jury, there being a stipulation in writing waiving the jury, the same effect as we would give to a verdict, as said by Mr. Justice Miller in Bassett v. U. S., (1869) 19 Wall. 38, 19 U. S. (L. ed.) 648]."

It must be borne in mind as regards trial without a jury that the Constitution of the United States provides that crimes as distinguished from petty offenses can only be tried by a jury. Frank v. U. S., (C. C. A. 6th Cir. 1911) 192 Fed. 884, 113 C. C. A. 186.

III. ADMIRALT

In general.—It was said by Brown, D. J., in The Empire, (E. D. Mich. 1884) 19 Fed. 558, referring to the clause in the text giving a right to trial by jury in certain admiralty cases, that "this somewhat unfortunate clause was introduced by the revisers into the statutes from a hasty dictum of Mr. Justice Nelson, in the case of The Eagle, (1888) 5 Wall. 15, 19 U. S. (L. ed.) 365, . . . but whatever be the origin of the case in point, there is no doubt that it is the law of the land and must be respected as such. There has been great difficulty, however, in determining in what cases and in what manner it is to be given effect. It creates what appears to be a very unjust discrimination in favor of the particular classes of vessels and causes of action enumerated in the act. Why it should be given in actions of contract and tort, and denied in those of salvage, general average, and prize, and why it should be limited to American vessels plying between domestic ports and denied to all foreign vessels, and to American vessels engaged in foreign trade, it is impossible to conceive." To the same effect see Gillet v. Pierce, (1875) Brown Adm. 553, 10 Fed. Cas. No. 5,437.

Unless given by statute, there is no right in admiralty to a trial by jury; and the party demanding a jury must bring himself by his pleadings within the provisions of the Act. Gillet v. Pierce, (1875) Brown Adm. 553, 10 Fed. Cas. No. 5,437.

The first provision in respect to trial by jury in admiralty cases is found in the Act of Feb. 26, 1845, part of which was retained in R. S. sec. 506. This act originally purported to give the District Courts jurisdiction of matters of contract and tort, arising in, upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed in the coasting trade and employed in the business of commerce and navigation between ports and places in divers states and territories, upon the lakes and navigable waters connecting the same, as is now possessed by the said courts in cases of like steamboats and other vessels employed in navigation and commerce upon the high seas. At the time this statute was adopted the admiralty jurisdiction was held to extend only to tide waters, so that it could not have been sustained if the admiralty jurisdiction had not been enlarged to apply to all waters navigable in fact, since the constitutional grant of admiralty could not have been extended by Congress. The Propeller Genesee Chief v. Fitzhugh, 12 How. 443, 13 U. S. (L. ed.) 1058; The Eagle, 9 Wall. 15, 19 U. S. (L. ed.) 365. By the latter case the portion of the Act of 1845 above quoted was held to have become inoperative as a grant of jurisdiction, because that jurisdiction was granted by the Constitution, and because the constitutional grant would otherwise be narrowed by that statute; but that the portion of the statute providing for a jury trial on request of either party was still in force. This part of the statute was preserved in R. S. sec. 666.

Territory affected.—The provisions for a jury trial "in causes of admiralty and maritime jurisdiction" apply only to the Great Lakes and water connected therewith, and then only to such issues of fact as arise in cases of contract or tort, the statute having no reference to foreign vessels or those trading between ports of the same state. The Western States, (C. C. A. 2d Cir. 1908) 159 Fed. 354, 86 C. C. A. 354, certiorari denied 210 U. S. 433, 28 S. Ct. 762, 52 U. S. (L. ed.) 1136.

The provisions of this section giving to either party the right to a jury trial in admiralty cases do not include the case of a libel against a vessel plying between ports within the judicial district and not engaged in commerce and navigation between places in different states. The City of Toledo, (N. D. Ohio 1896) 73 Fed. 220.

Nor are they applicable in a case of a vessel employed in navigating the rivers Monongahela and Ohio, particularly where employed in navigating between places in the same state. Bigg v. The Venture, (W. D. Pa. 1884) 21 Fed. 880.

In a case of contract or tort involving two vessels where either vessel is within the description of the statute, either party is entitled to demand a trial by jury. This
was the holding in a case of a libel for damages received by a vessel within the description of the statute through the negligence of a tug, a foreign vessel, while being towed from Chicago to Buffalo. The Erie Belle. (E. D. Mich. 1888) 20 Fed. 63.

Effect of verdict.—The verdict of a jury in these cases should be regarded only as advisory and will be ignored by the court where not consonant with any theory upon which the case was tried. The Empire. (E. D. Mich. 1884) 19 Fed. 558.

The provision . . . giving to either party the right to a trial by jury has not changed the powers of the admiralty judge, who is still responsible for whatever judgment is rendered in the admiralty proceedings. . . . The court may refer the questions to a jury, whose verdict will be only advisory.” Rieks, D. in the City of Toledo. (N. D. Ohio 1866) 73 Fed. 226.

In The Western States, (C. C. A. 2d Cir. 1903) 159 Fed. 354, 86 C. C. A. 354, certiorari denied 210 U. S. 433, 28 S. Ct. 763, 52 U. S. (L. ed.) 1136, a passenger filed a libel against a steamboat in rem, charging the owners with negligence in performing the contract for libellant’s transportation, and the issue was tried by a jury under this section. It was held that the verdict was not merely advisory, and that the power of the court can go no further than to grant a new trial, but that the district judge properly set aside a verdict for $16,000 on the ground that it was the result of passion and prejudice, or a misunderstanding of his charge, and entered a decree for libellant for $5,000.

Joinder of parties.—Where a trial by jury is demanded under this section in a suit for damages brought by a good many passengers on a vessel, against the vessel for being served with unwholesome food, the libelants will not be allowed to join in one suit, owing to the perplexity and confusion which would attend a trial in which there was a large number of libelants. The Rochester, (W. D. N. Y. 1915) 227 Fed. 203.

Sec. 648. [Issues of fact, when to be tried by jury.] The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section. [R. S.]


See R. S. sec. 568, supra, p. 121, and note thereto.

This section 648 was not among the sections named as repealed in Judicial Code, § 297, supra, this title, vol. 5, p. 1085.

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I APPLICATION OF SECTION TO DISTRICT COURTS

There are now no Circuit Courts, but the section is at present applicable to District Courts by virtue of section 201 of the Judicial Code, supra, this title, vol. 3, p. 1083. And see R. S. sec. 568, supra, p. 121.
Bankruptcy proceedings are equitable in character, and a trial of an issue by jury is not a matter of right. In re Rude, (D. C. Ky. 1909) 101 Fed. 805.

5. Illustrations

Contempt.—In a proceeding as for contempt, the party is not of right entitled to a trial by jury. King v. Ohio, etc., R. Co., (1877) 7 Biss. 529, 14 Fed. Cas. No. 7,500.

Action by assignee of right to receive money.—An action by an assignee of the right to receive a sum of money, concededly in the defendant’s hands, is completely cognizable and enforceable in law, and the defendant has a right to a jury trial under this section. Brown v. Fletcher, (C. C. A. 2d Cir. 1913) 296 Fed. 461, 124 C. C. A. 367.

Proceedings for sale of intestate’s real estate.—In proceedings for the sale of an intestate’s real estate for assets, an issue as to compensation for improvements being raised, the suit is one at common law, and is for the suit. Hamilton Bank v. Dudley, (1829) 2 Pet. 492, 7 U. S. (L. ed.) 496.

Seizure of land used for insurrectionary purposes.—A proceeding for the seizure of land used for insurrectionary purposes is a case of common-law jurisdiction as to trial by jury. Armstrong’s Foundry, (1867) 6 Wall. 766, 18 U. S. (L. ed.) 882.

6. Effect of State Statutes


Partition.—Partition was cognizable either at law or in equity before the adoption of the Constitution. It has been a matter for centuries a well-recognized branch of equity jurisprudence. When, therefore, a statutory proceeding for partition cannot be heard in a United States court on the law side, without affording a jury trial, and thereby doing violence to the forms of procedure provided in the state statutes, it seems to us to be the duty of the court to decline to take jurisdiction of it as a court of law, and to direct that it be brought in equity, where no jury need be had, and where every remedy provided by the statute may be amply administered.” Klever v. Seawall, (C. C. A. 6th Cir. 1895) 65 Fed. 333, 22 U. S. App. 715, 12 C. C. A. 681.

Condemnation of land.—A proceeding for condemnation of land for public uses is, in substance and effect, an action at law, and should be tried by an ordinary jury, notwithstanding state statutes provide other remedies. R. S. sec. 914, supra, p. 21, does not apply. Chappell v. U. S., (1868) 160 U. S. 499, 16 S. Ct. 397, 40 U. S. (L. ed.) 510.
The provision of a state statute providing for the assessment of damages for condemning land for a railroad is not repugnant to the section, as it is not a tax of a state in a court of common law. E. & N. R. Ry. v. City of Espanola, 135 N. M. 329. The act of 1893, ch. 347, § 2, in title "Public Property," entitled "Land and Leases," that provided for the condemnation of lands for public use, shall confer under as nearly as may be to those "in the courts of record of the State," or not to be construed as creating an exception to the general rule of trial by an ordinary jury in a court of record, and as requiring, by way of preliminary or of substitute, a trial by a different jury, not in a court of record, nor in the presence of any judge. In the condemnation of Hawaiian lands, by the statute of Hawaii itself, an issue of fact, in respect to the value of land sought to be taken by the United States, in the exercise of the power of eminent domain, shall be tried by a jury. U. S. v. Honolulu Plantation Co., (C. C. A. 9th Cir. 1903) 122 Fed. 581, 59 C. C. A. 279.


The question of following the state practice in matters of reference to referees and auditors has quite frequently been under review by the federal courts, and the general trend of the decisions is to the effect that such statute will not be followed, that in said courts trial by jury is the prescribed method for the ascertainment of facts, unless the state statute contemplated by the Act, expressly contemplated by the Act, expressly given by the Act, expressly given by the Act, expressly given by the Act, expressly given by the Act.

An action of book debt on record can be tried in a federal court or a jury, unless the parties by their submission waive trial by jury. The mode of trial can be taken from the procedural and substantive law, and the mode of trial provided by said courts or by those laws, and the substantive by the provisions of R. S. sec. 914, supra, p. 21, assimilating the forms and mode of procedure in federal courts of the United States to those existing in like causes in the state courts. See: State v. Winstead, 22 Vt. 1904, 22 Fed. 454.

9. Hawaii

By force of this section and provisions in the Hawaiian statutes, a statute Congress has not itself provided a particular mode of trial in proceedings for the condemnation of lands for public use. It was held that an issue of fact as to the value of land in such a proceeding by the United States in the District Court of the United States District of Hawaii, was to be determined by trial by jury. U. S. v. Honolulu Plantation Co., (C. C. A. 9th Cir. 1903) 122 Fed. 581, 59 C. C. A. 279.

III. TRIAL BY REFEREE OR AUDITOR

In general. Under this section and R. S. sec. 649, infra, p. 120, a federal court has no authority to refer a suit at common law to a referee for trial without the consent of both parties to the suit, nor is such authority conferred by R. S. sec. 914, supra, p. 21, which provides that federal practice shall conform as near as may be to the state practice. Howe Mach. Co. v. Edwards, (1878) 15 Blatchf. 408, 12 Fed. Cas. No. 6744; U. S. v. Rathbone, (1829) 2 Paine 578; 27 Fed. Cas. No. 16,121.

Since the federal statutes provide that in actions at law the trial of issues of fact shall be by jury, except where they are tried by reference or are otherwise submitted, the presence of a written stipulation, it is well settled by the great weight of authority, that, except by consent of parties, a federal court has no authority to refer the issues in an action at law to a referee and thus substitute a trial by referee for the statutory modes of trial by jury or court, in a matter of accounting or otherwise, and that even although such procedure be authorized by a state statute, the authority to make such reference is not, in such case, conferred upon the federal court by the provision of the conformity statute, R. S. sec. 914 (see supra, p. 21). U. S. v. Wells. (E. D. Tenn. 1913) 203 Fed. 148.

In Vermuele v. Reilly, (S. D. N. Y. 1912) 186 Fed. 228, a motion by the plaintiff for a reference was overruled on the ground that the action being a common-law action to recover damages the defendant was entitled to a jury trial.

Findings of fact by a consent referee are not reviewable on a writ of error further than to ascertain if they are sufficient.

As to following state practice in matter of reference, see supra, this note, p. 129, under sidehead Reference.

Chapter 6: Book account.—An action of book account is an action at law, and cannot be referred to an auditor following the provisions of a state statute. Sulzer v. Watson, (C. C. Vt. 1889) 90 Fed. 414.

IV. What Is Trial by Jury


"Trial by jury, in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impannelled, to administer oaths to them and to the constable in charge, and to enter judgment and to issue execution on their verdict; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if, in his opinion, it is against the law or the evidence. Vicksburg, etc., R. Co. v. Putnam, (1886) 118 U. S. 545, 7 S. Ct. 1, 10 U. S. (L. ed.) 257; U. S. v. Philadelphia, etc., R. Co., (1887) 123 U. S. 113, 8 S. Ct. 77, 31 U. S. (L. ed.) 138; Sparf v. U. S., (1895) 156 U. S. 51, 15 S. Ct. 273, 39 U. S. (L. ed.) 348; Thompson v. Utah, (1896) 170 U. S. 343, 18 S. Ct. 629, 42 U. S. (L. ed.) 1061; Capital Traction Co. v. Hof, (1899) 174 U. S. 1, 19 S. Ct. 580, 43 U. S. (L. ed.) 873.


Upon a mistrial a second trial cannot be had by a new jury out of the existing panel, but there must be a second venire. Wilson v. Barnum, (1849) 1 Wall. Jr. (C. C.) 347, 30 Fed. Cas. No. 17,787.

V. Province of Court and Jury

In general.—It is the right of the parties to have a jury pass upon all the material issues of fact, and this right cannot be taken from them by the court. Hodges v. Easton, (1882) 106 U. S. 408, 1 S. Ct. 107, 27 U. S. (L. ed.) 109.

Questions of fact are for the jury, questions of law for the court. Georgia v. Brailsford, (1794) 3 Dall. 1, 1 U. S. (L. ed.) 14.


Reasonable time, where the proofs are conflicting, is a mixed question of law and fact. In such cases the court should instruct upon the several hypotheses of fact insisted upon by the parties. Wiggins v. Burkham, (1869) 10 Wall. 129, 19 U. S. (L. ed.) 884.

It is the province of the jury to decide in what order they shall consider the evidence and the manner in which they shall weigh it. Crane v. Morris, (1832) 6 Pet. 598, 8 U. S. (L. ed.) 639.

The application of written instruments to external objects described therein is the peculiar province of the jury. Richardson v. Boston, (1869) 19 How. 263, 15 U. S. (L. ed.) 339.

The question what is meant by a certain term used among merchants is one of fact, and properly submitted to the jury. Law v. Cross, (1861) 1 Black 533, 17 U. S. (L. ed.) 185.

The court cannot submit a part of the facts to the jury, and itself determine the remainder, even when the remaining facts are recited in the judgment as "conceded or not disputed at the trial." Hodges v. Easton, (1882) 106 U. S. 408, 1 S. Ct. 107, 27 U. S. (L. ed.) 109.

Whenever evidence in its nature prima facie or presumptive is offered, its character, as such, ought not to be disregarded by the jury, and the court has no right to direct the jury to disregard it. Crane v. Morris, (1832) 6 Pet. 598, 8 U. S. (L. ed.) 514.

In U. S. v. Whoson, (1812) 1 Gall. 9, 28 Fed. Cas. No. 16,750, a verdict and judgment for the defendant having been rendered in the federal court in an action of debt for a penalty, the United States appealed and were held not to be entitled to try with a new jury in the appellate court facts which had been tried and determined by the jury in the court below.


Plea to jurisdiction.—A plea to the jurisdiction, with a replication raising an issue of fact, should be submitted to the jury, subject to the right of the court to direct a verdict on the issue when proper. Virginia v. Felts, (W. D. Va. 1904) 153 Fed. 85, where the conflicting authorities are cited.

Motion to quash service.—On a motion to quash service on a foreign corporation defendant, it was held not to be entitled to a jury trial of the issues whether it was doing business within the state, and whether the person on whom service was made was its representative. Peper Automobile Co. v. American Motor Car Sales Co., (E. D. Mo. 1910) 180 Fed. 245, citing numerous cases.
VI. CHARGE AND PRAYERS FOR INSTRUCTION


The court may refuse to give an extended series of instructions, though some may be correct, if the law arising upon the evidence is given by the court with such force as to guide correctly the jury. Chicago, etc., R. Co. v. Whitton, (1871) 13 Wall. 270, 20 U. S. (L. ed.) 671.

No court is bound, at the mere instance of a party, to repeat over to the jury the same substantial proposition of law, in every variety of form which the ingenuity of counsel may suggest. Kelly v. Jackson, (1832) 6 Pet. 622, 8 U. S. (L. ed.) 523.

The court must instruct the jury upon any point relevant to the issue, if requested. Douglass v. M'Allister, (1806) 3 Cranch 298, 2 U. S. (L. ed.) 445.

The court need not give instructions in the terms asked, but it is sufficient if so much thereof is given as is applicable to the evidence. Clymer v. Dawkins, (1845) 3 How. 674, 11 U. S. (L. ed.) 778; Pitta v. Whitman, (1843) 2 Story 609, 19 Fed. Cas. No. 11,186.

Once having instructed the jury on a particular aspect of the case, however material, cannot be assigned for error, unless the attention of the court was called to it with a request to instruct upon it. Mutual Life Ins. Co. v. Snyder, (1876) 93 U. S. 391, 23 U. S. (L. ed.) 887.

If the charge is merely ambiguous, the party dissatisfied with it should have requested to have it made clear before the jury left the bar. Schuykill, etc., Imp. Co. v. Munson, (1871) 14 Wall. 442, 20 U. S. (L. ed.) 867.

Judgment will not be set aside because the charge may be open to verbal criticisms, which could not, when taken with the rest of the charge, have made a reverse. Chicago, etc., R. Co. v. Whittion, (1871) 13 Wall. 270, 20 U. S. (L. ed.) 571.

If a series of propositions is embodied in instructions, and the instructions are excepted to in mass, if any one of the propositions is correct, the exception must be overruled. Boggoer v. New York Life Ins. Co., (1880) 103 U. S. 90, 26 U. S. (L. ed.) 310.


An assignment of error that the court below erred in the general charge, in lieu of instructions asked, without specifying errors, is insufficient. Lucas v. Brooks, (1873) 18 Wall. 436, 21 U. S. (L. ed.) 779.


VII. POWER TO DIRECT VERDICT


The court can only direct a verdict when the state of the evidence is such as to leave no room for doubt that it was the duty of the jury to find accordingly. Pence v. Langdon, (1878) 99 U. S. 578, 25 U. S. (L. ed.) 420.

If there be some evidence in favor of a party, yet if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the court may direct the

If the court is satisfied that, conceding all the inferences which the jury could justly draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury, and not go through the idle ceremony of submitting when it is clear that a verdict for the plaintiff would be set aside. Pleasant v. Fant, (1874) 22 Wall. 116, 22 U. S. (L. ed.) 789; Coolidge v. McConel, (1874) 2 Sav. 571, 6 Fed. Cas. No. 3,186; Kelley v. Belcher Silver Min. Co., (1875) 3 Sawy. 500, 14 Fed. Cas. No. 7,761; Merchants' Nat. Bank v. State Nat. Bank, (1868) 3 Cliff. 205, 17 Fed. Cas. No. 9,449.

The court cannot direct a verdict against a plaintiff, in reality passing upon the nature and effect of the whole evidence introduced by the plaintiff, part of which was necessarily of a presumptive nature, and capable of being urged with more or less effect to the jury. Crane v. Morris, (1832) 6 Pet. 606, 8 U. S. (L. ed.) 614.

Where the facts are undisputed, if different deductions or inferences may, by different minds, be reasonably made or drawn, as in a question of negligence, the decision is for the jury. Sioux City, etc., R. Co. v. Stout, (1875) 17 Wall. 657, 21 U. S. (L. ed.) 745.


When the evidence, weak or strong, tends to maintain the issue, it should be submitted to the jury. Richardson v. Boston, (1856) 19 How. 263, 16 U. S. (L. ed.) 639; Drakely v. Gregg, (1868) 8 Wall. 242, 19 U. S. (L. ed.) 400; Hickman v. Jones, (1869) 9 Wall. 107, 19 U. S. (L. ed.) 551.

The case should not be submitted to the jury where there is no more than a scintilla of evidence to support it, but only where there is none upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof rests. Pleasant v. Fant, (1874) 22 Wall. 116, 22 U. S. (L. ed.) 780; Marion County v. Clark. S. (1876) 14 Wall. 278, 24 U. S. (L. ed.) 59; Giblin v. McMullen, (1868) L. R. 2 P. C. 317.

It is not necessary, to warrant the court in submitting a case to the jury, that the state of the evidence should necessarily lead to the conclusion that the plaintiff is entitled to recover. Schuchardt v. Allen, (1863) 1 Wall. 359, 17 U. S. (L. ed.) 642.

A direction of a verdict, for the plaintiff, subject to the opinion of the court, upon the question whether the facts proved are sufficient to render defendants liable, is error, in that it violates the right of trial by jury in the absence of a waiver. Baylis v. Travellers Ins. Co., (1868) 113 U. S. 318, 5 S. Ct. 494, 28 U. S. (L. ed.) 989.

Where the judge recites from memory the evidence given on a former trial and directs a verdict thereon, there is error. Barney v. Schneider, (1869) 9 Wall. 248, 19 U. S. (L. ed.) 648.

Where there are several defendants in an action ex delitto an application to direct a verdict of acquittal as to one may be made. Castle v. Bullard, (1859) 23 How. 172, 16 U. S. (L. ed.) 424.

VIII. POWER TO GRANT NON SUIT


After the case is opened for trial the plaintiff is not entitled to take a nonsuit, dismissial, or mere discontinuance as of right, but can only do so by consent of the opposite party, or if for sufficient reason the court gives leave. Folger v. The Robert G. Shaw, (1847) 2 Woodb. & M. (U. S.) 531, 9 Fed. Cas. No. 4,899.

Where there are several defendants and the charge is joint and several, at common law there cannot be a nonsuit as to one and a verdict as to others, though one may be found guilty and another not. Castle v. Bullard, (1859) 23 How. 172, 16 U. S. (L. ed.) 424.

IX. VERDICT AND ITS EFFECT

The plaintiff may remit an excess of interest found in the verdict, and the court may amend the verdict accordingly. Paige v. Loring, (1873) Holmes 275, 18 Fed. Cas. No. 10,568 to the court.

Where issues are submitted, a verdict finding the "issue" for the plaintiff is not responsive, but the court may amend by changing from the singular to the

In the case of a verdict "for the defendants, subject to the opinion of the court on the points reserved," the facts and the opinion of the court upon the points reserved should be entered upon the record so that the merits might be reviewed. Smith v. Delaware Ins. Co., (1813) 7 Cranch 434, 3 U. S. (L. ed.) 396.

A finding of a jury which contradicts a fact admitted in the pleadings is to be disregarded. McFerran v. Taylor, (1806) 3 Cranch 370, 2 U. S. (L. ed.) 436.

A verdict certain as to a common intent upon a writ of right for the recovery of lands is sufficient to sustain a judgment. Litter v. Green, (1817) 2 Wheat. 306, 4 U. S. (L. ed.) 246.

A special verdict ought always to be settled under the correction of the judge, and filed as of the term when the trial took place. Suydam v. Williamson, (1857) 20 How. 427, 15 U. S. (L. ed.) 978.


Sec. 649. [Issues of fact tried by the court.] Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. [B. S.]


See R. S. sec. 566, supra, p. 121, and note thereto, and R. S. sec. 648, supra, p. 124, and note thereto.

See also R. S. sec. 700, infra, p. 205, where the notes of cases on this section are given.

This section 649 was not among the sections named as repealed in Judicial Code, § 297, supra, this title, vol. 5, p. 1065.


"Section 566 of the Revised Statutes [supra, p. 121] requiring that actions at law in the District Courts be tried by jury, has no application to the District Courts as now organized." Wm. Edwards Co. v. La Dow, (C. C. A. 6th Cir. 1916) 230 Fed. 378, 144 C. C. A. 529.

Sec. 1. [Findings of facts and law in admiralty cases — trial by jury — review by supreme court.] That the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and conclusions of law separately. And in finding the facts, as before provided, said court may, upon the consent of the parties, submit said questions of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such case, under the direction of the court, as it cases at common law. And the finding of such jury, unless set aside for a lawful cause, shall be entered of record, and stand as the finding of
the court, upon which judgment shall be entered according to law. The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law. [18 Stat. L. 315.]

This section is from the Act of Feb. 16, 1875, ch. 77, entitled "An Act to facilitate the disposition of cases in the Supreme Court of the United States, and for other purposes."

Section 2 of the same Act provided for trial by jury of issues of fact in patent causes in equity, and is given in title PATENTS.

Section 3 of the same Act increased the jurisdictional amount necessary for review by the Supreme Court of judgments and decrees of the Circuit Courts from $2,000 to $5,000, and was expressly repealed by section 14 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 829.

"Circuit" Courts mentioned in the text section 1 were abolished and their powers and duties imposed upon District Courts by Judicial Code, §§ 289-291, supra, this title, vol. 5, pp. 1082, 1083.

When the text section was enacted the "admiralty and maritime jurisdiction" of Circuit Courts, mentioned in this section, was the appellate jurisdiction — with trial anew upon the same and additional proofs — conferred by R. S. secs. 631, 632, both of which sections were repealed by Judicial Code, § 297, supra, this title, vol. 5, p. 1083. All jurisdiction exercising the jurisdiction of Circuit Courts was withdrawn by section 4 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, infra, p. 143, and distributed by that Act to the Circuit Court of Appeals and the Supreme Court, as now provided in Judicial Code, §§ 128 and 235, supra, this title, vol. 5, pp. 607, 794, and thus the text section relating wholly to the Circuit Court seems to have been impliedly repealed.

"With practically substantial unanimity it has been held by the Circuit Courts of Appeals that the [text section] has no application to those courts." The Nyack, (C. C. A. 7th Cir. 1912) 199 Fed. 383, 118 C. C. A. 67. See also the cases cited below in this note. Jury trial of issues of fact in the District Courts in certain cases of admiralty and maritime jurisdiction is regulated by R. S. sec. 566, supra, p. 191.

Repealed by implication.—This section must be regarded as repealed by necessary implication by the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 826, which distributed all appeals between the Supreme Court (section 5) and the Circuit Court of Appeals (section 6). Munson Steamship Line v. Miramar Steamship Co., (C. C. A. 2d Cir. 1909) 167 Fed. 960, 93 C. C. A. 360. Sections 5 and 6 above cited are set forth in note to Judicial Code, § 238, supra, this title, JUDICIARY, vol. 5, p. 796.

All jurisdiction of the Circuit Court in admiralty having been taken away by the Act of March 3, 1891, ch. 517, 26 Stat. L. 826 (supra, p. 143), creating the Circuit Court of Appeals, the Act of 1875, relating wholly to the Circuit Court, was impliedly repealed. No circuit judge could thereafter make findings or do any act in an admiralty case. The Nyack, (C. C. A. 7th Cir. 1912) 199 Fed. 383, 118 C. C. A. 67.

But in Pioneer Fuel Co. v. McBrier, (C. C. A. 8th Cir. 1897) 84 Fed. 405, 55 U. S. App. 181, 28 C. C. A. 468, Mr. Justice Brewer, questioning whether the Act of 1875 had been entirely superseded, said:

"By section 14 of the Act of 1891, section 3 of the Act of 1875 was expressly repealed, and it is worthy of consideration whether the appellate courts of the Circuit having been called to the Act of 1875, as shown by the repeal of the third section, it can fairly be assumed that it intended to repeal by implication either of the other sections."

Purpose and scope of act.—Prior to this Act neither special findings of facts nor exceptions were a necessary part of the record upon an appeal in an admiralty cause, and the hearing in the Supreme Court and in the Circuit Court was a trial de novo. It was the purpose of that Act to relieve the Supreme Court from the necessity of deciding questions of fact in admiralty causes, and the provisions whereby findings of facts and conclusions of law were required to be separately stated by the Circuit Courts had no application to cases which could not, because the amount in controversy was insufficient, be reviewed by the Supreme Court. The Havilah, (C. C. A. 2d Cir. 1891) 48 Fed. 684, 1 U. S. App. 1, 1 C. C. A. 77.

Findings of fact.—Where the amount involved in an admiralty suit was not sufficient to permit a review by the Supreme Court of the judgment of the Circuit Court, a general finding of fact and law by the latter court was sufficient under this Act. One Thousand Two Hundred and Sixty-Five Vitriflue Pipes, (1877) 14 Blatchf. 274, 18 Fed. Cas. No. 10,536; Richards v. Hansen, (C. C. Mass. 1879) 1 Fed. 54.

"There is no practice under this statute

In The John H. Pearson, (1887) 121 U. S. 469, 7 S. Ct. (t. 1008, 30 U. S. (L. ed.) 970, the question arose as to what was meant by the term "northern passage" from Gibraltar to New York, and it was held that the court below should have ascertained from the evidence what passages there were which vessels were accustomed to take and then determine which of them the vessel was allowed by its contract to choose as the northern; and the decree was reversed and the case remanded for further proceedings upon this ground.

Trial by jury.—Prior to this Act a court of admiralty had strictly no power to try issues of fact by a jury; but it might, either on its own motion or at the instance of the parties, submit any question of fact to commissioners or referees for their opinion and advice. Their decision, however, would not, like the verdict of a jury, be conclusive of the facts, which would finally have to be submitted to the decision of the court. Lee v. Thompson, (1878) 3 Woods 167, 15 Fed. Cas. No. 8292.

Appeal from territorial courts.—An appeal from a District Court of a territory in an admiralty case was governed by the provisions of this Act. The Eclipse, (1890) 133 U. S. 599, 10 S. Ct. 873, 34 U. S. (L. ed.) 269. Alaska.—The Supreme Court held in In re Cooper, (1892) 143 U. S. 472, 12 S. Ct. 453, 36 U. S. (L. ed.) 232, and The Sylvia Handy, (1892) 143 U. S. 513, 12 S. Ct. 464, 36 U. S. (L. ed.) 246, that this Act applied to appeals taken from decrees of the District Court of the United States for the district of Alaska sitting in admiralty, and the court was limited upon the appeal to a determination of the questions of law arising upon the record, and to such rulings of the court excepted to at the time and not presented by a bill of exceptions prepared as in actions at law.

Review by Supreme Court.—It was said by Mr. Justice Brown, delivering the opinion of the court in The City of New York, (1893) 147 U. S. 72, 13 S. Ct. 211, 37 U. S. (L. ed.) 84: "In construing the Act of 1875 the following propositions may be regarded as settled:"


"(2) That it is only the ultimate facts which the court is bound to find; and that this court will not take notice of a refusal to find the mere incidental facts, which only amount to evidence from which the ultimate fact is to be obtained. The John H. Pearson, (1887) 121 U. S. 469, [7 S. Ct. 1008, 30 U. S. (L. ed.) 970]; Merchants' Mut. Ins. Co. v. Allen, (1887) 121 U. S. 67, [7 S. Ct. 821, 30 U. S. (L. ed.) 858]; The Francis Wright, (1881) 105 U. S. 381, [26 U. S. (L. ed.) 1100].

"(3) If the court below neglects or refuses to make a finding one way or the other as to the existence of a material fact which has been established by an uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case the refusal to find would be equivalent to finding that the fact was immaterial, and in the other that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law and proper subjects for review in an appellate court. The E. A. Packer, (1891) 140 U. S. 360, [11 S. Ct. 794, 35 U. S. (L. ed.) 453]; The Francis Wright, (1881) 105 U. S. 381, [26 U. S. (L. ed.) 1100]."


"It does not, however, necessarily follow that this court is bound to determine the case upon the precise facts found by the Circuit Court. If, in its opinion, the findings are of a juxta, contradictory, or incomplete, or fail to establish a satisfactory
basis for a decision. The Circuit Court is bound to pass upon and find every material and ultimate fact necessary to a proper determination of the question of liability, and in case of refusal to make such finding an exception may be taken thereto, which can be considered by the court upon appeal." The E. A. Packer, (1891) 140 U. S. 360, 11 S. Ct. 794, 35 U. S. (L. ed.) 453.


In The Connamara, (1883) 108 U. S. 352, 2 S. Ct. 754, 27 U. S. (L. ed.) 761, it was said by Mr. Justice Gray, delivering the opinion of the court: "Before the Act of 1876 this court, upon an appeal in a case of salvage, gave the same weight and no more to the decree of the court below that a court of common law would allow to the verdict of a jury, and might reverse that decree for manifest error in matter of fact even if no violation of just principles which should govern the subject was shown. (Post v. Jones, (1858) 19 How. 160, 180, 15 U. S. (L. ed.) 618.) Since the Act of 1876, in cases of salvage and admiralty proceedings it may be necessary to establish this ground of complaint, which might under some circumstances include the whole, should be incorporated in the bill of exceptions." The City of New York, (1893) 147 U. S. 72, 13 S. Ct. 211, 37 U. S. (L. ed.) 84.

Appeals to Circuit Courts of Appeals.—In the seventh circuit it was held that "an admiralty appeal by the libelant in the Circuit Court of Appeals, under the reason that the amount awarded appears to be too large, unless the excess is so great that upon any reasonable view of the facts found the award cannot be justified by the rules of law applicable to the case." Cited and followed in Irvine v. The Hesper, (1887) 122 U. S. 256, 7 S. Ct. 1177, 30 U. S. (L. ed.) 1175; The Tornado, (1883) 109 U. S. 110, 3 S. Ct. 78, 27 U. S. (L. ed.) 874; The Trefusis, (C. C. A. 5th Cir. 1899) 98 Fed. 314, 39 C. C. A. 96.

The finding of a commissioner appointed in an admiralty cause, on a question of fact depending largely on the credit to be given to the various witnesses testifying before him, confirmed by the court, has every reasonable presumption in its favor; and an appellate court is not justified in setting aside or modifying the decree based thereon, unless there clearly appears to have been error or mistake in the finding or the conclusion drawn therefrom. Cahill's Appeal, (C. C. A. 2d Cir. 1892) 124 Fed. 690 C. C. A. 618; The North Star, (C. C. A. 2d Cir. 1907) 151 Fed. 168, 80 C. C. A. 536; United Steamship Co. v. Haskins, (C. C. A. 9th Cir. 1910) 181 Fed. 962, 104 C. C. A. 426.

Congress has "the constitutional power to confine the jurisdiction of this court on appeals in admiralty to questions of law arising on the record." The Francis Wright, (1881) 105 U. S. 381, 26 U. S. (L. ed.) 1100.

Bill of exceptions.—A bill of exceptions to present for review rulings of the court must be based on exceptions taken to the rulings at the time the rulings are made. No other exceptions can be embraced in a bill of exceptions. If no exceptions to rulings are taken before the decree is entered, that is, during the trial, there can be no bill of exceptions. Richardson r. Ship Havre, (S. D. N. Y. 1880) 4 Fed. 748.

"In the case of The Francis Wright, (1881) 105 U. S. 381, [26 U. S. (L. ed.) 1100], the court held that the bill of exceptions ought to show the ground relied on to sustain the objections, so that it might appear that the court below was properly informed as to the point to be decided and that the facts sought to be incorporated were conclusively proved by uncontradicted evidence, and if the exception were as to facts found it should be stated that it was because there was no evidence to support them, and then so much of the testimony as was necessary to establish this ground of complaint, which might under some circumstances include the whole, should be incorporated in the bill of exceptions." The City of New York, (1893) 147 U. S. 72, 13 S. Ct. 211, 37 U. S. (L. ed.) 84.
Act of 1891, is to be heard and determined under substantially the same rules and limitations that regulated the determination of admiralty appeals in the Circuit Courts prior to the passage of that Act. This court may properly consider and determine every issue raised by the pleadings, and, without regard to the decree below, direct such a decree to be entered thereon as is consistent with law." The court may dismiss the libel though the respondents did not themselves appeal. Gilchrist v. Chicago Ins. Co. (C. C. A. 7th Cir. 1889) 104 Fed. 566, 44 C. C. A. 43.

And in a later case in the same circuit the court said: "With practically substantial unanimity it has been held by the Circuit Courts of Appeals that the statute has no application to those courts. The provision was intended to relieve the Supreme Court of the labor of looking into the facts found by the Circuit Court on appeals to that court from the District Court in admiralty cases." The Nyack (C. C. A. 7th Cir. 1912) 199 Fed. 353, 118 C. C. A. 67.

In the fifth circuit it was held that an appeal in admiralty from the District Court to the Circuit Court of Appeals is not governed by the rules applicable to appeals in similar cases to the Circuit Court before the passage of the Act. The Bebee Denre. C. C. A. 5th Cir. 1885 55 Fed. 220, 2 U. S. App. 582, 5 C. C. A. 57.

And again in that circuit it was held that the Circuit Court of Appeals in reviewing a decree in admiralty is governed by the provisions of the law in force at the time of the passage of the Act applicable to appeals by the Supreme Court and under the Act of Feb. 28, 1887. The authority cited is limited to questions of law. The Treviño v. C. C. A. 5th Cir. 1888 96 Fed. 574, 29 C. C. A. 171.

In the eighth circuit it was held that the Circuit Court of Appeals has no jurisdiction as to a cause of action being brought in federal court by a foreign corporation against a foreign corporation. United States v. Can. 8th Cir. 1884 27 Fed. 74, 6 C. C. A. 458.

In the ninth circuit it was held that the Circuit Court of Appeals has jurisdiction over a cause of action in an action by a foreign plaintiff against a foreign defendant. McAllister v. United States. 9th Cir. 1890 68 Fed. 245, 25 C. C. A. 120.

Court as contemplated by the Act of 1875. The trial here is, therefore, upon the law and facts." Similar holdings were made in the first, second, fourth, sixth, eighth, and ninth circuits. See The Havilah (C. C. A. 2d Cir. 1891) 48 Fed. 684, 1 U. S. App. 1, 1 C. C. A. 77; The State of California. (C. C. A. 9th Cir. 1892) 49 Fed. 175, 7 U. S. App. 200, 1 C. C. A. 90. The cases with 45; The court may dismiss the libel though the respondents did not themselves appeal. Gilchrist v. Chicago Ins. Co. (C. C. A. 7th Cir. 1889) 104 Fed. 566, 44 C. C. A. 43.

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"It must be remembered also in this connection," said Brewer, J. in Pioneer Fuel Co. v. M. R. R. C. C. A. 5th Cir. 1887 (54 Fed. 453), 55 U. S. App. 251, 25 C. C. A. 400, "that the Circuit Court of Appeals cannot, in respect to admiralty cases at least, offer the relief to the Circuit Court in admiralty cases to which is offered to the Supreme Court in Admiralty cases. The Circuit Court of Appeals has jurisdiction of admiralty cases; but the Supreme Court has jurisdiction of cases of error from the Supreme Court of the United States."

"A no further jurisdiction is this Court as contemplated by the Act of 1875. The trial here is, therefore, upon the law and facts." Similar holdings were made in the first, second, fourth, sixth, eighth, and ninth circuits. See The Havilah (C. C. A. 2d Cir. 1891) 48 Fed. 684, 1 U. S. App. 1, 1 C. C. A. 77; The State of California. (C. C. A. 9th Cir. 1892) 49 Fed. 175, 7 U. S. App. 200, 1 C. C. A. 90. The cases with 45; The court may dismiss the libel though the respondents did not themselves appeal. Gilchrist v. Chicago Ins. Co. (C. C. A. 7th Cir. 1889) 104 Fed. 566, 44 C. C. A. 43.


Where the issues presented by a libel and cross-libel and the answers thereto in an admiralty cause are tried as a single controversy in the District Court, the effect is the same as if the two suits had been formally consolidated, and an appeal from the final decree brings up all questions. The Colorado, (C. C. A. 2d Cir. 1910) 184 Fed. 609, 106 C. C. A. 613.

Costs as subject to review.—The awarding or withholding of costs in admiralty is a matter in the discretion of the court, which is not subject to review where that is the sole question involved: The Eva D. Rose, (C. C. A. 4th Cir. 1908) 166 Fed. 101, 92 C. C. A. 85.

An Act To confer jurisdiction upon the circuit courts in certain cases.


[Sec. 1.] [Jurisdiction of circuit court of suit for partition, where United States is joint tenant, etc.] [Superseded.] That the several circuit courts of the United States shall have jurisdiction of suits in equity brought by any tenant in common or joint tenant for the partition of lands in cases where the United States is one of such tenants in common or joint tenants, such suit to be brought in the circuit court of the district in which such land is situated. [30 Stat. L. 416.]

"Circuit" Courts were abolished and their powers and duties imposed upon District Courts by Judicial Code, §§ 289-291, supra, this title, vol. 5, pp. 1082, 1083.

The section 1 here noted was embraced in and superseded by Judicial Code, § 24, paragraph Twenty-fifth, supra, this title, vol. 4, p. 843, and repealed by force of the last paragraph of Judicial Code, § 297, supra, this title, vol. 5, p. 1085.

See generally as to the venue of suits in District Courts, Judicial Code, §§ 51-56, supra, this title, vol. 5, pp. 486-524.

Sec. 2. [Procedure — service of process — appearance — pleading — purchase by United States.] That when such suit is brought by any person owning an undivided interest in such land, other than the United States, against the United States alone or against the United States and any other of such owners, service shall be made on the United States by causing a copy of the bill filed to be served upon the district attorney of the district wherein the suit is brought, and by mailing a copy of the same by registered letter to the Attorney-General of the United States; and the complainant in such bill shall file with the clerk of the court in which such bill is filed an affidavit of such service and of the mailing of such letter. It shall be the duty of the district attorney upon whom service of the bill is made as aforesaid to appear and defend the interests of the Government, and within sixty days after service upon him as hereinabove prescribed, unless the time shall be enlarged by order of the court made in the case, to file a plea, answer, or demurrer on the part of the Government, and the cause shall proceed as other cases for partition by courts of equity, and in making such partition the court shall be governed by the same principles of equity that control courts of equity in partition proceedings between private persons. Whenever in such suit the court shall order a sale of the property or any part thereof the Attorney-General of the United States
An Act To expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted.


[Sec. 1.] [Anti-trust cases given precedence in district court — hearing by three or more judges — division of opinion — additional judge and reargument.] That in any suit in equity pending or hereafter brought in any circuit court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every suit expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said court, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select; or, in case the full court shall not at any time be made up by reason of the necessary absence or disqualification of one or more of the said circuit judges, the justice of the Supreme Court assigned to that circuit or the other circuit judge or judges may designate a district judge or judges within the circuit who shall be competent to sit in said court at the hearing of said suit. In the event the judges sitting in such case shall be equally divided in opinion as to the decision or disposition of said cause, or in the event that a majority of said judges shall be unable to agree upon the judgment, order, or decree finally disposing of said case in said court which should be entered in said cause, then they shall immediately certify that fact to the Chief Justice of the United States, who shall at once designate and appoint some circuit judge to sit with said judges and to assist in determining said cause. Such notice of the Chief Justice shall be immediately transmitted to the clerk of the circuit court in which said cause is pending, and shall be entered upon the records of said court. Thereupon said cause shall at once be set down
for reargument and the parties thereto notified in writing by the clerk of
said court of the action of the court and the date fixed for the reargument
thereof. The provisions of this section shall apply to all causes and proceed-
ings in all courts now pending, or which may hereafter be brought. [32
Stat. L. 823, as amended by 36 Stat. L. 854.]}

This and the following section 2 constitute the Act known as the “Expediting Act.”
This section was amended to read as given in the text by an Act of June 25, 1910, ch.
428, 36 Stat. L. 854. As originally enacted this section was as follows:

“[Sec. 1.] That in any suit in equity pending or hereafter brought in any circuit
court of the United States under the Act entitled ‘An Act to protect trade and commerce
against unlawful restraints and monopolies,’ approved July second, eighteen hundred
and ninety, ‘An Act to regulate commerce,’ approved February fourth, eighteen hundred
and eighty-seven, or any other Acts having a like purpose that hereafter may be
enacted, wherein the United States is complainant, the Attorney-General may file with
the clerk of such court a certificate that, in his opinion, the case is of general public
importance, a copy of which shall be immediately furnished by such clerk to each of
the circuit judges of the circuit in which the case is pending. Thereupon such case
shall be given precedence over others and in every way expedited, and be assigned
for hearing at the earliest practicable day, before not less than three of the circuit judges
of the circuit; and if there be not more than two of the circuit judges, then before them and
such district judge as they may select. In the event the judges sitting in such case shall be
divided in opinion, the case shall be certified to the Supreme Court for review in like manner as
it taken there by appeal as hereinafter provided.”

“Circuit” Courts mentioned in this section were abolished and their powers and
duties imposed upon District Courts by Judicial Code, §§ 289 and 291, supra, this title,
vol. 5, pp. 1092, 1083.

The Act of July 2, 1890, ch. 647, to which the text refers, was the Sherman Anti-
Trust Act, so-called, which is given in title TRADE COMBINATIONS AND TRUSTS.

The Act of Feb. 4, 1887, ch. 104, to which the text refers, was the Interstate
Commerce Act, which, as amended by the Act of March 2, 1889, ch. 382, the Act of
Feb. 10, 1891, ch. 128, and the Act of Feb. 8, 1895, ch. 61, is given in INTERSTATE COM-
MERCE, vol. 4, p. 337.

By the express terms of section 3 of the Act of Feb. 19, 1903, ch. 708, known as the
Elkins Act, given in INTERSTATE COMMERCE, vol. 4, p. 566, the provisions of the Act
of Feb. 11, 1903, above cited, were made to apply “to any case prosecuted under
the direction of the Attorney-General in the name of the Interstate Commerce
Commission.

Constitutionality.—In U. S. v. New
York, etc., R. Co., (C. C. Mass. 1908) 165
Frd. 742, it was held that this section as
originally enacted was not unconstitu-
tional. In that case it was contended
that the statute was so framed that it was
limited to a particular class of cases, and
operative only at the request of the United
States and could never be called on by
a respondent, and never by either party
in any action pending in a court of the
United States. The court said: “There can be
no question that this makes an apparent
discrimination, yet we are unable to per-
ceive that it is injurious to respondents,
or any other possible respondents, in any
legal sense of the word. The interests in-
volved under the Sherman Anti-trust Act
and its amendments are liable to include
exceedingly extensive pecuniary values;
and the possible remedies given thereby,
which combine, with the rest, the powers,
express or implied, of issuing injunctions,
and of appointing receivers, and declaring
forfeitures, all relating to vast properties,
are of so radical a character that a hasty
or inapt administration of the statute by
a single judge might inevitably embarrass
industries as wide as the continent, and
even practically destroy them, before an
appellate tribunal could be reached. There-
fore, we say the statute under which the
Attorney-General filed his certificate is not
injurious, because on the whole, when
availed of, it operates for the protection of
the interests of respondents more than for
those of the United States.”

Purpose of Act.—A careful reading of
the entire Act shows clearly that the in-
tention of Congress, in addition to ex-
pediting the hearing of the cases enu-
erated, was to have them, owing to their
great importance, tried by at least three
judges, instead of one as had been the
usual practice in the Circuit Court since
the enactment of the Act of March 3,
1891, ch. 617, 26 Stat. L. 826, creating the
United States Circuit Courts of Appeal.
U. S. v. St. Louis Terminal Ass'n, (E. D.
Mo. 1912) 197 Fed. 446.

Effect of provision.—Fairly construed,
this section permits such cases to proceed
in the usual way, except for being expe-
dited, until assigned for final hearing be-
fore three judges; and the provision (in
the text section before its amendment)
that “in the event the judges sitting in
such case shall be divided in opinion the
case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided," is effective only where, by reason of such division of opinion, a final decree cannot be entered, since, if entered, an appeal therefore would lie under section 2. Southern Pac. Terminal Co. v. Interstate Commerce Commission, (S. D. Tex. 1908) 166 Fed. 134.

Not repealed by Judicial Code.—The special provisions of the Expediting Act requiring in a particular class of cases the organization of a court constituted in a particular manner were not repealed by the Judicial Code. Rev. p. U. S., (1913) 226 U. S. 420, 33 S. Ct. 170, 57 U. S. (L. ed.) 281, wherein the court said: "This is the only question, because if that act was not repealed by the Code, then its provisions amount to an assignment by operation of law of the circuit judges to sit as judges of the District Court for the purpose of discharging the duties imposed by the act. When the issue is thus narrowed solution is readily reached by the application of the elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible. Petri v. F. E. Creelman Lumber Co., (1905) 196 U. S. 457, 497, [26 S. Ct. 133, 50 U. S. (L. ed.) 281. That the new District Court created by the Judicial Code was vested with the duty of hearing and disposing of the cases provided for in the Expedition Act as the successor of the formerly existing Circuit Court, as we have already stated, is undoubted. The mere fact that the Expedition Act in terms refers to the organization of a Circuit Court would be, as a general rule, under the circumstances, of no importance, and becomes absolutely without significance in view of the express provision of chapter XIII, section 291, of the Judicial Code, saying: 'Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the Circuit Courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the District Courts.'"

Prior practice.—This section as originally enacted did not authorize the sending up of the whole case, and therefore the court would not consider, as we think, here, a final judgment, order, or decree determinative of the merits was rendered. Baltimore, etc., R. Co. v. Interstate Commerce Commission, (1909) 215 U. S. 216, 30 S. Ct. 86, 54 U. S. (L. ed.) 164.

Assigned for "hearing."—The word "hearing," as ordinarily used in an equity case, clearly means a trial or a disposition of some matter arising in the case which requires judicial determination by the court, whether interlocutory or final. U. S. v. St. Louis Terminal Ass'n, (E. D. Mo. 1912) 117 Fed. 446. Right of single judge to direct decree.—In U. S. v. St. Louis Terminal Ass'n, (E. D. Mo. 1912) 197 Fed. 446, there was a decree of the Supreme Court dismissing the bill and remanding the case for a decree. On the hearing in the trial court after remand on the question of the right of a single judge to direct the decree, it was held that the entry of a final decree in conformity with specific directions of the Supreme Court did not come within the provision of this section requiring a hearing before at least three circuit judges, although a certificate of expedition was filed in the trial court when the suit was originally instituted. "The directions contained in the mandate of the Supreme Court in this cause leave nothing for determination by or to the discretion of the judge of this court. He is specifically directed to enter a certain decree, and in entering that decree he is, in effect, performing a ministerial duty which may be enforced by mandamus." But in Ez p. U. S., (1913) 226 U. S. 420, 33 S. Ct. 170, 57 U. S. (L. ed.) 281, on petition for a writ of prohibition, this holding was overruled, the Supreme Court, per Mr. Chief Justice White, saying: "We think the court below erred in concluding that the United States was not entitled to a District Court organized in the mode pointed out in the Expedition Act, unless it be, as stated by the lower court in its opinion, the subject in hand was of such a character, as not to be within the scope of the Expedition Act. Coming to consider that question without going into any elaboration, we are of opinion that error was committed in so holding. While it is true that the mandate of this court gave certain specific directions as to the scope and character of the decree to be entered, it afforded an opportunity to the defendant to submit a plan in order to carry out the decree and gave to the United States an opportunity to be heard in opposition to that plan and left to the court an important and serious duty to be discharged in any event, and especially in case of controversy on the subject. These considerations, we think, brought the subject within the scope of the Expedition Act and justified the request of the United States that the case be considered and a decree entered by a court composed as provided in that act."
any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: Provided, That in any case where an appeal may have been taken from the final decree of a circuit court to the circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may be taken from such decree to the Supreme Court in the manner now provided by law. [32 Stat. L. 823.]

See note to the preceding section 1 of this Act.
The general time limit for appeal to the Supreme Court is three months, as provided in section 6 of the Act of Sept. 6, 1916, ch. 448, 30 Stat. L. 727, quoted in note to R. S. sec. 1008, infra, p. 158.

Order requiring production of evidence in aid of proceedings before Interstate Commerce Commission.—In Interstate Commerce Commission v. Baird, (1904) 194 U. S. 25, 24 S. Ct. 563, 48 U. S. (L. ed.) 860, it was held that an appeal from an order made in the Circuit Court of the United States in the matter of the petition of the Interstate Commerce Commission for orders requiring the testimony of witnesses and the production of certain papers, books and documents, was authorized.

Sec. 1031. [When peremptory challenges exceed the number allowed by law.] If, in the trial of a capital offense, the party indicted peremptorily challenges jurors above the number allowed him by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if they had not been made. [R. S.]

The number of challenges allowed by law is prescribed in Judicial Code, § 287, supra, this title, vol. 5, p. 1078.

Cited.—This section is cited in Brewer v. Jacobs, (W. D. Tenn. 1884) 22 Fed. 217.

IX. PROCEDURE IN INJUNCTION CASES

Sec. 17. [Preliminary injunctions and temporary restraining orders—notice.] That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be
granted without notice in the contingency specified, the matter of the
issuance of a preliminary injunction shall be set down for a hearing at the
earliest possible time and shall take precedence of all matters except older
matters of the same character; and when the same comes up for hearing
the party obtaining the temporary restraining order shall proceed with the
application for a preliminary injunction, and if he does not do so the court
shall dissolve the temporary restraining order. Upon two days' notice to
the party obtaining such temporary restraining order the opposite party
may appear and move the dissolution or modification of the order, and in
that event the court or judge shall proceed to hear and determine the motion
as expeditiously as the ends of justice may require.

Section two hundred and sixty-three of an Act entitled "An Act to codify,
revise, and amend the laws relating to the judiciary," approved March
third, nineteen hundred and eleven, is hereby repealed.

Nothing in this section contained shall be deemed to alter, repeal, or
amend section two hundred and sixty-six of an Act entitled "An Act to
codify, revise, and amend the laws relating to the judiciary," approved
March third, nineteen hundred and eleven. [38 Stat. L. 737.]

This section and the following sections to and including section 26, infra, p. 143,
constitute the last sections of the Act of Oct. 15, 1914, ch. 323, commonly known as the
"Clayton Act," entitled "A Act To supplement existing laws against unlawful
restraints and monopolies, and for other purposes." Sections 1-16 of the Act are given
in title TRADE COMBINATIONS AND TRUSTS.

Judicial Code, § 283, repealed by this section, was a re-enactment of R. S. sec. 718,
and is given, supra, this title, vol. 5, p. 951.

Judicial Code, § 286, mentioned at the end of this section, is given supra, this title,
vol. 5, p. 983.

As to the effect of unconstitutionality of any part of the Act, see section 26, infra,
p. 143.

SEC. 18. [Restraining orders, etc.—security as condition precedent.]
That except as otherwise provided in section 16 of this Act, no restraining
order or interlocutory order of injunction shall issue, except upon the giving
of security by the applicant in such sum as the court or judge may deem
proper, conditioned upon the payment of such costs and damages as may be
incurred or suffered by any party who may be found to have been wrong-
fully enjoined or restrained thereby. [38 Stat. L. 738.]

See the note to the preceding section 17 of this Act.

Not retroactive.—This section was held
not to be retroactive and not to apply
to temporary restraining orders granted
under section 283 of the Judicial Code (see
supra, this title, vol. 5, p. 951) prior to
the above enactment. Western Union Tel.
Co. v. U. S., etc., Trust Co., (C. C. A. 8th
Cir. 1915) 221 Fed. 545, 137 C. C. A. 113.

SEC. 19. [Restraining orders, etc.—contents—binding only upon
whom.] That every order of injunction or restraining order shall set forth
the reasons for the issuance of the same, shall be specific in terms, and shall
describe in reasonable detail, and not by reference to the bill of complaint or
other document, the act or acts sought to be restrained, and shall be binding
only upon the parties to the suit, their officers, agents, servants, employees,
and attorneys, or those in active concert or participating with them, and
who shall, by personal service or otherwise, have received actual notice of
the same. [38 Stat. L. 738.]

See note to section 17, supra, this page.
sec. 20. [Restraining orders, etc.—when not to issue.—what acts not to be prohibited.] That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. [38 Stat. L. 738.]

See note to section 17, supra, p. 140.

This section does not prevent the granting of an injunction against the officers and members of a labor-union restraining them from unlawfully causing, inducing, or in any way forwarding acts of violence violating the rights of a complainant as an interstate commerce and United States mail carrier, where such injunction in no way abridges any of the rights secured by this provision. Alaska Steamship Co. v. International Longshoremen's Ass'n, (W. D. Wash. 1916) 236 Fed. 964.

X. PROCEDURE FOR CONTEMPT

sec. 21. [Contempt constituting criminal offense under federal or state law.] That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided. [38 Stat. L. 738.]

This and the following sections 22-26 are from the Clayton Act of Oct. 15, 1914, ch. 323. See the note to section 17 of this Act, supra, p. 140.

SEC. 22. [Procedure for contempt — rule to show cause — trial and judgment — bail.] That whenever it shall be made to appear to any district court or judge thereof, or to any judge therein sitting, by the return of a proper officer on lawful process, or upon the affidavit of some credible person, or by information filed by any district attorney, that there is reasonable ground to believe that any person has been guilty of such contempt, the court or judge thereof, or any judge therein sitting, may issue a rule requiring the said person so charged to show cause upon a day certain why he should not be punished therefor, which rule, together with a copy of the affidavit or information, shall be served upon the person charged, with sufficient promptness to enable him to prepare for and make return to the order at the time fixed therein. If upon or by such return, in the judgment of the court, the alleged contempt be not sufficiently purged, a trial shall be directed at a time and place fixed by the court: Provided, however, That if the accused, being a natural person, fail or refuse to make return to the rule to show cause, an attachment may issue against his person to compel an answer, and in case of his continued failure or refusal, or if for any reason it be impracticable to dispose of the matter on the return day, he may be required to give reasonable bail for his attendance at the trial and his submission to the final judgment of the court. Where the accused is a body corporate, an attachment for the sequesterion of its property may be issued upon like refusal or failure to answer.

In all cases within the purview of this Act, such trial may be by the court, or, upon demand of the accused, by a jury; in which latter event the court may impanel a jury from the jurors then in attendance, or the court or the judge thereof in chambers may cause a sufficient number of jurors to be selected and summoned, as provided by law, to attend at the time and place of trial, at which time a jury shall be selected and impaneled as upon a trial for misdemeanor; and such trial shall conform, as near as may be, to the practice in criminal cases prosecuted by indictment or upon information.

If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment, either by fine or imprisonment, or both, in the discretion of the court. Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months: Provided, That in any case the court or a judge thereof may, for good cause shown, by affidavit or proof taken in open court or before such judge and filed with the papers in the case, dispense with the rule to show cause, and may issue an attachment for the arrest of the person charged with contempt; in which event such person, when arrested, shall be brought before such court or a judge thereof without unnecessary delay and shall be admitted to bail in a reasonable penalty for his appearance to answer to the charge or for trial for the contempt; and thereafter the proceedings shall be the same as provided herein in cases the rule had issued in the first instance. [38 Stat. L. 738.]

See note to the preceding section 21 of this Act.

SEC. 23. [Conviction of contempt reviewed on writ of error — stay and bail.] That the evidence taken upon the trial of any persons so accused
may be preserved by bill of exceptions, and any judgment of conviction may be reviewed upon writ of error in all respects as now provided by law in criminal cases, and may be affirmed, reversed, or modified as justice may require. Upon the granting of such writ of error, execution of judgment shall be stayed, and the accused, if thereby sentenced to imprisonment, shall be admitted to bail in such reasonable sum as may be required by the court, or by any justice, or any judge of any district court of the United States or any court of the District of Columbia. [38 Stat. L. 739.]

See note to section 21 of this Act, supra, p. 141.

SEC. 24. [Certain contempts excluded from operation of Act.] That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one of this Act, may be punished in conformity to the usages at law and in equity now prevailing. [38 Stat. L. 739.]

See note to section 21 of this Act, supra, p. 141.

SEC. 25. [One year limitation for contempt proceeding — no bar to criminal prosecution — pending proceedings.] That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts; but nothing herein contained shall affect any proceedings in contempt pending at the time of the passage of this Act. [38 Stat. L. 740.]

See note to section 21 of this Act, supra, p. 141.

SEC. 26. [Effect of partial unconstitutionality of Act.] If any clause, sentence, paragraph, or part of this Act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered. [38 Stat. L. 740.]

See note to section 21 of this Act, supra, p. 141.

XI. APPELLATE JURISDICTION AND PROCEDURE

SEC. 4. [Appeals from district and circuit courts.] That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts; but all appeals by writ of error [or] otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States
or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same. [26 Stat. L. 827.]

This section is from the Circuit Court of Appeals Act of March 3, 1891, ch. 517, no part of which Act was repealed by Judicial Code, § 297, supra, this title, vol. 5, p. 1085, excepting repeals by force of the last paragraph in, and the third paragraph from the end of, said section 297.

"Circuit Courts," mentioned in the text section, were abolished, and their powers and duties imposed upon District Courts by Judicial Code, §§ 289–291, supra, this title, vol. 5, pp. 1082, 1083.

Sections 5 and 6 of the above cited Circuit Court of Appeals Act are given in full in the note to Judicial Code, § 238, supra, this title, vol. 5, p. 796, with references to the several sections of the Judicial Code in which they are embraced; and the part of section 6 prescribing a time limit for appeal or writ of error for review by the Supreme Court of decisions of the Circuit Court of Appeals is given infra, p. 157. Section 7 of said Act (as amended by the Revised Code, § 129, supra, this title, vol. 5, p. 629. Section 10 of said Act relates to appellate procedure and is given infra, p. 234. Section 11 of said Act also related to appellate procedure; part of it is embraced in Judicial Code, § 132, supra, this title, vol. 5, p. 643, and the remainder, divided into two parts, is given infra, pp. 161, 170. Section 14 of said Act repealed inconsistent provisions and is given in the note to Judicial Code, § 238, supra, this title, vol. 5, at p. 797.


New methods of procedure not provided.

— "The purpose of the Act of 1891 was to distribute between the Supreme Court and the newly formed Courts of Appeals the entirety of appellate jurisdiction from the Circuit and District Courts of the United States, and not to provide new methods of procedure." Pioneer Fuel Co. v. McBrier, (C. C. A. 8th Cir. 1897) 84 Fed. 495, 55 U. S. App. 181, 28 C. C. A. 488.


In U. S. v. Rider, (1894) 163 U. S. 132, 16 S. Ct. 983, 41 U. S. (L. ed.) 101, it was held by the Supreme Court that the Act of 1891 had superseded and repealed the earlier acts authorizing questions of law to be certificated from the Circuit Court to the Supreme Court. The effect of the Act is thus stated in the opinion: "Appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the Circuit Courts of Appeals, and in all civil cases by appeal or error, without regard to the amount in controversy. The same effect was given to cases by writ of error to or from the Circuit Courts of Appeals in cases not made final as specified in section 6. . . . It is true that repeals by implication are not favored, but we cannot escape the conclusion that, tested by its scope, its obvious purpose and its terms, the Act of March 3, 1891, covers the whole subject-matter under consideration, and furnishes the exclusive rule in respect of appellate jurisdiction on appeal, writ of error, or certificate." Followed in Barden v. Hawarden First Nat. Bank, (1899) 175 U. S. 826, 20 S. Ct. 196, 44 U. S. (L. ed.) 261.

Construction and applicability generally.

— This section referred to the jurisdiction of the courts created by the Act and to the changes in the distribution of the judicial power made necessary thereby. It was held to be inapplicable to the procedure or limit of time in which appeals or writs of error could be taken in a case brought to the Supreme Court from the Circuit or District Courts. Allen v.

Decision at chambers in habeas corpus.
—This section "may be held to authorize an appeal to the United States Circuit Court of Appeals from a final decision of a district judge at chambers in a habeas corpus case, as well as from a final decision of a District Court." Webb v. York, (C. C. A. 8th Cir. 1896) 74 Fed. 753, 40 U. S. App. 114, 21 C. C. A. 65.

Bankruptcy cases.—Under this section the former appellate jurisdiction of the Circuit Court in bankruptcy cases was vested in the Circuit Court of Appeals. Duff v. Carrier, (C. C. A. 3d Cir. 1893) 55 Fed. 433, 3 U. S. App. 552, 5 C. C. A. 177.

Pecuniary limit.—R. S. sec. 361, which limited appeals from the District to the Circuit Court in equity and admiralty to cases where the sum in dispute exceeded fifty dollars, was held to be inapplicable to appeals to the Circuit Court of Appeals, but was superseded by the Act establishing such courts, which created a new appellate jurisdiction without any pecuniary limitation. The Joseph B. Thomas, (C. C. A. 3d Cir. 1906) 148 Fed. 762, 78 C. C. A. 428. Conti v. North American Trading, etc., Co. v. Smith, (C. C. A. 9th Cir. 1899) 93 Fed. 7, 35 C. C. A. 183. Said section 651 was expressly repealed by Judicial Code, § 297, supra, this title, vol. 5, p. 1085.

It was said by the Supreme Court, in The Paquete Habana, (1900) 175 U. S. 677, 20 S. Ct. 290, 44 U. S. (L. ed.) 320, that "the Act of 1891 nowhere imposes a pecuniary limit upon the appellate juris-
diction, either of this court or of the Circuit Court of Appeals, from a District or Circuit Court of the United States. The only pecuniary limit imposed is one of $1,000 upon the appeal to this court of a case which has been once decided on appeal in the Circuit Court of Appeals, and in which the judgment of that court is not made final by section 6 of the Act. . . . The nature of the case and the amount in dispute is the test of the appellate jurisdiction of this court from the District and Circuit Courts." Followed in Giles v. Harris, (1903) 189 U. S. 475, 23 S. Ct. 639, 47 U. S. (L. ed.) 909.

Where there was no allegation of the amount in controversy, but no objection was made thereto in the lower court, as it could have been remedied by amendment, the objection was held not available on error to the Supreme Court. Giles v. Harris, (1903) 189 U. S. 475, 23 S. Ct. 639, 47 U. S. (L. ed.) 909.

Appeals under Interstate Commerce Law.—After July 1, 1891, following the passage of Act of March 3, 1891, no appeal could be taken directly to the Supreme Court under former section 16 of the Interstate Commerce Act from a decree of the Circuit Court dismissing a bill praying for a mandatory injunction against the defendants, requiring them to afford complainant "the same equal facilities as are afforded to any other connecting road, and for such other relief as may be deemed equitable." Little Rock, etc., R. Co. v. East Tennessee, etc., R. Co., (1896) 159 U. S. 688, 16 S. Ct. 199, 49 U. S. (L. ed.) 311.

Sec. 2. [Review by Circuit Court of Appeals of decisions of Supreme Court of Hawaii and of Porto Rico.]

Writs of error and appeals from the final judgments and decrees of the supreme courts of the Territory of Hawaii and of Porto Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the value of $5,000, may be taken and prosecuted in the circuit courts of appeals. [38 Stat. L. 804.]

This provision and the following section 4 were in the Act of Jan. 28, 1915, ch. 22, 38 Stat. L. 803. This provision followed a paragraph in section 2 of said Act which amended Judicial Code, § 248, supra, this title, vol. 5, p. 900.

Section 5 of said Act of Jan. 29, 1915, is set forth, infra, p. 238, and in the note thereto the title of the Act and references to all the other sections thereof are given, including section 6, which excepts pending cases from the operation of the Act.

Provisions for review by the United States Supreme Court on appeal, writ of error, or certiorari, of the final judgments or decrees of the Supreme Court of the Territory of Hawaii and of the Supreme Court of Porto Rico, are made in Judicial Code, § 248 (as amended), supra, this title, vol. 5, p. 900.

Porto Rico is attached to the first circuit and Hawaii is attached to the ninth circuit by Judicial Code, § 116, supra, this title, vol. 5, p. 599.

As to appellate review of decisions of the United States District Court for Hawaii and Porto Rico, respectively, see Judicial Code, §§ 128 and 238, supra, this title, vol. 5, pp. 607, 794.

Time of taking appeal.—Additional rule 37 of the Circuit Court of Appeals, adopted Oct. 18, 1916, provides as follows: "Appeals and writs of error from and to the District Court of the United States for the District of Porto Rico, and
from the Supreme Court of the District of Porto Rico whenever by law they can be taken, shall be taken within six calendar months from the time when the right to such an appeal or writ of error accrues, and not afterwards, by filing a claim for the appeal in the registry of the court appealed from, or by suing out a writ of error from the Court of Appeals, or from the court or judge in Porto Rico, as the case may be." Graham v. O'Farrell, (C. A. 1st Cir. 1916) 236 Fed. 719, 158 C. C. A. 49.

Further review by Supreme Court.—
As to the effect of this section upon the appellate jurisdiction of the United States Supreme Court to review final decisions of the Circuit Court of Appeals in cases taken to the latter court under this section, see Inter-Island Steam Nav. Co. v. Ward, (1916) 242 U. S. 1, 37 S. Ct. 1, 1 U. S. Adv. Cas. 1916, page 1.

SEC. 4. [Finality of judgments of Circuit Court of Appeals in cases arising under Bankruptcy Act.] That the judgments and decrees of the circuit courts of appeals in all proceedings and cases arising under the bankruptcy Act and in all controversies arising in such proceedings and cases shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceeding, case, or controversy be certified to it for review and determination, with the same power and authority as if taken to that court by appeal or writ of error; but certiorari shall not be allowed in any such proceeding, case, or controversy unless the petition therefor is presented to the Supreme Court within three months from the date of such judgment or decree. [39 Stat. L. 804.]

See the note to the preceding section 2 of this Act. The same rule is also given in Bankruptcy, vol. 2, supra, p. 833, and there annotated, the notes also giving cross-references to all the other sections of the Act. And see section 5 of said Act and the notes thereeto, infra, this title, p. 238.

The text section 4 was amended by section 3 of the Act of Sept. 6, 1916, ch. 448, 39 Stat. L. 727, in (1918 Supp. Fed. Stat. Ann. title JUDICIARY) Federal Statutes Annotated, Pamph. Supp. No. 8, for October, 1916, p. 133. The said amendment makes final the decisions of the Circuit Courts of Appeals in sundry other cases not relating to bankruptcy; but it makes no material change whatever in the text section 4, except that it contains no time limit for review by certiorari. This omission probably would not constitute an implied repeal of the three months' limitation in the text section. See article STATUTES AND STATUTORY CONSTRUCTION, vol. 1 of this work, § 137, p. 158. Waiving that question, however, it is to be observed that section 6 of said Act of Sept. 6, 1916, ch. 448, above cited in this paragraph, provides that "no writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Circuit Court shall be allowed or entertained unless duly applied for within three months after entry of the judgment or decree complained of: Provided, That writs of certiorari addressed to the Supreme Court of the Philippine Islands may be granted if application therefor be made within six months."

SEC. 6. [Writs of error on conviction of crimes punishable by death.] That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error, it shall be the duty of the clerk of the court to which the writ of error shall be directed to forthwith transmit to the Clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the Clerk of the Supreme Court of the United States to receive, file, and docket the same. Every such writ of error shall
during its pendency operate as a stay of proceedings upon the judgment in respect of which it is sued out. Any such writ of error may be filed and docketed in said Supreme Court at any time in a term held prior to the term named in the citation as well as at the term so named; and all such writs of error shall be advanced to a speedy hearing on motion of either party. When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution. No such writ of error shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record. [25 Stat. L. 656.]

This section is from the Act of Feb. 6, 1889, ch. 113, entitled "An act to abolish circuit court powers of certain district courts of the United States, and to provide for writs of error in capital cases, and for other purposes." The other sections of said Act were superseded by various provisions in the Circuit Court of Appeals Act of March 3, 1891, ch. 517, and in the Judicial Code.

The Circuit Court of Appeals Act of 1891, ch. 517, § 5, in the third paragraph thereof, authorized a review by the Supreme Court of an act of error direct to the District Court or Circuit Courts "in cases of conviction of a capital or otherwise infamous crime." And in section 6 of said Act all other appellate jurisdiction from federal courts was conferred on the Circuit Court of Appeals, and the decisions of the latter court were made final "in all cases arising . . . under the criminal laws." By the Act of Jan. 20, 1897, ch. 68, 29 Stat. L. 492, the words "or otherwise infamous" were struck out of said section 5 of the Circuit Court of Appeals Act; Judicial Code, § 128, supra, this title, vol. 5, p. 607, omitted the entire provision above quoted from said section 5, and said Act of Jan. 20, 1897, ch. 68, was expressly repealed by Judicial Code, § 297, supra, this title, vol. 5, p. 1085. Said section 6 of the Circuit Court of Appeals Act was carried into Judicial Code, § 128, prescribing the appellate jurisdiction of the Circuit Courts of Appeals, which jurisdiction now includes all criminal cases. Nevertheless a conviction in a criminal case, whether capital or other, may be taken on writ of error, by the defendant therein, direct to the Supreme Court from a District Court under Judicial Code, § 238, supra, this title, vol. 5, p. 794, if the case is otherwise one of the cases enumerated in said section 238; see the notes to that section. And the Criminal Appeals Act of March 2, 1907, ch. 2564, infra, p. 149, authorizes review by the Supreme Court on direct writ of error to a District Court of certain interlocutory decisions in criminal cases.

But the provisions in the text section 6 relating to appellate procedure were preserved to some extent by force of the provisions in section 11 of the Circuit Court of Appeals Act of 1891, ch. 517, infra, p. 170, providing that "all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this Act in respect of the circuit courts of appeals." R. S. secs. 651 and 693, providing for review by the Supreme Court of decisions of a District or Circuit Court in criminal cases on a certificate of division of opinion of the trial judges, were impliedly repealed by the Circuit Court of Appeals Act of March 3, 1891, ch. 517, and were expressly repealed by Judicial Code, § 297, supra, this title, vol. 5, p. 1085.

The text section 6 evidently superseded entirely R. S. sec. 1040, which provided as follows:

"Sec. 1040. Whenever a judgment of death is rendered in any court of the United States, and the case is carried to the Supreme Court in pursuance of law, the court rendering such judgment shall, by its order, postpone the execution thereof from time to time and from term to term, until the mandate of the Supreme Court in the case is received and entered upon the records of such lower court. In case of affirmance by the Supreme Court, the court rendering the original judgment shall appoint a day for the execution thereof; and in case of reversal, such further proceeding shall be had in the lower court as the Supreme Court may direct."

Prior to the passage of this Act the Supreme Court had no general authority to review on error or appeal the judgments of the Circuit Courts in cases within their criminal jurisdiction. U. S. v. Rider, (1896) 163 U. S. 132, 16 S. Ct. 983, 41 U. S. (L. ed.) 101.


Inapplicable where judgment could be otherwise reviewed.—"This section," said the court, in Cross v. U. S., (1892) 145 U. S. 571, 12 S. Ct. 842, 36 U. S. (L. ed.) 821, "manifestly does not contemplate the allowance of a writ of error to any appellate tribunal but only to review the final judgment of the court before which the respondent was tried, where such judgment could not otherwise be reviewed by writ of error or appeal." Followed in Brown v. U. S., (1896) 171 U. S. 631, 19 S. Ct. 56, 43 U. S. (L. ed.) 321, and New v. Oklahoma, (1904) 106 U. S. 252, 25 S. Ct. 68, 49 U. S. (L. ed.) 182.


Neither under the Act of March 3, 1891, nor under the Act of Feb. 6, 1886, was the Supreme Court given jurisdiction to grant a writ of error to review the judgment of the Supreme Court of the District of Columbia, in criminal cases, nor did it have jurisdiction over the judgment of that court on habeas corpus. Cross v. Burke, (1892) 146 U. S. 82, 13 S. Ct. 29, 36 U. S. (L. ed.) 896.


Final judgments.—An order entered on the record, upon a motion in arrest of judgment, that "By reason of the law and the evidence and the verdict of the jury in this case, it is ordered and adjudged that the defendants . . . be executed by being hung until each and either are dead, according to the forms, delays, and processes provided in the laws of the United States," is not such a final judgment as requires the writ of error to be taken within sixty days after the expiration of the term, where it does not appear that the defendants were present and had been asked what they had to say why sentence of death should not be pronounced upon them. Ball v. U. S., (1891) 140 U. S. 118, 11 S. Ct. 761, 35 U. S. (L. ed.) 377.

When judgment becomes final.—A judgment of death or conviction for murder does not become final until the order designating the day of execution and that the death warrant is filed, and a writ of error prosecuted within sixty days from the entry of such order is in time. Ball v. U. S., (1891) 140 U. S. 118, 11 S. Ct. 761, 35 U. S. (L. ed.) 377.

Admission to bail.—As to this provision it was said by the Supreme Court in 1894 that although the Act expressly recognized the power of that court "to make rules regulating the proceedings upon writs of error in capital cases, yet, as by its terms the writ was to be allowed as of right, without requiring any security, and was of itself to operate as a stay of proceedings, no rule upon the subject was considered necessary, and none was made. . . . It can not be doubted, however, that Congress intended that the allowance of the writ of error and stay of proceedings, while suspending the execution of the sentence, should neither have the effect of discharging the prisoner from custody nor of preventing his being admitted to bail, upon sufficient cause shown, pending the writ of error; and no special provision upon the subject of bail in a capital case after conviction having been made by act of Congress or rule of court, it would seem that it might be taken by the justice or judge who allowed the writ of error. But however it may be in a capital case, it is quite clear, in view of all the legislation on the subject of bail, that Congress must have intended that under the Act of 1891, in cases of crimes not capital, and therefore bailable of right before conviction, bail might be taken, upon writ of error, by order of the proper court, justice or judge. And we are of opinion that any justice of this court, having power, by the acts of Congress, to allow the writ of error, to issue the citation, to take the security required by law, and to grant a supersedeas, has the authority as in-
This was the Act of March 2, 1907, ch. 2564, commonly called the Criminal Appeals Act, entitled "An Act Providing for writs of error in certain instances in criminal cases."

"Circuit" courts mentioned in this Act were abolished by Judicial Code, § 289, supra, this title, vol. 5, p. 1082.

Prior to the passage of this Act writs of error from the Supreme Court direct to District or Circuit Courts were allowed only in cases of final decisions by the latter courts, as provided in section 5 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, 26 Stat. L. 827, which section was embraced in and superseded by Judicial Code, § 238, supra, this title, vol. 5, p. 794. See the notes to the last cited section. And review by the Circuit Courts of Appeals on writs of error in criminal cases was limited to "final decisions" of the District and Circuit Courts by section 6 of said Circuit Court of Appeals Act, which section, as far as material here, was embraced in and superseded by Judicial Code, § 128, supra, this title, vol. 5, p. 607, providing also for finality of judgments of the Circuit Court of Appeals "in all cases arising under ... the criminal laws."

This provision was not repealed by the Judicial Code of March 3, 1911, ch. 231, U. S. c. Winalow, (1913) 227 U. S. 202, 33 S. Ct. 253, 57 U. S. (L. ed.) 481, and it was expressly confirmed in the paragraph of text next following herein, infra, p. 152.

I. Purpose and scope of act, 149

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III. Construction and sufficiency of indictment, 151

IV. Demurrer to indictment, 152

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I. PURPOSE AND SCOPE OF ACT

Purpose of provision.—In U. S. v. Bitty, (1908) 208 U. S. 293, 28 S. Ct. 396, 52 U. S. (L. ed.) 543, it was said: "If a court of original jurisdiction err in quashing, setting aside, or dismissing an indictment for an alleged offense against the United States, upon the ground that the statute on which it is based is unconstitutional, or upon the ground that the statute does not embrace the case made by the indictment, there is no mode in which the error can be corrected and the provisions of the statute enforced, except the case be brought here by the United States for review. Hence, that there might be no unnecessary delay in the administration of the criminal law, and that the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced — the above Act of 1907 was passed."

Scope of review.—The right of the
United States to go directly to the Supreme Court because of a construction of a statute by the court below is derived solely from the above Act. This Act vests the Supreme Court with jurisdiction to review only the particular questions decided by the court below, and does not permit the opening of the whole case in the Supreme Court to authorise consideration of the validity of the indictment on any other grounds than those enumerated in the Act and passed on by the court below. U. S. v. Keitel, (1908) 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230.

And in reviewing a decision of the trial court in sustaining special pleas in bar of the prosecution, the court may not go beyond the ruling of the court below on such pleas. U. S. v. Mason, (1909) 213 U. S. 115, 29 S. Ct. 480, 53 U. S. (L. ed.) 726, holding that the court will not consider the grounds of demurrer to the indictment.

Where a writ of error is taken on the ground that the statute on which the indictment was founded was wrongly construed, and also on the separate ground that a plea of the statute of limitations, in bar of the prosecution, was wrongly sustained, it is not necessary that the Supreme Court should pass on both questions where its decision in regard to one of them is in favor of the action of the lower court and is conclusive against the government's right further to prosecute the case. U. S. v. Biggs, (1908) 211 U. S. 507, 29 S. Ct. 181, 53 U. S. (L. ed.) 305.


II. CONSTRUCTION AND APPLICATION

Validity.—This Act is directed to judgments rendered before the moment of jeopardy is reached, and therefore is not repugnant to the Fifth Amendment of the United States Constitution. Taylor v. U. S., (1907) 207 U. S. 120, 29 S. Ct. 53, 53 U. S. (L. ed.) 120.

This Act is not unconstitutional on the ground that it authorizes the United States in the cases specified to bring the case directly from the District or Circuit Court to the Supreme Court, but does not allow the accused to bring it to the Supreme Court where a demurrer to the indictment or some count thereof is overruled. The accused has his remedy by review of the final judgment where a demurrer is erroneously overruled. The object of the Act was to prevent unnecessary delay in the administration of the criminal law, and to provide a method by which the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced. Such a provision is within the legitimate discretion of Congress to prescribe. U. S. v. Bitty, (1908) 208 U. S. 393, 28 S. Ct. 396, 53 U. S. (L. ed.) 545, reversing on other grounds 15 D. N. Y. (1907) 155 Fed. 938.


Application generally of term "construction of the statute."—A judgment holding insufficient on demurrer certain counts of an indictment charging willful misapplication of the funds of a national bank, in violation of R. S. sec. 5209 (in title NATIONAL BANKS), because the facts alleged do not constitute a crime under that section as it should be construed, is reviewable as "based upon the . . . construction of the statute." U. S. v. Heine, (1910) 218 U. S. 632, 31 S. Ct. 98, 54 U. S. (L. ed.) 1139, 21 Ann. Cas. 884.

For the same reason a judgment is reviewable which quashed certain counts of an indictment for violation of the same statute because they possessed the defects found in a prior indictment held not to charge a crime under the statute. U. S. v. Heine, (1910) 218 U. S. 547, 31 S. Ct. 102, 54 U. S. (L. ed.) 1145, 21 Ann. Cas. 884.

The "construction of the statute" is also involved, so as to sustain jurisdiction of a writ of error under this section, where an indictment against a national bank officer for making false reports to the Comptroller of the Currency was quashed because such officer was not an agent within the meaning of the federal statute defining the crime. U. S. v. Corbett, (1909) 215 U. S. 233, 30 S. Ct. 81, 54 U. S. (L. ed.) 173.

Where the validity of departmental regulations is in issue, and this involves the construction of a federal statute, and a demurrer is sustained to an indictment by a United States District Court, because of such construction the Supreme Court has jurisdiction to review the case. U. S. v. Foster, (1914) 233 U. S. 618, 34 S. Ct. 666, 58 U. S. (L. ed.) 1074.

Existence of statute overlooked.—Within the meaning of the Criminal Appeals Act the statute on which, as matter of law, an indictment is founded, may be misconstrued not only by misinterpreting its language, but by overlooking its existence and failing to apply its provisions to an indict-

Effect of bringing up single ruling.—In U. S. v. Fortale, (1914) 235 U. S. 27, 35 S. Ct. 1, 59 U. S. (L. ed.) 111, which was a writ of error to a District Court which had sustained a demurrer to an indictment, it appearing that a single ruling only was brought up which related to the construction of a statute, it was held that the court below erred in sustaining the demurrer so far as that ruling was based upon the construction of the statute in question, but as that was the only question brought up, the reversal of the judgment was without prejudice to further action of the court below consistent with the opinion.

III. CONSTRUCTION AND SUFFICIENCY OF INDICTMENT

Construction of indictment.—The action of the court below as to the mere construction of the indictment is not open to review on the writ of error authorized by the Criminal Appeals Act, U. S. v. Rogers, (1909) 211 U. S. 507, 29 S. Ct. 181, 53 U. S. (L. ed.) 305, and cases cited in the following paragraph.

This Act does not give authority to review the action of the court below as to the mere construction of an indictment, and in the exercise of the power to review under the Act the Supreme Court must accept the construction of the indictment made by the lower court and test in that aspect the lower court's construction of the statute on which the indictment was founded. Whether an exception to this rule exists where the construction given by the court below to the indictment was merely the result of a misconstruction of the statute on which it was founded, quere. U. S. v. Herr, (1908) 211 U. S. 406, 29 S. Ct. 135, 53 U. S. (L. ed.) 255; U. S. v. Biggs, (1908) 211 U. S. 507, 29 S. Ct. 181, 53 U. S. (L. ed.) 305; all following U. S. v. Keitel, (1908) 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230.


So in a recent case the United States Supreme Court says: "It is settled that under the Criminal Appeals Act we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the court in a case under review erroneously construed the statute," U. S. v. Carter, (1913) 231 U. S. 492, 34 S. Ct. 173, 58 U. S. (L. ed.) 336.

But where an indictment is quashed on the ground that the facts charged therein are not within the statute under which the prosecution is brought, a contention that a writ of error will not lie under the above Act, because the indictment and not the statute was interpreted or construed, is without merit. U. S. v. Keitel, (1908) 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230.

And where the District Court holds that the acts charged in the indictment do not fall within the condemnation of the statute upon which the indictment is founded it necessarily construes the statute and a writ of error lies. U. S. v. Birdsal, (1914) 233 U. S. 223, 34 S. Ct. 512, 58 U. S. (L. ed.) 930.

The sufficiency of an indictment upon general principles of criminal law is not open for review in the federal Supreme Court on a writ of error to a federal District Court under this Act. U. S. v. Stevenson, (1909) 215 U. S. 190, 30 S. Ct. 35, 54 U. S. (L. ed.) 163.

But a judgment of a federal Circuit Court holding insufficient on demurrer certain counts of an indictment charging willful misapplication of the funds of a national bank, in violation of R. S. sec. 5209 (in title NATIONAL BANKS, infra, this volume), because the facts alleged did not constitute a crime under that section, as it should be construed, was held to be reviewable in the Supreme Court, under this Act, when based upon the construction of the statute upon which the indictment was founded. U. S. v. Heinze, (1910) 218 U. S. 532, 31 S. Ct. 98, 54 U. S. (L. ed.) 1139, 21 Ann. Cas. 884.

And jurisdiction of the federal Supreme Court of a writ of error sued out under this Act to review a judgment of a federal District Court quashing an indictment for a conspiracy illegally to acquire coal lands from the United States, because of the opinion that the federal statute did not prohibit the acts complained of, cannot be successfully challenged on the theory that the indictment, and not the statute, was construed. U. S. v. Keitel, (1909) 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230.
IV. DEMURRER TO INDICTMENT


And where on a motion to quash the service and return on the ground that the same were not authorized by law, the court, treating such motion as a demurrer to the indictment, found that the indictment could not be maintained and the decision was held to be one based on the construction of the statute, the Supreme Court said: "It is objected that this court has no jurisdiction of the present writ of error under the act of March 2, 1907, c. 2664, 34 Stat. 1246, and that the court below had no authority to treat the motion of Barrett as equivalent to a demurrer. Without following the defendant into the niceties by which it seeks to escape the jurisdiction of this court after having eluded that of the court below, it is enough to say that in our opinion, if we are to go behind the entry, the decision entered was one setting aside the indictment and was based upon the construction of the statute upon which the indictment is founded, within the meaning of the act of March 2, 1907." U. S. v. Adam's Express Co., (1913) 229 U. S. 381, 33 S. Ct. 878, 57 U. S. (L. ed.) 1237.

And a judgment of a federal District Court sustaining a demurrer to an indictment upon two grounds, one of which involves the construction of the federal statute on which the indictment is founded, and the other the sufficiency of such indictment upon general principles of criminal law, is reviewable in the federal Supreme Court on a writ of error, under this Act. U. S. v. Stevenson, (1908) 215 U. S. 180, 30 S. Ct. 35, 54 U. S. (L. ed.) 153.

But the various grounds of demurrer to an indictment cannot be considered on a writ of error sued out by the government in a criminal case, under this Act, to review a judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy; but the court has jurisdiction to review only the ruling of the court below on the sufficiency of such plea. U. S. v. Mason, (1909) 213 U. S. 115, 29 S. Ct. 490, 53 U. S. (L. ed.) 725.

V. SPECIAL PLEAS IN BAR

The Supreme Court has jurisdiction to review a judgment purporting to dismiss an indictment upon the ground that the statute of limitations was a bar to the prosecution, although the plea filed and heard by consent and stipulation was denominated a plea in abatement. U. S. v. Barber, (1911) 219 U. S. 72, 31 S. Ct. 209, 55 U. S. (L. ed.) 90.

And the decision of a federal court sustaining a special plea in bar to an indictment is reviewable in the Supreme Court under this Act, although the decision may invoke the application, rather than the validity or construction, strictly speaking, of the statute upon which the indictment was founded. U. S. v. Celestine, (1909) 215 U. S. 278, 30 S. Ct. 93, 54 U. S. (L. ed.) 195.


Sec. 6. [Effect of Act — pending cases — Criminal Appeals Act unaffected.] That this Act shall not affect cases now pending in the Supreme Court of the United States or cases in which writs of error or appeals have been allowed at the date of its approval. And nothing in this Act shall be deemed to repeal, amend, or modify the provisions of an Act entitled "An Act providing for writs of error in certain instances in criminal cases," approved March second, nineteen hundred and seven. [38 Stat. L. 804.]

This is the concluding section of the Act of Jan. 28, 1915, ch. 22. Section 5 of said Act is given infra, this title, p. 238, and in the note thereto the title of the Act is given together with cross-references to all the other sections of said Act. In section 2 of said Act, Judicial Code, §§ 128 and 238, supra, this title, vol. 5, pp. 607, 794, were re-enacted in amended form, and the saving clause in the text section 6 was probably inserted to avoid any implication that the entire appellate jurisdiction was merged in said sections 128 and 238.
SEC. 2. [Appellate jurisdiction of supreme court of United States over Territorial courts, how exercised — proceedings on appeal.] That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe:

Provided, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal: * * * [18 Stat. L. 27.]

This is one of the two sections constituting the Act of April 7, 1874, ch. 80, commonly termed the "Territorial Practice Act." Section 1 is given in the title Territorial.

The words "said Territorial courts" in the text section mean the "courts of the several Territories of the United States" mentioned in section 1. At the date of the Act, viz., April 7, 1874, there were no territorial courts outside of the continental United States; R. S. sec. 1957 conferred criminal and civil jurisdiction over Alaska upon the Federal District Courts in California, Oregon, and the District Courts of Washington, and it was not until the Act of May 17, 1884, ch. 53, 23 Stat. L. 24, that a court was established for the district Alaska.

The Territorial Practice Act above cited never had application to the Philippine Islands, appellate review of decisions of the Supreme Court thereof by the United States Supreme Court being formerly regulated by section 10 of the Act of July 1, 1902, ch. 1369, providing that appeals or writs of error shall be taken "in the same manner, under the same regulations, and by the same procedure, as the final judgments and decrees of the circuit courts of the United States." See De La Rama v. De La Rama, (1906) 201 U. S. 303, 26 S. Ct. 485, 50 U. S. (L. ed.) 765.


Judicial Code, § 247, supra, this title, vol. 5, p. 905, which specifies all of the jurisdiction that can now be exercised by the Supreme Court to review judgments and decrees of the District Court for Alaska provides that "such writs of error and appeal shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken from the district courts to the Supreme Court." By order promulgated by the United States Supreme Court, May 11, 1891 (139 U. S. 707, 11 S. Ct. IV, 34 U. S. (L. ed.) 1123B), Alaska was assigned to the ninth judicial circuit, and it is included in that circuit by Judicial Code, § 116, supra, this title, vol. 5, p. 599.

Judicial Code, § 134, supra, this title, vol. 5, p. 685, authorizes appeals from the District Court for Alaska to the Circuit Court of Appeals for the ninth circuit, but does not prescribe the procedure therein.

Section 504 of the Act of April 7, 1874, ch. 51, 31 Stat. L. 415, constituting a Civil Code for Alaska, provided as follows: "All provisions of law now in force regulating the procedure and practice in cases brought by appeal or writ of error to the Supreme Court of the United States or to the United States Circuit Court of Appeals for the ninth circuit, except in so far as the same may be inconsistent with any provision of this Act, shall regulate the procedure and practice in cases brought to the courts,
respectively, from the district court for the district of Alaska." The effect of this
provision was held to be, in Shields v. Mongollon Exploration Co., (C. C. A. 9th Cir.
1905) 137 Fed. 539, 70 C. C. A. 123, that the Territorial Practice Act, above cited in
this note (including, of course, the text section 2), became inapplicable to appeals
to the Circuit Court of Appeals from the District Court for Alaska.

Judicial Code, § 240 (as amended by the Act of Jan. 28, 1915, ch. 29, § 2), supra,
this title, vol. 5, p. 990, gives specified jurisdiction to the Supreme Court of
writes of error and appeals from decisions of the Supreme Court of the Territory of Hawaii and
of the Supreme Court of Porto Rico, "to be taken and prosecuted ... within the same
time, in the same manner, under the same regulations, and in the same class of cases,
in which writs of error and appeals from the final judgments and decrees of the highest
court of a state," etc., may be taken.

Prior to the enactment of said section 240 of the Judicial Code, it was provided in
the Act of April 12, 1900, ch. 191, § 35, in title Porto Rico, "that writs of error and
appeals from the final decisions of the Supreme Court of Porto Rico and the district
court of the United States shall be allowed and may be taken to the Supreme Court of the
United States in the same manner and under the same regulations and in the same
cases as from the supreme courts of the Territories of the United States;" and under
this provision appeals were governed by the appellate procedure prescribed in the text
section of the Territorial Practice Act. Garzot v. de Rubio, (1908) 209 U. S. 263, 28

By order of the United States Supreme Court of April 15, 1901, cited in Ex p.
Wilders'Steamship Co., (1902) 183 U. S. 545, 22 S. Ct. 225, 46 U. S. (L. ed.) 321, the
Territory of Hawaii was assigned to the ninth judicial circuit, and it is included in

Porto Rico was made a part of the first judicial circuit by the Act of Jan. 28, 1915,

The Act of Jan. 28, 1915, ch. 22, § 2, amends Judicial Code, § 240, supra, this title,
vol. 5, p. 990, and then provides as follows: "Writs of error and appeals from the final
judgments and decrees of the Supreme Courts of the Territory of Hawaii and of Porto
Rico, wherein the amount involved, exclusive of costs, to be ascertained by the oath
of either party or of other competent witnesses, exceeds the value of $5,000, may be
taken and prosecuted in the circuit courts of appeals." See supra, p. 145.

Section 11 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, infra,
p. 170, provided that "all provisions of law now in force regulating the methods
and system of review, through appeals or writs of error, shall regulate the methods
and system of appeals and writs of error provided for in this Act in respect of the
circuit courts of appeals."

Section 15 of said Circuit Court of Appeals Act of March 3, 1891, ch. 517, pro-
vided that "the circuit court of appeal in cases in which the judgments of the
circuit courts of appeal are made final by this Act shall have the same appellate juris-
diction, by writ of error or appeal, to review the judgments, orders, and decrees of the
supreme courts of the several Territories as by this Act they may have to review the
judgments, orders, and decrees of the district court and circuit courts; and for that
purpose the several Territories shall, by orders of the Supreme Court, to be made from
time to time, be assigned to particular circuits."

The Territories of Arizona and New Mexico having been admitted to the Union (see
supra, this title, vol. 5, pp. 554, 578), there are no remaining territories within the
continental United States.

The foregoing survey of legislation shows it to be doubtful if the text section of
the Territorial Practice Act has at present any scope whatever for operation, except
possibly in appeals to the Circuit Court of Appeals for the first circuit from decisions
of the Supreme Court of Porto Rico, as to which appeals see section 11 of the Circuit
Court of Appeals Act, as above quoted, in connection with the Act of April 15, 1900,
ch. 191, § 35 (in title Porto Rico), also above quoted.

In general.—This statute constituted the only right of review on appeals from
45 U. S. (L. ed.) 1000.

Territories affected by section — Oklahoma.—The manner of reviewing judg-
ments, in civil cases, of the Supreme Court of the territory of Oklahoma, was
specially provided for by the ninth sec-
tion of the Act of May 2, 1890, 26 Stat.
L. 81, 85, ch. 182, providing a territorial
government for Oklahoma, and was not
governed by the Act of Congress of 1874.
Comstock v. Eagleton, (1905) 196 U. S.
587.

Alaska.—The appellate jurisdiction of the Circuit Court of Appeals over appeals
and writs of error from the District Courts

Philippine Islands.—This Act had no application to the Philippine Islands,appears from the Supreme Court of which were regulated by section 10 of the Act of July 1, 1902. De la Rama v. De la Rama, (1906) 201 U. S. 303, 26 S. Ct. 485, 50 U. S. (L. ed.) 765. See now Judicial Code, § 248 (as subsequently limited), supra, this title, vol. 5, p. 907.

Porto Rico.—In Garzet v. de Rubio, (1898) 209 U. S. 283, 25 S. Ct. 548, 52 U. S. (L. ed.) 794, it was said:—While the suggestion that because there is no intermediate reviewing court between this and the District Court of the United States for Porto Rico, differing from what is generally the case in the territories of the United States, a wider scope of authority should exist in reviewing an appeal the decrees of the District Court of Porto Rico, may have cogency, it affords no ground for disregarding the plain command of the statute of 1874, which is here applicable, as expounded by many previous decisions of this court.” But see now the provisions above cited in that part of this note which is immediately under the text.

“Trial by jury.”—The provision of this Act permitting a writ of error “in cases of trial by jury” only evidently has regard to a trial by jury as in an action at common law in which there must be a trial by a jury, and where the court is not authorized to try and determine the fact for itself unless a jury is waived by the parties according to the statute; and has no application to a trial of special issues submitted to a jury in a case pending in the nature of a suit in equity, not as a matter of right or to settle the issues of fact, but at the discretion of the court, and simply to inform its conscience and to aid it in making up its own judgment upon the facts, and the real trial of the facts is by the court and not by a jury. In all proceedings in the territorial courts in the nature of suits in equity, therefore, as well as in those proceedings in the nature of actions at common law in which no trial by jury is had, either because a jury has been duly waived or because the issues tried are issues of law only, the appellate jurisdiction of the Supreme Court must be by appeal and not by writ of error. Davis v. Alvord, (1876) 94 U. S. 545, 24 U. S. (L. ed.) 283; Stringfellow v. Cain, (1878) 90 U. S. 610, 25 U. S. (L. ed.) 421; Davis v. Frederick, (1881) 104 U. S. 618, 26 U. S. (L. ed.) 849; Hecht v. Boughton, (1881) 105 U. S. 236, 26 U. S. (L. ed.) 1018; U. S. v. Union Pac. R. Co., (1881) 105 U. S. 263, 26 U. S. (L. ed.) 1021; Story v. Black, (1886) 119 U. S. 235, 7 S. Ct. 176, 30 U. S. (L. ed.) 341; Idaho, etc., Land Imp. Co. v. Bradbury, (1899) 132 U. S. 509, 10 S. Ct. 171, 33 U. S. (L. ed.) 493; Gregory Consol. Min. Co. v. Starr, (1891) 141 U. S. 222, 11 S. Ct. 914, 35 U. S. (L. ed.) 715; Cameron v. U. S., (1893) 148 U. S. 301, 13 S. Ct. 503, 37 U. S. (L. ed.) 458; Bonnifield v. Price, (1892) 154 U. S. 672, 14 S. Ct. 1194, 28 U. S. (L. ed.) 1029.


But, as said by the Supreme Court of the United States, “if the findings of the District Court are sustained by the Supreme Court and a general judgment of affirmance rendered, the findings of the District Court thus approved by the Supreme Court will furnish a sufficient statement of facts of the case for the purpose of an appeal to this court. The same will be true if there is a reversal for the reason that the facts as found are not sufficient to support the judgment. But if . . . the judgment is reversed because the evidence does not sustain the findings, other findings must be made before the case can be put in a condition for hearing in this court on appeal.” Stringfellow v. Cain, (1878) 99 U. S. 610, 25 U. S. (L. ed.) 421. See to the same effect Gray v. Howe, (1882) 108 U. S. 12, 2 S. Ct. 136, 27 U. S. (L. ed.) 634; Eilers v. Boastman, (1884) 111 U. S. 356, 4 S. Ct. 432, 28 U. S. (L. ed.) 454; Wasatch Min. Co. v. Crescent Min. Co., (1899) 148 U. S. 293, 13 S. Ct. 600, 37 U. S. (L. ed.) 454; Hawa c. Victoria Copper Min. Co., (1893) 160 U. S. 303, 16 S. Ct. 282, 40 U. S. (L. ed.) 436; Salina Stock Co. v. Salina Irrigation Creek Co., (1898) 163 U. S. 109, 16 S. Ct. 1036, 41 U. S. (L. ed.) 90.

The findings of a territorial District Court, having been adopted and affirmed by the Supreme Court of the territory, serve the purpose of the statement of facts required. Egie Min., etc., Co. v. Hamilton, (1910) 218 U. S. 513, 31 S. Ct. 27, 54 U. S. (L. ed.) 1131.

Where the Supreme Court of a territory adopts the findings of fact of the lower court and also finds additional facts, the Supreme Court of the United States may consider both findings. Apache County v. Barth, (1900) 177 U. S. 539, 20 S. Ct. 718, 44 U. S. (L. ed.) 878.

A so-called statement of facts which merely sets out the evidence is not such a statement as is required by this Act. Cohn v. Daley, (1899) 174 U. S. 539, 19 S. Ct. 809, 43 U. S. (L. ed.) 1077.
In the case of Stringfellow v. Cain, (1878) 99 U. S. 610, 25 U. S. (L. ed.) 421, the Supreme Court of the territory set aside the findings of the trial court and directed the district court to make a decree on the evidence at the same time making its own findings therefrom, and the Supreme Court of the United States refused to disturb the decree of the territorial Supreme Court, saying: "Without undertaking to decide what would be the proper practice in an ordinary civil action when judgment is reversed because a new trial was refused in the District Court, we are clearly of the opinion that in a suit like this, when all the evidence is before the Supreme Court that could be considered by the District Court if the case should be sent back, it is proper for the Supreme Court itself to state the facts established by the evidence and render the judgment which ought to have been rendered by the District Court."

"In the absence of any findings of the Supreme Court of the territory, and also being without anything in the nature of a bill of exceptions, we have nothing on which to base a reversal of the judgment in this case. The refusal of the Supreme Court to make findings is justified by its certificate that the facts were not before it." Armijo v. Armijo, (1901) 181 U. S. 558, 21 S. Ct. 707, 45 U. S. (L. ed.) 1000.

Questions for review in general.—On an appeal from a judgment of a territorial Supreme Court, affirming the judgment of the court of first instance, which, after hearing the evidence, found all the issues in a suit for specific performance in favor of the defendants, the Supreme Court of the United States will ordinarily, in reviewing the facts, confine itself to questions of the admissibility of evidence and whether there was any evidence to sustain the conclusion reached, where such is the practice in the territorial court. Halsell v. Renfrow, (1906) 202 U. S. 287, 26 S. Ct. 610, 50 U. S. (L. ed.) 1032, 6 Ann. Cas. 189.

The jurisdiction of the federal Supreme Court is limited to the inquiry whether the findings of fact made by the court below support its judgment, and to a review of exceptions which have been duly taken to rulings upon the admission or rejection of evidence. Eagle Min., etc., Co. v. Hamilton, (1910) 218 U. S. 613, 31 S. Ct. 27, 54 U. S. (L. ed.) 1131.


"Our review is confined to determining the question whether the facts found by the court below sustain the judgment. And these facts are to be certified to us by the territorial Supreme Court, either by adopting the findings of the trial court, or by making separate findings of its own." Citizens' Nat. Bank of Rosewell v. Davison, (1913) 229 U. S. 212, 33 S. Ct. 625, 57 U. S. (L. ed.) 1153, Ann. Cas. 1915A 272.

"We are not at liberty," said the court in Nealin v. Wells, (1881) 104 U. S. 438, 26 U. S. (L. ed.) 802, "to consider anything as embraced in the statement of facts required by the statute, except the special findings of the District Court adopted by the Supreme Court in its general judgment of affirmance. This excludes any consideration of exceptions taken in the District Court in the course of the trial and noted in the statement filed in that court as the basis of the motion for a new trial, and leaves as the sole question for determination here, whether the facts as found justify the decree sought to be reversed." Where the record presents no statement of facts to enable the appellate court to determine whether the facts found are sufficient to sustain the judgment, and no exceptions are taken to rulings in the admission or rejection of evidence, no question is presented for review. Salina Stock Co. v. Salina Irrigation Creek Co., (1896) 163 U. S. 109, 16 S. Ct. 1036, 41 U. S. (L. ed.) 90.

Re-examination of facts.—In De la Rama v. De la Rama, (1906) 201 U. S. 303, 26 S. Ct. 485, 50 U. S. (L. ed.) 765, it was said: "Since that Act was passed we have always held that the jurisdiction of this court on an appeal from the Supreme Court of a territory did not extend to a re-examination of the facts, but was limited to determining whether the find-
ings of fact supported the judgment, and
to reviewing errors in the admission or
rejection of testimony, when exceptions
have been duly taken to the action of the
court in this particular.” Citing String-
fellow v. Cain, (1878) 99 U. S. 610, 25
U. S. (L. ed.) 421; Eilers v. Boatman,
(1884) 111 U. S. 356, 4 S. Ct. 432, 28
U. S. (L. ed.) 454; Idaho, etc., Land Imp.
Co. v. Bradbury, (1889) 132 U. S. 509, 10
S. Ct. 177, 33 U. S. (L. ed.) 183; Mam-
moth Min. Co. v. Salt Lake Foundry, etc.,
Co., (1894) 151 U. S. 447, 14 S. Ct. 384,
38 U. S. (L. ed.) 229; Young v. Amy,
(1898) 171 U. S. 179, 18 S. Ct. 802, 43

"The necessary effect of this enact-
ment," said the court in Idaho, etc., Land
Imp. Co. v. Bradbury, (1889) 132 U. S.
509, 10 S. Ct. 177, 33 U. S. (L. ed.) 433,
"is that no judgment or decree of the
highest court of a territory can be reviewed
by this court in matter of fact, but only in
matter of law. As observed by Chief Jus-
tice Waite, "we are not to consider the tes-
timony in any case. Upon a writ of error
we are confined to the bill of exceptions or
questions of law otherwise presented by the
record; and upon an appeal, to the state-
ments of facts and rulings certified by the
court below. The facts set forth in the
statement which must come up with the
appeal are conclusive on us." Hecht v.
Boughton, (1891) 105 U. S. 235, 26 U. S.
(L. ed.) 1018."

Weight of evidence.—In either class of
cases, whether equitable or legal, coming
up to the Supreme Court of the United
States by appeal from a territorial court
after a hearing or trial on the facts, the
evidence at large cannot be brought up.
The authority of the court is limited to
determining whether the court's findings of
fact support its judgment or decree, and
whether there is any error in rulings duly
excepted to on the admission or rejection
of testimony. The authority of the court
does not extend to a consideration of the
weight of evidence or its sufficiency to
support the conclusions of the court. String-
fellow v. Cain, (1878) 99 U. S. 610, 25
U. S. (L. ed.) 421; Cannon v. Pratt,
Neslin v. Wells, (1881) 104 U. S. 428, 26
U. S. (L. ed.) 802; Hecht v. Boughton,
(1881) 105 U. S. 235, 26 U. S. (L. ed.)
1018; Gray v. Howe, (1882) 108 U. S. 12,
1 S. Ct. 136, 27 U. S. (L. ed.) 634; Eilers
v. Boatman, (1884) 111 U. S. 356, 4 S. Ct.
392, 28 U. S. (L. ed.) 454; Zeckendorf v.
Johnson, (1887) 123 U. S. 617, 8 S. Ct.
261, 31 U. S. (L. ed.) 27; Idaho, etc.,
Land Imp. Co. v. Bradbury, (1889) 132
U. S. 509, 10 S. Ct. 177, 33 U. S. (L. ed.)
433; San Pedro, etc., Co. v. U. S.,
(1892) 146 U. S. 120, 13 S. Ct. 94, 36 U. S. (L. ed.)
912; Mammoth Min. Co. v. Salt Lake
Foundry, etc., Co., (1894) 151 U. S. 447,
14 S. Ct. 384, 38 U. S. (L. ed.) 229; Haws
v. Victoria Copper Min. Co., (1895) 160
U. S. 303, 16 S. Ct. 292, 40 U. S. (L. ed.)
438; Salina Stock Co. v. Salina Irrigation
Creek Co., (1898) 163 U. S. 109, 16 S. Ct.
1036, 41 U. S. (L. ed.) 90; Grayson v.
1064, 41 U. S. (L. ed.) 230; Bear Lake,
etc., Waterworks, etc., Co. v. Garland,
(1898) 164 U. S. 1, 17 S. Ct. 7, 41 U. S.
(L. ed.) 327; Harrison v. Perez, (1897)
168 U. S. 311, 18 S. Ct. 128, 45 U. S. (L. ed.)
478; Holloway v. Dunham, (1898) 170
U. S. 615, 18 S. Ct. 784, 42 U. S. (L. ed.)
1165; Young v. Amy, (1898) 171 U. S. 179,
18 S. Ct. 802, 43 U. S. (L. ed.) 127;
Apache County v. Barth, (1900) 177 U. S.
535, 20 S. Ct. 535, 44 U. S. (L. ed.)
378.

[Sec. 6.] [Time limit for appeal or writ of error from Circuit Court of
Appeals to Supreme Court.] * * *
[In all cases not hereinafter, in
this section, made final there shall be of right an appeal or writ of error or
review of the case by the Supreme Court of the United States where the
matter in controversy shall exceed one thousand dollars besides costs.]
But no such appeal shall be taken or writ of error sued out unless within
one year after the entry of the order, judgment, or decree sought to be
reviewed. [26 Stat. L. 238.]

This was the conclusion of section 6 of the Circuit Court of Appeals Act of March 3,
1891, ch. 517. The bracketed part was embraced in Judicial Code, § 241, supra, this
title, vol. 5, p. 877, and was superseded by force of the last paragraph of Judicial Code,
§ 297, supra, this title, vol. 5, p. 1085. Sections 5 and 6 of said Circuit Court of
Appeals Act are set forth in the note to Judicial Code, § 238, supra, this title, vol. 5,
p. 794. As to other sections of said Act see section 4 thereof supra, p. 145, and the
note thereto. See R. S. sec. 1008, infra, p. 158, for the two years period of limitation prior
to the enactment of said Circuit Court of Appeals Act.
The time limit of one year in the text section was reduced to three months by section
6 of the Act of Sept. 6, 1916, ch. 448, 39 Stat. L. 796, which section is set forth in the
note to R. S. sec. 1008, infra, p. 158.
Sec. 1003. [Writes of error and appeals to supreme court, time for taking.] No judgment, decree, or order of a circuit or district court, in any civil action, at law or in equity, shall be reviewed in the Supreme Court on writ of error or appeal unless the writ of error is brought, or the appeal is taken, within two years after the entry of such judgment, decree, or order: Provided, That where a party entitled to prosecute a writ of error or to take an appeal is an infant, insane person, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within two years after the judgment, decree, or order, exclusive of the term of such disability. [R. S.]


Citing cases noted next in this section were decided by Judicial Code, § 299, supra, that title, vol. 5, p. 55.

This section no longer in force.—This section here was not among the Revised Statutes sections expressly repealed in Judicial Code, § 297, supra, that title, vol. 5, p. 550. But the time limit for bringing up any case for review by the Supreme Court, except by writ of error or to the Supreme Court of the Philippine Islands, was reduced to three months by the Act of 1893, cited below in this note with comments thereon.

Section 6 of the Court of Appeals Act of March 3, 1891, ch. 177, supra, p. 257, provides, in respect of appeals or writs of error to review final decisions of the Circuit Court of Appeals, that "the such appeal shall be taken or writ of error used out under within the year after the entry of the order, judgment, or decree sought to be reviewed." Section 11 of said Circuit Court of Appeals Act, supra, p. 161, provides that "no appeal or writ of error by which any order, judgment, or decree may be reviewed in the Circuit Court of Appeals under the provisions of this Act shall be taken or used out except within the year after the entry of the order, judgment, or decree sought to be reviewed: Provided, however, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the Circuit Courts of Appeals.

The above noted provisions in sections 6 and 11 of said Circuit Court of Appeals Act were not inserted in or repealed by the Judicial Code, nor did said Circuit Court of Appeals Act provide any time limit for appeals to the Supreme Court direct from the Circuit Court. Hence the text section R. S. sec. 1003, supra, remained in force, and was eventually applied to review by the Supreme Court in the classes of cases described in Judicial Code, § 223, supra, this title, vol. 5, p. 794. But the time limit of two years in the text section R. S. sec. 1003, supra, was reduced to three months by section 6 of the Act of Sept. 6, 1916, ch. 449, 39 Stat. L. 727 (1916) Supp., Fed. Stat. Ann., title 5 1/2, C. L. 1916, supra, Note, title 2, supra, which provides as follows: "That no writ of error, appeal or writ of certiorari addressed to bring up any cause for review by the Supreme Court shall be allowed or entertained unless the same shall be applied for within three months after entry of the judgment or decree under review: Provided, That writs of certiorari addressed to the Supreme Court of the Philippine Islands may be granted if application therefor be made within six months." It is deemed that this last enactment operates to repeal the proviso in the text section R. S. sec. 1003 excluding terms of disability; for it is a strong general rule that "no act can engraft on a statute of limitations an exception which the statute itself contains." See cases cited in article STATUTES AND STATUTORY CONSTRUCTION, vol. 1 of this work, §§ 26, p. 39, and see the conclusion of the opinion in Central Trust Co. v. Executors, 1915, 259 U. S. 11, 42 S. Ct. 60 U. S. (L. Ed.) 119, as quoted in the text in this work, supra, vol. 1, pp. 333-334. Moreover, if the limitation of three months in section 6 of the Act of Sept. 6, 1916, above quoted, had been intended by Congress to be subject to the exception of periods of disability, "it would have been easy to say so." See article STATUTES AND STATUTORY CONSTRUCTION, vol. 1 of this
work, § 27, p. 41. It should also be observed that the periods of limitation in the sections of the Circuit Court of Appeals Act, as above quoted, were subject to no such exception, thus evining the attitude of Congress upon this matter at the date when that Act was passed; and R. S. sec. 655, which excluded terms of disability from the operation of the period of limitation of appeal by Circuit Court of decisions of a District Court, was expressly repealed by Judicial Code, § 297, supra, this title, vol. 5, p. 1085. Again, since the two years period in the enacting clause of R. S. sec. 1008 is also adopted in the proviso, it is unreasonable to suppose that Congress intended in the Act of Sept. 6, 1916, above quoted, to leave said two years period in the proviso in force, while reducing to three months the period of two years in the enacting clause.

Lastly, courts strive to avoid a construction of statutes which will require the adoption of one rule for a particular class of cases and a different rule for another class within the same reason as the first. See article STATUTES AND STATUTORY CONSTRUCTION, vol. 1 of this work, § 76, p. 103. And there would be a senseless discrimination if disabilities suspended the running of the limitation for appeal or writ of error under this section 1008, but were ignored in the other statutes above cited prescribing a time limit for appellate proceedings.

For a more extended argument in support of the foregoing views see article in \textit{Law Notes} for April, 1917, pp. 5-8.


**When writ of error is brought.**—A writ of error is not brought in the legal meaning of the term until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court and the period of limitation prescribed by this Act must be calculated accordingly. Brown v. Corin (1854) 11 How. 579; Rush v. Musina r. Cavazos, (1867) 6 Wall. 355, 18 U. S. (L. ed.) 810; Scarborough v. Pargoud, (1883) 108 U. S. 567, 2 S. Ct. 877, 27 U. S. (L. ed.) 824; U. S. v. Baxter, (C. C. A. 8th Cir. 1892) 51 Fed. 624, 10 U. S. App. 241, 2 C. C. A. 410; Kentucky Coal, etc., Co. v. Howes, (C. C. A. 6th Cir. 1907) 153 Fed. 163, 82 C. C. A. 337.

Though a decree has been entered "as of a prior date (the date of an order settling apparently the terms of a decree to be entered thereafter) the rights of the parties in respect to an appeal are determined by the date of the actual entry, or of the signing and filing of the final decree. Providence Rubber Co. v. Goodyear, (1867) 6 Wall. 153, 18 U. S. (L. ed.) 762.

Where the bond was approved on September 5th, it was filed September 9th, and on that day the citation, returnable October 8th, was signed and issued, and on October 4th was served, an allowance of an appeal was perfected on September 9th. Farmers' Loan, etc., Co. v. Chicago, etc., R. Co., (C. C. A. 7th Cir. 1896) 73 Fed. 314, 34 U. S. App. 626, 19 C. C. A. 477.

Filing papers in lower court.—An appeal will be dismissed where the papers on appeal are not filed in the lower court within the two years required by this section. Fowler v. Hamill, (1891) 139 U. S. 540, 11 S. Ct. 663, 35 U. S. (L. ed.) 266.

When the judge has done all that is necessary for him to do to perfect the transmission of the case to the appellate court, and the party seeking review has done all that is required of him, the mere omission of the clerk of the reviewing court to endorse the writ of error as filed cannot prevent the jurisdiction attaching to the appellate court. Mutual Life Ins. Co. v. Phinney, (1900) 175 U. S. 327, 20 S. Ct. 906, 44 U. S. (L. ed.) 1088, reversing (C. C. A. 9th Cir. 1896) 76 Fed. 617, 48 U. S. App. 78, 22 C. C. A. 425.

The case must be docketed within the two years allowed by the above section or it will be dismissed, which is not a sufficient excuse for failure to docket that the attorney was not familiar with the practice of the Supreme Court. Green v. Elbert, (1891) 137 U. S. 618, 11 S. Ct. 186, 34 U. S. (L. ed.) 792.

**Nunc pro tunc appeal.**—An appeal not taken within two years as required by this section cannot be entered nunc pro tunc so as to cure the defect. London Credit Co. v. Arkansas Cent. R. Co., (1888) 128 U. S. 258, 9 S. Ct. 107, 32 U. S. (L. ed.) 448.

**Effect of acceptance of appeal bond.**—Where two years have elapsed since a decree appealed from was rendered the accepting of an appeal bond does not have the effect of allowing the appeal. Killian v. Clark, (1884) 111 U. S. 784, 4 S. Ct. 700, 28 U. S. (L. ed.) 599.

**Time of application.**—An appeal will be granted on application made after the entry of the decree.
piration of the term at which the decree was rendered; the objection that the court has no power to render the premises being one that should be determined by the Supreme Court. Noe v. U. S. (1857) Hoff Land Ca. 242, 18 Fed. Cas. No. 10,256.


"The writ of error and the appeal are the foundations of our jurisdiction, without which we have no right to revise the action of the inferior court; and the writ of error like all other common-law writs becomes functus officio unless some return is made to it during the term of the court to which it is returnable." Edmonson v. Bloomshire, (1868) 7 Wall. 310, 19 U. S. (L. ed.) 91.

In The Doe Hermanos, (1825) 10 Wheat. 308, 6 U. S. (L. ed.) 328, it was said, if an appeal bond is not given within the time allowed by law for an appeal, the court below may disallow the appeal, although prayed for and allowed within the prescribed time.

Sec. 1009. [Appeals in prize causes, within what time.] Appeals in prize causes shall be made within thirty days after the rendering of the decree appealed from, unless the court previously extends the time, for cause shown in the particular case: Provided, That the Supreme Court may, if in its judgment the purposes of justice require it, allow an appeal in any prize cause, if it appears that any notice of appeal, or of intention to appeal, was filed with the clerk of the district court within thirty days next after the rendition of the final decree therein. [R. S.]


The proviso in this section is also part of R. S. sec. 4636 in title Prize.
Appeals "from the final sentences and decrees in prize causes" direct from the District Court to the Supreme Court are authorized by Judicial Code, § 238, supra, this title, vol. 5, p. 794. Consequently, the terms of Judicial Code, § 128, supra, this title, vol. 5, p. 607, exclude appellate jurisdiction of the Circuit Court of Appeals in prize causes.

SEC. 11. [Time within which appeals, etc., to circuit courts of appeals to be taken.] That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit court of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: Provided however, That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. * * * [26 Stat. L. 839.]

This is part of section 11 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517. Of the rest of the same section part is given infra, p. 170, and the other part constitutes Judicial Code, § 132, supra, this title, vol. 5, p. 643. Section 10 of the same act also relates to appellate procedure and is given infra, p. 234. As to various other sections of said Act, see section 4 thereof, supra, p. 143, and the note thereto.

As to the time limit of three months for review by the Supreme Court of decisions of the Circuit Court of Appeals, see the note to section 4 of the Act of Jan. 28, 1915, ch. 22, supra, p. 146.

R. S. sec. 635 provided as follows: "No judgment, decree, or order of a district court shall be reviewed by a circuit court, on writ of error or appeal, unless the writ of error is sued out, or the appeal is taken, within one year after the entry of such judgment, decree, or order. Provided, That where a party entitled to prosecute a writ of error or to take an appeal is an infant, or non compos mentis, or imprisoned, such writ of error may be prosecuted, or such appeal may be taken, within one year, after the entry of the judgment, decree, or order, exclusive of the term of such disability." This section was expressly repealed by Judicial Code, § 297, supra, this title, vol. 5, p. 1085.

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I. NECESSITY OF COMPLIANCE WITH STATUTE

1. In General


The limitation of time for appeal applies to suits on claims against the United States brought in the Circuit (now District) Court under the Tucker Act of March 3, 1887, ch. 359, 24 Stat. L. 505, supra, this title, vol. 5, p. 1117, and the court has no power to allow an appeal therein by the United States after the expiration of six months from the entry of the decree. Butt v. U. S., (N. D. W. Va. 1904) 126 Fed. 794.

To give the appellate court jurisdiction of a writ of error, the writ must be issued and filed with the court below within the
time prescribed by the law, and this requirement cannot be waived by the parties. Stevens r. Clark. (C. C. A. 7th Cir. 1894) 62 Fed. 321, 18 U. S. App. 584, 10 C. C. A. 379.

A writ of error from the Circuit Court of Appeals to review a judgment issued from such court, and in granting the writ, therefore, the judge to whom it is presented must exercise the power of the Circuit Court of Appeals, and is bound by its limitations. Threadgill v. Platt, (N. D. Va. 1895) 71 Fed. 3.

"A formal petition for the allowance of a writ of error, in order to vest the appellate court with jurisdiction, is not necessary." Louisville Trust Co. v. Stockton, (C. C. A. 5th Cir. 1896) 72 Fed. 1, 41 U. S. App. 434, 19 C. C. A. 408.

A failure to file an assignment of errors within the six months allowed for a writ of error under rule 11 of the eighth circuit is fatal to the review. U. S. v. Goodrich, (C. C. A. 8th Cir. 1893) 54 Fed. 21, 12 U. S. App. 108, 4 C. C. A. 160.

Where, although an appeal was allowed within the six months limited by the statute, no citation was issued to the persons who procured the order appealed from, and the record was not filed within the time required by rule 16 of the Circuit Court of Appeals, nor until a year after the appeal was allowed, the court had no power then to award a citation, and by a nunc pro tunc order allow the appeal to stand as of the date when the record was filed. Hudson r. Limestone Natural Gas Co., (C. C. A. 3d Cir. 1906) 144 Fed. 952, 75 C. C. A. 673.

Appeals in admiralty cases.—The time for taking an appeal in admiralty cases is governed by this section. A rule of the District Court requiring appeal in admiralty to be taken within ten days from the rendering of the decree, does not have the effect of "staying" the action, as supposed by the court. Robins Dry Dock, etc., Co. r. Chesbrough, (C. C. A. 1st Cir. 1914) 216 Fed. 121, 132 C. C. A. 365.

2. Extension of Time

An agreement between the parties extending the time within which to sue out a writ of error is ineffectual for that purpose. Clark r. Doerr, (C. C. A. 5th Cir. 1906) 143 Fed. 960, 75 C. C. A. 148, dismissing a writ of error.

The time for suing out the writ or praying an appeal cannot be enlarged by stipulation of the parties, nor by the order of the court. Stevens r. Clark, (C. C. A. 7th Cir. 1894) 62 Fed. 321, 18 U. S. App. 584, 10 C. C. A. 379.

A decree for specific performance terminating the litigation between the parties, but reserving the cause for any further direction that may become necessary, by the failure of either party to comply with the requirements of the decree, is a final decree, and its operation is not suspended by a motion to extend the time to comply therewith, and for an order of reference. Long r. Maxwell, (C. C. A. 4th Cir. 1894) 59 Fed. 948, 8 U. S. App. 484, 8 C. C. A. 410.

3. Excuse for Delay

Delay in filing the bill of exceptions, due to judicial engagements of the trial judge, is no excuse for the failure to sue out a writ of error within the six months, although an assignment of errors should accompany the petition for the writ of error. Since such assignment may be formulated without the previous settlement of the bill of exceptions, and, besides, is not a jurisdictional matter. Old Co. r. U. S., (1010) 216 U. S. 541, 30 S. Ct. 221, 54 U. S. (L. ed.) 318, affirming a dismissal of a writ of error.

II. When Time Begins to Run

The time to appeal does not commence to run until the entry of a judgment. The fact that the court refers in a bill of exceptions to its "decision" does not make it equivalent to a judgment. Marks r. Northern Pac. R. Co., (C. C. A. 9th Cir. 1896) 76 Fed. 941, 44 U. S. App. 714, 22 C. C. A. 630. See also Bankruptcy, vol. 1, pp. 830, 831.

If a motion or a petition for rehearing is made and continued in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. Aspen Min., etc., Co. r. Billings, (1892) 150 U. S. 31, 14 S. Ct. 196, 37 U. S. (L. ed.) 986; Voorhes r. John T. Noye Mfg. Co., (1894) 161 U. S. 135, 14 S. Ct. 295, 38 U. S. (L. ed.) 101; Northern Pac. R. Co. r. Holmes, (1894) 161 U. S. 137, 14 S. Ct. 296, 38 U. S. (L. ed.) 99; Kingman r. Western Mfg. Co., (1898) 170 U. S. 675, 18 S. Ct. 786, 42 U. S. (L. ed.) 1192. See also Bankruptcy, vol. 1, p. 830.

The six months' time does not begin to run until a motion for new trial filed in due time is finally disposed of. Alexander r. Stevens, (C. C. A. 9th Cir. 1893) 57 Fed. 828; Louisville Trust Co. r. Stockton, (C. C. A. 5th Cir. 1896) 72 Fed. 1, 41 U. S. App. 434, 18 C. C. A. 408.

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III. Computation of Time

In the computation of the six months allowed by this section for taking out a writ of error from the Circuit Court of Appeals to the lower court, the time in which the plaintiff in error was attempting to pursue a mistaken remedy in the Supreme Court will be included. Darnell v. Illinois Cent. R. Co. (C. C. A. 6th Cir. 1913) 206 Fed. 445, 154 C. C. A. 337.


IV. When Appeal is "Taken" or Writ of Error "Sued Out"

The filing in the office of the clerk of the lower court of a petition for an appeal with the assignment of errors within the statutory time is not sufficient. There must be an allowance of the appeal. Green v. Lynn, (C. C. A. 1st Cir. 1898) 87 Fed. 939, 50 U. S. App. 380, 31 C. C. A. 948.


In Baxter v. Phillipps, (S. D. Ala. 1914) 219 Fed. 309, the court said: "The statute does not say within six months after the day or date of the entry of the order, judgment, or decree on the records of the court. In re McCall, (C. C. A. 6th Cir. 1906) 145 Fed. 791, 792, 37 C. C. A. 430; Clark v. Doerr, (C. C. A. 5th Cir. 1906) 76 Fed. 960, 75 C. C. A. 146. . . . The writ of error is not sued out or brought until the writ is actually filed with the clerk of the court which rendered the judgment or decree sought to be reviewed. It is the filing of the writ that removes the record from the inferior court to the appellate court, and the period of limitation prescribed by the act of Congress must be calculated accordingly. Kentucky Coal, etc., Co. v. Howes, (C. C. A. 6th Cir. 1907) 153 Fed. 163, 85 C. C. A. 337. The United States Supreme Court has held that the day the judgment is filed and entered is the day on which the plaintiff in error had a right to his writ, and on that day the limitation for writs of error, as provided by the statute, began to run within which his right existed. Polley v. Black River Imp. Co., (1885) 113 U. S. 81, 83, 5 S. Ct. 396, 29 U. S. (L. ed.) 739.

"When a writ of error from the Circuit Court of Appeals is allowed within the six months, but is not actually issued by the clerk until after the expiration thereof, it will be dismissed, for, in a legal sense, the writ of error is not brought until it is filed in the court below." Threadgill v. Platt, (N. D. Va. 1895) 71 Fed. 1, citing U. S. v. Baxter, (C. C. A. 8th Cir. 1892) 51 Fed. 624, 2 C. C. A. 410.

A writ of error is not "brought," to use the verbiage of R. S. sec. 1008, supra, p. 158, within the legal meaning of the term until the writ is actually filed or lodged with the clerk of the court which rendered the judgment sought to be reviewed. Old Nick Williams Co. v. U. S., (1910) 215 U. S. 541, 30 S. Ct. 221, 54 U. S. (L. ed.) 318; Kentucky Coal, etc., Co. v. Howes, (C. C. A. 6th Cir. 1907) 153 Fed. 163, 82 C. C. A. 337, dismissing a writ of error because it was not thus brought within six months, and also holding that while a motion for a new trial, having been seasonably entered, prevents the judgment from becoming final until disposed of, the allowance of a bill of exceptions does not have that effect.

A writ of error is not "sued out" within the meaning of this section by the filing of the petition and bond therefor, and the allowance of the writ by the court below. The writ must be obtained and issued within the time named to give the court jurisdiction. "Whether the failure to obtain and issue the writ in time resulted from the negligence of the plaintiff in error, or was the fault of the clerk, appears to be immaterial." Wazahachie r. Coler, (C. C. A. 5th Cir. 1899) 92 Fed. 254, 34 C. C. A. 394.

The Circuit Court of Appeals has no jurisdiction to review a judgment on a writ of error not issued until more than six months after the entry of the judgment, notwithstanding it may have been allowed within that time. Rutan v. Johnson, (C. C. A. 3d Cir. 1904) 130 Fed. 109, 64 C. C. A. 443.

Sec. 997. [Removal of causes by writ of error.] There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party. [R. S.]

I. Allowance of appeal, 164
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I. ALLOWANCE OF APPEAL

Appeals subject to same rules, etc., as writs of error, see R. S. sec. 1012, next following, infra, p. 170.

Right to appeal.—An appeal to the Supreme Court in a proper case is a matter of right, and its allowance is in reality nothing more than the doing of those things which are necessary to give the appellant the means of invoking the jurisdiction. A writ of error is the process of the Supreme Court, and it is issued therefore only upon its authority, but an appeal can be taken without any action by such court. All that need be done to get an appeal is for the appellant to cite his adversary in the proper way before the Supreme Court and for him toocket the cause at the proper time. Such a citation as is required may be signed by a judge of the Circuit Court from which the appeal is taken or by a justice of the Supreme Court. Brown v. McConnell, (1888) 124 U. S. 488, 8 S. Ct. 559, 31 U. S. (L. ed.) 495.


An appeal must be prayed for and allowed, whether the cause shall be generally be dismissed. U. S. v. Haynes, (1840) 2 McLean 155, 26 Fed. Cas. No. 15,335.

And it has been held that the prayer for the appeal and the order allowing it constitute a valid appeal, and that the bond is not essential to it. Edmonson v. Bloomshire, (1868) 7 Wall. 306, 19 U. S. (L. ed.) 91.

In London Credit Co. v. Arkansas Cent. R. Co., (1888) 128 U. S. 258, 9 S. Ct. 107, 32 U. S. (L. ed.) 448, it was ruled that an appeal could not be said to be "taken" until it was in some way presented to the court which made the decree appealed from, thereby putting an end to its jurisdiction over the cause and making it its duty to send it to the appellate court.

But where an appeal bond had been presented and approved, but no formal appeal prayed or allowed, it was held that the court might enter an order nunc pro tunc allowing the appeal. Nicholson v. Chicago, (1869) 5 Biss. 89, 18 Fed. Cas. No. 10,248.

And in Brandies v. Cochran, (1881) 105 U. S. (L. ed.) 996, it was decided that in the absence of a petition and allowance the filing of the appeal bond, duly approved by a justice of the Supreme Court, was sufficient evidence of the allowance of an appeal, and was a compliance with the law requiring an appeal to be filed in the clerk's office.

So where a bond is given and the record is filed in the proper time, this is sufficient to give the appellate court jurisdiction, although the citation is not served until afterwards. Mendenshall v. Hall, (1890) 134 U. S. 569, 10 S. Ct. 618, 33 U. (L. ed.) 1012.

Effect of allowance.—When an appeal to the Supreme Court is allowed the cause is not necessarily removed from the jurisdiction of the lower court so that the allowance could not be revoked there. Ex p. Roberts, (1872) 15 Wall. 394, 21 U. S. (L. ed.) 341, overruling Nutt's Case, (1872) 8 Ct. C. 185.

So where the Supreme Court of the District of Columbia affirmed a decree and allowed an appeal therefrom which was not perfected and a motion whereof the adverse party had due notice was thereupon made and entered on the minutes to vacate the affirmance and grant a reargument it was held that not having been acted upon it was continued as unfinished business, and that under such circumstances it was competent for the court at the ensuing term to grant the motion, vacate the allowance of the appeal, and pass a decree of reversal. Goddard v. Ordway, (1879) 101 U. S. 745, 25 U. S. (L. ed.) 1040.

Sufficiency of proceeding for appeal.—The filing of the original citation and original writ of supersedeas, together with certified copies of the assignment of error, and of the supersedeas bond in the lower court, is sufficient to give effect to the appeal. Tornanes v. Melsing, (C. C. A. 9th Cir. 1901) 106 Fed. 776, 45 C. C. A. 615.

And it has been held to be sufficient if the judge signs a bill of exceptions and a citation within the time prescribed, although the writ had been issued by a clerk without a petition filed or the allowance by a judge. Louisville Trust Co. v. Stockton, (C. C. A. 5th Cir. 1896) 72 Fed. 1, 41 U. S. App. 679, 18 C. C. A. 498.

And in Brown v. McConnell, (1888) 124 U. S. 489, 8 S. Ct. 559, 31 U. S. (L. ed.) 495, it was held that the signing of a citation U. S. punishable to the proper term of the Supreme Court, though without the acceptance of security, nevertheless constituted an allowance of appeal which would enable the court to take jurisdiction and to afford the appellants an opportunity to furnish the requisite security.
II. ALLOWANCE OF WRIT OF ERROR

Who may allow.—When there is a court composed of a chief justice and associate justices the writ can only be allowed by the chief justice of that court or by a justice of the Supreme Court of the United States. It is case of a writ of error in a court composed of a single judge or chancellor the writ may be allowed by that judge or chancellor or by a judge of the Supreme Court of the United States. Bartemeyer v. Iowa, (1871) 14 Wall. 26, 20 U. S. (L. ed.) 792.

And where the constitution of a state provides that in the absence of the chief justice the judge having the next shortest term should preside in his stead, and where the record shows that the chief justice was absent, and that a writ of error was allowed by the judge having the next shortest term, the writ is properly allowed. Butler v. Gage, (1891) 138 U. S. 52, 11 S. Ct. 235, 34 U. S. (L. ed.) 869.

And it has been decided that the clerk of the Superior Court of a territory may issue a writ of error to bring a record of that court to the Supreme Court of the United States, and the chief justice may sign the citation. Sheppard v. Wilson, (1845) 5 How. 210, 12 U. S. (L. ed.) 120.

But a writ of error will not be granted by the federal Supreme Court to a state court unless at the request of one of the members of the court concurred in by his associates. In re Robertson, (1895) 156 U. S. 183, 15 S. Ct. 324, 39 U. S. (L. ed.) 389.

And in an early case it was decided that writs of error to remove causes to the Supreme Court from inferior courts can regularly issue only from the clerk's office of the Supreme Court. West v. Barnes, (1791) 2 Dall. (Pa.) 401, 1 U. S. (L. ed.) 433.

Indorsement by judge of allowance.—It is a sufficient allowance of a writ of error for a judge to indorse his allowance upon the petition only, although it would be better practice to indorse both petition and writ. Warner v. Texas, etc., R. Co., (C. C. A. 8th Cir. 1892) 49 Fed. 269, 4 U. S. App. 98, 1 C. C. A. 241; Springfield Safe-Deposit, etc., Co. v. Attica, (C. C. A. 8th Cir. 1898) 86 Fed. 387, 56 U. S. App. 330, 29 C. C. A. 214.

A prayer and petition for a writ of error that the writ may be issued “for the correction of errors so complained of,” is a prayer for reversal within the requirements of this section. Springfield Safe-Deposit, etc., Co. v. Attica, (C. C. A. 8th Cir. 1898) 86 Fed. 387, 56 U. S. App. 330, 29 C. C. A. 214.

III. PRAYER FOR REVERSAL

The defect of the omission of a prayer for reversal is so far technical that the assignment of errors may be corrected by adding it. McCallan v. Pyeatt, (C. C. A. 8th Cir. 1892) 49 Fed. 269, 4 U. S. App. 98, 1 C. C. A. 241; Springfield Safe-Deposit, etc., Co. v. Attica, (C. C. A. 8th Cir. 1898) 86 Fed. 387, 56 U. S. App. 330, 29 C. C. A. 214.

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IV. MANNER OF DIRECTING WRITS OF ERROR


V. SERVICE OF WRIT OF ERROR

A writ of error is served by lodging a copy thereof in the office of the clerk of the court where judgment was rendered. Wood v. Lide, (1807) 4 Cranch 180, 2 U. S. (L. ed.) 588; Davidson v. Lanier, (1866) 4 Wall. 447, 18 U. S. (L. ed.) 377.

If, however, it is served after its return day it does not give the court jurisdiction, but if served before the return day a return afterwards will be good. Wood v. Lide, (1807) 4 Cranch 180, 2 U. S. (L. ed.) 588.

VI. RETURN TO WRIT OF ERROR

Time of return.—A writ of error must be returned to the term of court to which it is returnable. Blair v. Miller, (1800) 4 Dall. (Pa.) 21, 1 U. S. (L. ed.) 724.

A writ of error must be returned and entered at the return term. If a term intervenes the objection is fatal and the error is not capable of being removed by any amendment. Hamilton v. Moore, (1797) 3 Dall. (Pa.) 371, 1 U. S. (L. ed.) 642.


And a writ of error made returnable to a day different from the return day fixed by statute as the day on which the term commences will be dismissed. Puget Sound Agricultural Co. v. Pierce County, (1807) 8 Wall. 246, 18 U. S. (L. ed.) 739.

Where the clerk of a Supreme Court of a state neglects or refuses to make a return of error the Supreme Court will lay a rule upon him to make return on or before the first day of the next term, and where there is another case upon the docket involving the same questions the court will direct it to be continued in order that the cases may be argued together. U. S. v. Booth, (1855) 18 How. 476, 15 U. S. (L. ed.) 464.

Omission to state day of return in court.


Sufficiency of return.—A return to a writ of error from the Supreme Court to a state court, certified by the clerk of the court which pronounced the judgment and to which the writ is addressed, and authenticated by the seal of the court, is in conformity to law, and brings the record regularly before the Supreme Court.


VII. EFFECT OF WRIT OF ERROR


VIII. PARTIES


So in a writ of error to a joint judgment against several, all must join. The omission of one or more is an irregularity for which the writ will be dismissed. Hampton v. Rouse, (1871) 13 Wall. 187, 20 U. S. (L. ed.) 593.

And a writ of error in the name of one "and others," the others not being named, will be dismissed. Deneale v. Archer, (1834) 8 Pet. 526, 8 U. S. (L. ed.) 1033; Miller v. McKenzie, (1870) 10 Wall. 582, 19 U. S. (L. ed.) 1043.

It is also ground for a dismissal of a writ of error that the parties plaintiff were described instead of named. Wilson v. Life, etc., Ins. Co., (1838) 12 Pet. 140, 9 U. S. (L. ed.) 1032.

But a defendant in equity whose interest is separate from that of the other defendants may appeal without the others. For- gary v. Conrad, (1848) 6 How. 201, 12 U. S. (L. ed.) 404.

And the names of the appellees need not be individually stated in the order allowing an appeal where they are all given in the appeal bond. Richardson v. Green, (1889) 130 U. S. 104, 9 S. Ct. 443, 32 U. S. (L. ed.) 872.

IX. RECORDS

In general,—The statutes concerning writs of error and appeals use the term "record" so as not to include the testimony merely on filing the case. Miller v. Tobin. (C. C. Ore. 1853) 18 Fed. 609.

Necessity of producing record.—Where the issue in the District Court is not tied to the record and the court below adjudges that the plaintiff has not produced the record, there can be no reversal of that judgment unless the record, if any be produced, is contained in the record brought up on the writ of error to the appellate court. U. S. v. Cook. (1819) 2 Mason 22, 25 Fed. Cas. No. 14,551.
Return of copy of record.—The return of a copy of the record of a state court duly certified by the clerk, and annexed to the writ of error, is a sufficient return. Martin v. Hunter, (1816) 1 Wheat. 304, 4 U. S. (L. ed.) 97.

Where writ allowed but not issued.—Where a writ of error has been allowed by the chief justice of the state court, but no such writ has been issued, the clerk may refuse to send the transcript of the record to the United States Supreme Court. Ex p. Ralston, (1857) 119 U. S. 613, 7 S. Ct. 317, 30 U. S. (L. ed.) 506.

Effect of absence of seal.—Where a writ of error was allowed in open court in the Circuit Court, but the writ had no seal and was not returned to the Supreme Court with the transcript of the record, and two terms afterwards a paper was filed in the clerk's office in form of a writ of error but without a seal, and having no authenticated transcript annexed, the cause was dismissed on motion. Overton v. Cheek, (1859) 22 How. 46, 61 U. S. (L. ed.) 255.

Essential parts of record.—This section makes an assignment of errors, a prayer for reversal, and a citation to the adverse party, essential parts of the record upon which a review of the rulings of a trial court may be invoked in the appellate courts of the United States. When an appeal is prayed and allowed in open court the prayer for reversal and the citation may be waived. But the assignment of errors is indispensable to the perfection of the appeal. Webber v. Milhills, (C. C. A. 8th Cir. 1903) 124 Fed. 64, 59 C. C. A. 577; Loeckman v. Lang, (C. C. A. 8th Cir. 1903) 126 Fed. 279, 62 C. C. A. 550.

A demurrer to evidence makes the evidence a part of the record. So whereoyer of any instrument is prayed, or there is a demurrer to any part of the pleadings. Suydam v. Williamson, (1867) 20 How. 427, 15 U. S. (L. ed.) 978.

X. AUTHENTICATION OF TRANSCRIPT

Sufficiency of authentication.—An authenticated transcript of the record must be filed in the Supreme Court to give that court jurisdiction of an appeal or writ of error, but where the certificate lacks only the clerk's signature, the question presented is not one of no authentication but of irregular authentication, and it is within the discretion of the court to allow the defect to be supplied. Idaho, etc., Land Imp. Co. v. Bradbury, (1835) 132 U. S. 509, 10 S. Ct. 177, 33 U. S. (L. ed.) 433.

It is sufficient authentication of the transcript where the clerk certified "that the foregoing is a true, full, and complete transcript of the record, orders, and decrees from the files and records of my office." Pennsylvania Life Ins. Co. v. Jacksonville, etc., R. Co., (C. C. A. 5th Cir. 1893) 55 Fed. 131, 2 U. S. App. 606, 5 C. C. A. 65.

And a transcript to the record is sufficiently authenticated for the purpose of an appeal or a writ of error to this court if it is signed by the deputy in the name of and for the clerk of the court from which the appeal comes, or to which the writ of error is directed, and sealed with the seal of that court. Garneau v. Dozier, (1879) 100 U. S. 7, 25 U. S. (L. ed.) 538.

XI. FILING OF ASSIGNMENT OF ERRORS

In general.—This section does not require filing an assignment of errors before allowance of a writ of error or an appeal. This requirement rests upon a rule of the Circuit Court of Appeals, which is the same as a Supreme Court rule. There are two reasons for this rule. One is that the judge who denies the application for the allowance or issue of a writ of error is presented may be informed what the alleged errors are upon which the petitioner relies, so that he may intelligently decide the question whether or not the writ should be issued. The other is that opposing counsel and the appellate court may be informed by a statement which becomes a part of the record what questions of law are presented for their consideration and determination. Simpson v. Denver First Nat. Bank, (C. C. A. 8th Cir. 1904) 129 Fed. 257, 63 U. S. (C. A. 371.


And where no bill of exceptions has been filed and no writ of error or appeal allowed, the cause will be dismissed on motion, although the defendant has filed a supersedeas bond. Tuscaloosa Northern R. Co. v. Gude, (1891) 141 U. S. 244, 11 S. Ct. 1094, 35 U. S. (L. ed.) 742.

And the assignment of errors on the appeal from a District Court to the Supreme Court of a territory cannot be accepted by the Supreme Court of the United States as the equivalent of the assignment required by the statute, and where the brief contains no specification of errors as is required by rule, no statement of the case presenting the questions involved or a proper reference to the
pages of the record relied upon to support the points which are made, the court

Necessity of filing.—A filing of an assignement of errors is an essential condi-
tion to the granting of a writ of the allowance of an appeal, and its purpose is
to apprise the opposite counsel and the court of the particular legal points re-

And where there is no assignement of errors sent up with the record and no
specification of the errors relied upon as required by rule of the Supreme Court, and
there is no such plain error not assigned or specified as calls upon the court to
exercise its option to review the questions involved, the writ of error must be dis-

But an assignement of errors is not jurisdictional in the Supreme Court of
the United States or in the Circuit Court of Appeals, and the court may reverse for an
obvious error even though not assigned.
World's Columbian Exposition Co. v. Re-

And although no assignement of error is
annexed to the transcript as required by this
section, the Supreme Court may at
its option notice a plain error not as-
signed. School Dist. v. Hall, (1882) 106
U. S. 428, 1 S. Ct. 417, 27 U. S. (L. ed.)
257; U. S. v. Pena, (1890) 175 U. S. 600,
20 S. Ct. 165, 44 U. S. (L. ed.) 251; And see Farrar v. Churchill, (1890) 135
U. S. 609, 16 S. Ct. 771, 34 U. S. (L. ed.)
246; Gregory Consol. Min. Co. v. Starr,
(1899) 131 U. S. 311, 10 S. Ct. 514, 36 U.
S. (L. ed.) 715; Camden v. Stuart,
(1892) 144 U. S. 104, 12 S. Ct. 585, 36 U.
S. (L. ed.) 363.

Again, where there is a bill of exceptions
the writ of error does not operate only
upon that part of the record. Wherever
an error is apparent on the record, it is
open to revision, whether it be made to
appear by a bill of exceptions or in any
other manner. Suydam v. Williamson,
But see O'Neill v. Vermont, (1892) 144
U. S. 323, 12 S. Ct. 693, 36 U. S. (L. ed.)
450, where a plain error not assigned or
specified was not recognized.

And this section does not necessitate
the settlement of a bill of exceptions prior
to the filing of the writ and the assign-
ment of errors. Old Nick Williams Co. v.

A writ of error will not be dismissed for
want of jurisdiction by reason of a failure to annex thereto or return there-
with an assignement of errors pursuant to
the requirements of this section. Gumbel
616, 28 U. S. (L. ed.) 1128. See also to
same effect Stevenson v. Barbour, (1891)
320.

Title required.—Although an assignement of
errors filed in the District Court should
bear the title of that court, yet where it
bears the title of the Circuit Court of Ap-
peals it will not invalidate the appeal in
the latter court. Church Cooperage Co.
v. Pinkney, (C. C. A. 2d Cir. 1909) 170
Fed. 266, 95 C. C. A. 462.

Where an assignement of errors is
returned with a writ as required by this
section, and no counsel has appeared for
the plaintiffs in error, but the case is sub-
mitted by the defendants in error on briefs
without any specifications of errors by the
plaintiffs as required by rule, the judgment
will be affirmed for want of a due prose-
cution of the writ of error. Dugger v.
Tavloe, (1897) 121 U. S. 266, 7 S. Ct.
925, 30 U. S. (L. ed.) 948. And see Bos-
ton Hydraulic Gold Min. Co. v. Eagle
Copper, etc., Min. Co., (1885) 115 U. S.
221, 6 S. Ct. 33, 29 U. S. (L. ed.) 392.

Assignment of error not well founded.—
Where there is an assignement of error rest-
ing on an averment in the answer which is
not well founded in fact the decree of the
lower court will be affirmed. Cheney v.
Bacon, (C. C. A. 8th Cir. 1892) 49 Fed.
305, 4 U. S. App. 207, 1 C. C. A. 244.

Sufficiency of assignement of error.—
Where the sole ground alleged against
the validity of a judgment was that the case
was improperly removed from the state
court, and there were two other assign-
ments of error which were that the verdict
was contrary to law and also that the judg-
ment was contrary to law, it was held that
the latter two assignements of error would
not be considered, first because neither of
them specifically pointed out the error
complained of as required by the rules of
the Circuit Court of Appeals, and secondly
because counsel in their brief did not point
out or discuss any particular error other
than that relating to the removal of the
case. Ireton v. Pennsylvania Co., (C. C.
A. 6th Cir. 1911) 185 Fed. 84, 107 C. C.
A. 304, writ of certiorari denied (1912)
223 U. S. 728, 32 S. Ct. 529, 56 U. S.
(L. ed.) 833.

An assignement of errors cannot be sup-
ersed by a subsequent assignement of
errors, certainly not by one filed without
leave of court. Lloyd v. Chapman, (C. C.
A. 9th Cir. 1899) 93 Fed. 599, 35 C. C.
A. 474.

Appeals.—An appeal is subject to the
same rules as a writ of error, and where
no assignement of errors is filed the case
may be dismissed on motion. Dufour v.
Lang, (C. C. A. 5th Cir. 1892) 54 Fed. 913,
2 U. S. App. 477, 4 C. C. A. 663.
The power of tribunals of appeal to affirm or reverse or modify does not depend upon the presence or absence of any specific assignment of error. This, however, does not mean that a court of error can review any matter not excepted to where such matter has no footing in the case other than by bill of exceptions. World's Columbian Exposition Co. v. Republic of Texas, (C. L.A. 7th Cir. 1888) 91 Fed. 64, 62 U. S. App. 704, 33 C. C. A. 333.

Waiver.—And it has been held that the failure to file an assignment of errors is not jurisdictional, and may be waived. Old Nick Williams Co. v. U. S., (1810) 215 U. S. 541, 30 S. Ct. 221, 54 U. S. (L. ed.) 318.

XII. DOCKETING OF CAUSE


And an appeal will be dismissed where, at the term at which it was returnable, the transcript was by reason of laches of the appellant not filed, or the cause docketed in this court. The appellate at any time before the hearing may take advantage of the objection, or the court upon its own motion may dismiss the appeal. Grigby v. Purcell, (1878) 99 U. S. 505, 25 U. S. (L. ed.) 354.

Nor is it sufficient excuse for failure to docket a case on appeal at the return term that the clerk had agreed to take the record and file it with the clerk of the Supreme Court, and that the appellant relied upon this. Foyolle v. Texas, et al, (1888) 124 U. S. 319, 8 S. Ct. 558, 31 U. S. (L. ed.) 353.

But the docketing of a cause by the defendant in error in advance of the return day of a writ of error does not prevent the plaintiff in error from doing what was necessary while the writ was in life to give it full effect. Davies v. Corbin, (1864) 144 U. S. 28, 1 S. Ct. 687, 5 S. Ct. 696, 25 U. S. (L. ed.) 1149.

A motion to dismiss an appeal for failure to docket at the proper term must be made during the term of the appellate court next after the time when the appeal was allowed. Edwards v. U. S., (1880) 102 U. S. 575, 26 U. S. (L. ed.) 293; Richardson v. Green, (1889) 130 U. S. 104, 9 S. Ct. 445, 32 U. S. (L. ed.) 872.

Waiver of objection as to docketing.—When a defendant in error moves for a new bond long after the docketing of the case in the Supreme Court, he waives the objection that the case was not docketed in time. Waldron v. Waldron, (1893) 156 U. S. 361, 15 S. Ct. 385, 39 U. S. (L. ed.) 453.

XIII. APPEARANCE OF COUNSEL

The appearance of counsel for the party docketing the case may be entered upon the filing of the transcript. Green v. Elbert, (1891) 137 U. S. 610, 11 S. Ct. 188, 34 U. S. (L. ed.) 792.

If the counsel on neither side appear when the cause is called the writ of error will be dismissed. Radford v. Craig, (1809) 6 Cranch 289, 3 U. S. (L. ed.) 104.

XIV. WAIVER

In general.—Though a decree in equity is fully executed at the instance of the successful party, and the losing party receives money under it, this does not waive an appeal. Erwin v. Lowry, (1849) 7 How. 172, 12 U. S. (L. ed.) 655.

And partial satisfaction of a judgment, whether obtained by a levy or voluntary payment, is not a bar to a writ of error by the plaintiff therein, where it appeared that the levy was made or the payment was received prior to the service of the writ. U. S. v. Dashiel, (1865) 3 Wall. 688, 18 U. S. (L. ed.) 266.

Where the record of a judgment in a Circuit Court had been sent to the Supreme Court and an appearance entered there by the defendant in error, and the Supreme Court had reversed the judgment and remanded the cause for a new trial, it was held that the defendant in error could not object that the judgment in the cause was in force and unreversed upon the ground that no writ of error had been sued out, as it would be presumed that all formal objections and particularly one to the want of a writ were waived by consent of the parties. Evans v. Eaton, (1818) 3 Wash. 443, 8 Fed. Cas. No. 4,560.

Examination of transcript for "plain error."—The option reserved, under Supreme Court rules, of examining the transcript of record on writ of error or appeal in order that the court may be advised as to whether there has occurred any "plain error" which obviously demands correction, will be exercised where the defendants in error have made no objection to the failure to assign error, under R. S. secs. 997 (the text) and 1012 (next following), but have submitted the case upon the specifications of error in the brief of the plaintiffs in error. Columbia Heights Realty Co. v. Rudolph, (1910) 217 U. S. 547, 30 S. Ct. 581, 54 U. S. (L. ed.) 877.
Sec. 1012. [Appeals to Supreme Court subject to same rules, etc., as
writs of error.] Appeals from the circuit courts and district courts acting
as circuit courts, and from district courts in prize causes, shall be subject
to the same rules, regulations, and restrictions as are or may be prescribed
in law in cases of writs of error. [R. S.]

L. 310.

"Circuit" Courts, mentioned in this section, were abolished by Judicial Code,
§ 289, supra, this title, vol. 5, p. 1082. But the text section 1012 was not incorporated
in the Judicial Code, and section 291 of said Code, supra, this title, vol. 5, p. 1083,
provides that, "Whenever, in any law not embraced within this Act, any reference is made
to, or any power or duty is conferred or imposed upon, the circuit courts, such reference
shall * * * be deemed and held to refer to, and to confer such power and impose
such duty upon, the district courts."

"This provision applies to the time
within which appeals may be brought as
well as to other regulations concerning
352; Brandies v. Cochran, [1882] 106
London Credit Co. v. Arkansas Cent. R. Co.,
(1888) 125 U. S. 258, 9 S. Ct. 107, 32 U.
S. (L. ed.) 448.

Application of section.—This section
does not have the effect of making a finding
and statement of facts by a Circuit
Court in an equity cause conclusive on the
appellate court. Hendryx v. Perkins, (C.
C. A. 1st Cir. 1903) 123 Fed. 268, 59 C.
C. A. 908.

In Fidelity, etc., Co. v. Expanded Metal
Co., (C. C. A. 3d Cir. 1910) 183 Fed. 568,
100 C. C. A. 114, it was said: "It is obvi-
ous that section 1012 applies the same
rules, regulations, and restrictions to ap-
peals as section 1000 [infra, p. 187] ap-
plies to writs of error."

This section has been cited in Columbia
Heights Realty Co. v. Rudolph, (1910)
217 U. S. 547, 30 S. Ct. 581, 54 U. S.
(L. ed.) 877; Simpson v. Denver First
Nat. Bank, (C. C. A. 8th Cir. 1904) 129
Fed. 257, 63 C. C. A. 371; Sutherland v.
Pearce, (C. C. A. 9th Cir. 1911) 186 Fed.

[Sec. 11.] [Existing provisions relating to appellate procedure con-
tinued in force for circuit court of appeals.] * * * And all provisions
of law now in force regulating the methods and system of review, through
appeals or writs of error, shall regulate the methods and system of appeals
and writs of error provided for in this act in respect of the circuit courts
of appeals, including all provisions for bonds or other securities to be
required and taken on such appeals and writs of error. [26 Stat. L. 829.]

This is part of section 11 of the Circuit Court of Appeals Act of March 3, 1891,
ch. 517. The preceding part of the same section is given supra, p. 161, and the con-
Section 10 of the same Act also relates to appellate procedure and is given infra, p. 234.
As to various other sections of said Act see section 4 thereof, supra, p. 143, and the note
thereto.

The above section is annotated, infra, p. 172, after the notes to section 3 of the Act
of 1879 here following:
not to have been entirely repealed by force of the Circuit Court of Appeals Act
of March 3, 1891, ch. 617, 26 Stat. L. 826, which withdrew all appellate jurisdiction from
Circuit Courts, nor by the repealing provisions in said Circuit Court of Appeals Act,
§ 14, which are set forth in notes to Judicial Code, § 233, supra, this title, vol. 5, at
p. 797. At any rate, said Act of 1879 is here set forth in full, because some of its pro-
visions were awarded a degree of potency by the Supreme Court and the Circuit Court
of Appeals in cases cited in the notes to sections 2 and 3 of said Act, infra, pp. 171, 172.
An act [sic] to give circuit courts appellate jurisdiction in certain criminal cases.


[Sec. 1.] [Appeal to criminal jurisdiction of circuit courts.] The circuit court for each judicial district shall have jurisdiction of writs of error in all criminal cases tried before the district court where the sentence is imprisonment or fine and imprisonment, or where, if a fine only, the fine shall exceed the sum of three hundred dollars; and in such case a respondent feeling himself aggrieved by a decision of a district court, may except to the opinion of the court, and tender his bill of exceptions, which shall be settled and allowed according to the truth, and signed by the judge, and it shall be a part of the record of the case. [20 Stat. L. 354.]

Notes to above section 1.—"Prior to the Act of March 3, 1879 (20 Stat. L. 354), giving to Circuit Courts appellate jurisdiction in certain criminal cases, there was no way by which questions of law arising in such cases, after conviction, could be taken from the District to the higher courts; and in cases not within that Act no way exists now." U. S. v. Haynes, (D. C. Mass. 1887) 29 Fed. 691.

Exceptions.—The "decision" of the court to which the defendant may except only includes such rulings or directions as would not, in the ordinary course of procedure, otherwise appear of record. Therefore it does not apply to the judgment of the court imposing punishment on the defendant. Nelson v. U. S., (C. C. Ore. 1887) 30 Fed. 112.

A bill of exceptions is not necessary to bring before the court a question of law raised by a motion in arrest of judgment for defects in the indictment. As a practical question, it would seem an unnecessary hardship to compel a defendant to resort to the complicated and costly remedy of a bill of exceptions and a writ of error, when, with the concurrence of the court and the district attorney, the case can go up in the simple and inexpensive form of a remission of the indictment. U. S. v. Haynes, (D. C. Mass. 1887) 29 Fed. 691.

Review on error.—On a writ of error allowed on a petition, and solely on the questions raised by the bill of exceptions, it is not competent, under this statute, to review any other questions. Brand v. U. S., (N. D. N. Y. 1880) 4 Fed. 394.

It is only the decisions of the District Court which are excepted to in that court that can be reviewed under the writ of error. The questions to be considered on allowing the writ are only the questions decided by the court below, and which appear by the record to have been decided, and where also the decisions were excepted to below. Brand v. U. S., (N. D. N. Y. 1880) 4 Fed. 394.

Sec. 2. [Writ of error, bond and bail.] Within one year next after the end of the term at which such sentence shall be pronounced, and not after, the respondent may petition for a writ of error from the judgment of the district court in the cases named in the preceding section, which petition shall be presented to the circuit judge or circuit justice in term or vacation, who, on consideration of the importance and difficulty of the questions presented in the record, may allow such writ of error, and may order that such writ shall operate as a stay of proceedings under the sentence; but the allowance of such writ shall not so operate without such order. The judge or justice allowing such writ of error shall take a bond with sufficient sureties that the same shall be prosecuted to effect, and that the respondent shall abide the judgment of the circuit court thereon. And if the writ shall be allowed to operate as a stay of proceedings under the sentence, bail may in like manner be taken for the appearance of the respondent at the term of the circuit court to which such writ of error shall be returnable, and that he will not depart without leave of court. [20 Stat. L. 354.]

Notes to above section 2 — Bail on writ of error.—In Hudson v. Parker, (1895) 156 U. S. 277, 15 S. Ct. 450, 39 U. S. (L. ed.) 424, it was held that a judge of the federal District Court had power to admit to bail a defendant convicted in his court and sentenced for an offense then reviewable by the Supreme Court, a writ of error having been sued out from the Supreme Court. As conducing to that conclusion, the court referred to the provisions in the above section 2 of the Act of 1879 in connection with the text section 11 of the Circuit Court of Appeals Act of 1891.

Sec. 3. [Return of writ of error proceedings.] Such writ of error so allowed shall be returnable to the next regular term of the circuit court for the district, and shall be served on the district attorney of the United States for such district. The circuit court may advance all such writs of error on its docket in order that speedy justice may be done. And in case of an affirmance of the judgment of the district court, the circuit court shall proceed to pronounce final sentence and to award execution thereon;
but if such judgment shall be reversed, the circuit court may proceed with the trial of said cause de novo, or remand the same to the district court for further proceedings. [20 Stat. L. 534.]

Notes to above section 3 — Judgment on reversal in criminal case. — In Ballew v. U. S. (1895) 160 U. S. 187, 16 S. Ct. 263, 40 U. S. (L. ed.) 388, the court quoted the text section 11 of the Circuit Court of Appeals Act of 1891, and referred to other provisions in the federal statutes, including the above section of the Act of 1879, and said: "From this and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, it follows as a necessary conclusion that general authority was given to it on writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require." Followed, with respect to the powers of the Circuit Court of Appeals, and likewise referring to the above cited provisions, in Hanley v. U. S., (C. C. A. 2d Cir. 1903) 123 Fed. 849, 59 C. C. A. 153. See also Whitworth v. U. S., (C. C. A. 8th Cir. 1902) 114 Fed. 302, 52 C. C. A. 214.

The section authorizes the Circuit Court to render its own judgment in case of an affirmance, which need not necessarily be the judgment of the District Court. U. S. v. Wynn, (E. D. Mo. 1882) 11 Fed. 57.

"One object of the statute was to give to the Circuit Court authority, not only over the rulings of the District Court during the trial, but also over the degree of punishment imposed upon the party, if, upon the whole record before the Circuit Court, it should appear in the judgment of the court that the penalty was not in conformity with law; as where a fine was imposed where the statute authorized imprisonment only, or imprisonment where it authorized a fine only, or otherwise was unlawful, or where it was too severe. In all these cases, I think the opinion of the District Court is subject to review by the Circuit Court, and may be changed," and the Circuit Court, while affirming the judgment of the District Court, may impose a different sentence. Bates v. U. S., (N. D. Ill. 1881) 10 Fed. 92.

Retrial in the Appellate Court. — On reversal of the judgment, the counsel agreeing that the cause might be retried in the Circuit Court, it was so ordered. Dear v. U. S., (N. D. Ill. 1881) 10 Fed. 269.

Notes to the text section 11 — Existing provisions of the law in force. — The sentence beginning "and all provisions of law now in force" operates to continue the then existing method by which appeals and writs of error were taken from the Circuit Courts to the Supreme Court and make it applicable to the Circuit Courts of Appeals. So stated by the committee on revision in note to Judicial Code, § 250, supra, vol. 5, p. 913.

Methods and systems of review. — The same rules that govern the Supreme Court in taking jurisdiction of an appeal or writ of error obtain in the Circuit Court of Appeals, and a decision awarding a peremptory writ of mandamus can only be reviewed in such court by writ of error. Muhlenberg County v. Dyer, (C. C. A. 6th Cir. 1895) 65 Fed. 634, 31 U. S. App. 109, 13 C. C. A. 64.

Appeals in admiralty cases. — See Act of Feb. 16, 1875, ch. 77, § 1, supra, p. 130, where the cases as to the effect of the Circuit Court of Appeals Act are given and the question of appeals in admiralty generally is treated.


Reversal and superseded. — "As to the methods and system of review, through appeals or writs of error, including the citations, superseded, and bond or other security, in cases either civil or criminal, brought to this court from the Circuit Court or the District Court, Congress made no provision in this act, evidently considering those matters to be covered and regulated by the provisions of earlier statutes forming parts of one system." Hudson v. Parker, (1895) 156 U. S. 277, 15 S. Ct. 450, 39 U. S. (L. ed.) 424; Title Guarantee & Trust Co. v. U. S. (1912) 222 U. S. 401, 32 S. Ct. 168, 56 U. S. (L. ed.) 248.

"From this broad power, this court or its judges may exercise, in aid of its appellate jurisdiction in criminal cases, the same powers in regard to the allowing of writs of error, or admission to bail pending a writ of error, which were formerly exercised in appellate criminal proceedings by the Supreme Court or its justices, by virtue of the provisions of statutory law in force, or by implication from the grant of jurisdiction over proceedings in error." McKnight v. U. S., (C. C. A. 7th Cir. 1902) 113 Fed. 452, 457, 51 C. C. A. 285.

Under this section, in cases of crimes not capital at least, bail may be taken on writ of error by order of the proper court, justice, or judge. Hudson v. Parker, (1895) 156 U. S. 277, 15 S. Ct. 450, 39 U. S. (L. ed.) 424. See also Bail and Recognizances, vol. 1, p. 498.

The Circuit Court of Appeals has the power, and it is generally its duty to admit to bail after conviction of a crime, not capital, pending a writ of error. Me-

The words "all provisions for bonds or other securities" which were in force at the time of the Act of 1891, do not include as applicable to appeals from the Circuit Court of Appeals the provision of section 16 of the Interstate Commerce Act [Act of Feb. 4, 1887, as amended by the Act of March 2, 1889, ch. 382, § 5, title INTERSTATE COMMERCE, vol. 4, p. 490], that the appeal therein referred to shall not operate to stay or supersede, for the appeal treated of in section 16 is an appeal from the trial court and does not refer to an appeal from the Circuit Court of Appeals, and the scope of the provision was not enlarged by the Act of 1891. Louisville, etc., R. R. Co. v. Behlmer, (1898) 169 U. S. 644, 18 S. Ct. 502, 42 U. S. (L. ed.) 889.

A single judge of the Circuit Court of Appeals upon granting a writ of error or an execution of an order as a supersedeas and prescribe its forms and terms, which must be obeyed if possible, irrespective of its validity, under penalty of a contempt. Tornanesse v. Melaing, (C. C. A. 9th Cir. 1901) 105 Fed. 775, 46 C. C. A. 515.

The Circuit Court of Appeals has no power to grant a supersedeas where there has been a failure by the petitioner to take the steps prescribed by statute for giving to the writ of error itself the effect of staying execution, and where there is no fault or error of the court below; nor can the court below grant a supersedeas where the writ of error was not sued out until after sixty days from the date of the judgment. New England R. Co. v. Hyde, (C. C. A. 1st Cir. 1900) 101 Fed. 367, 41 C. C. A. 404. See R. S. sec. 716 (now Judicial Code, § 292, supra, this title, vol. 6, p. 929), and R. S. sec. 1007, infra, p. 198.

Time of allowing supersedeas.—As nothing is contained in the Act of March 3, 1891, ch. 517, regulating the time when an appeal from a Circuit Court of Appeals to the Supreme Court must be taken in order to operate as a supersedeas, the general provision of R. S. sec. 1007, infra p. 198, making the allowance of a writ and the lodgment of the same in the office of the clerk within sixty days after the date of a judgment, is applicable. Title Guaranty, etc., Co. v. U. S., (1912) 222 U. S. 401, 32 S. Ct. 168, 56 U. S. (L. ed.) 248, petition for writ of certiorari denied (1912) 223 U. S. 720, 32 S. Ct. 923, 56 U. S. (L. ed.) 629.

Modifying judgment.—By virtue of this provision, in connection with other sections of the federal statutes, a Circuit Court of Appeals has ample power, on reversal of the judgment in a criminal case because of the imposition of an excessive sentence, to modify the judgment by remitting the excess. Hanley v. U. S., (1903) 123 Fed. 849, 59 C. C. A. 153, C. C. A. 2d Cir.

Securities on appeal.—The provisions of R. S. sec. 1000, infra, p. 187, are applicable under this section to appeals to the Circuit Court of Appeals. The Presto, (C. C. A. 5th Cir. 1899) 93 Fed. 522, 35 C. C. A. 394.

Execution for costs.—This provision makes applicable to the Circuit Court of Appeals, R. S. sec. 701, infra, p. 224, so that in order to authorize the court to issue execution for costs awarded by the Circuit Court of Appeals on a writ of error, the mandate from the latter court should contain a special provision directing the same. American Trust, etc., Bank v. Zeigler Coal Co., (N. D. Ill. 1908) 165 Fed. 512.

Allowance of amendments.—"Writ of error from this court to Circuit and District Courts are sued out under the same practice and regulations as are those from the Supreme Court. . . . The power conferred upon the Supreme Court by R. S. sec. 1005, infra, p. 196, concerning the amendment of defective writs in matters of form, is likewise conferred upon this court with respect to writs of error issuing from this court. Cotter v. Alabama Great Southern R. Co., (C. C. A. 6th Cir. 1894) 61 Fed. 747, 22 U. S. App. 372, 10 C. C. A. 35.

Under this section and R. S. sec. 1005, infra, p. 196, the Circuit Court of Appeals is justified in allowing an amendment to correct a writ of error which, owing to the illness of counsel, does not set forth accurately the parties plaintiff, and in denying a motion to dismiss the writ, founded upon such mistake. Green County v. Thomas, (1900) 211 U. S. 568, 29 S. Ct. 168, 53 U. S. (L. ed.) 345.


Amount in controversy.—R. S. sec. 691, as amended by Act of Feb. 16, 1875, § 3, being expressly repealed by section 14 of the Act of March 3, 1891, ch. 517, their provisions as to the amount in controversy were not transferred to the Circuit Court of Appeals as "provisions of law in force." Northern Pac. R. Co. v. Amato, (C. C. A. 2d Cir. 1892) 49 Fed. 881, 1 U. S. App. 113, 1 C. C. A. 468.

Issuance of writ of error.—A writ of error returnable to the Circuit Court of Appeals may be issued from the clerk's office of the Circuit Court in which the case was tried under R. S. sec. 1004, infra, p. 194. Northern Pac. R. Co. v. Amato, (C. C. A. 2d Cir. 1892) 49 Fed. 881, 1 U. S. App. 113, 1 C. C. A. 468.

Motions for new trial.—The rule that decisions of the District Courts on motions to


 Sec. 698. [Transcripts on appeals.] Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the Supreme Court: Provided, That either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof. And on such appeals no new evidence shall be received in the Supreme Court, except in admiralty and prize causes. [R. S.]


The above section, having never been expressly repealed, is evidently made applicable to the Circuit Courts of Appeals by the Circuit Courts of Appeals Act of March 3, 1891, ch. 517, § 11, supra, p. 170.

See R. S. sec. 750, supra, p. 119, as to contents of final record in such cases. As to sending up "any original document or other evidence," see also Act of Feb. 13, 1911, ch. 47, § 1, infra, p. 180.

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I. Scope
Application to Circuit Court of Appeals.
—This section, with the practical construction put on it by Judge Story and by the Supreme Court rules in admiralty Nos. 49 and 50, so far as it required that the proofs in the court of the first instance be in some way reduced to writing in cases intended for a review of the facts on appeal, applies to appeals to the Circuit Court of Appeals. "In any case in which all the proofs are not reduced to writing in the District Court and no equivalent is found in the record, we have no power except to decline to try the facts anew." ThePhiladelphia, (C. C. A. 1st Cir. 1894) 60 Fed. 423, 21 U. S. App. 90, 9 C. C. A. 64.

Nor is there any doubt that the closing paragraph of this section, prohibiting the reception of new evidence in the Supreme Court on appeal, except in admiralty and prize causes, and the implication which it contains, applies to the Circuit Court of Appeals. The Philadelphia, (C. C. A. 1st Cir. 1894) 60 Fed. 423, 21 U. S. App. 90, 9 C. C. A. 64.


II. Record
1. Filing

Time of filing record.—It is ordinarily said that it must be filed during the return term, and that if it is so filed it is seasonable notwithstanding the requirements of the rules of the Supreme Court (No. 9, par. 1), and that of the first circuit (No. 16, par. 1), unless the party appealed against seasonably moves as also

Delay in filing — Motion to dismiss appeal. — In The Kawaiiani, (C. C. A. 9th Cir. 1904) 128 Fed. 879, 63 C. C. A. 347, a motion was made to dismiss the appeal. It was not contended that the appeal was not duly perfected but that the record was not filed in the Circuit Court of Appeals within the time prescribed by its rules. The appeal was perfected July 18, 1902, and the record was not filed until January 5, 1903; but it was filed before any motion was made to dismiss, the latter not having been made until June 9, 1903. Denying the motion to dismiss, the court said: "As said by the Circuit Court of Appeals for the Sixth Circuit in Altenberg v. Grant, (C. C. A. 6th Cir. 1897) 83 Fed. 868, 861, 54 U. S. App. 312, 28 C. C. A. 244: 'Bingham v. Morris, 7 Cranch 99, [3 U. S. (L. ed.) 281] shows that if the transcript of record is filed before the motion for dismissal, the motion will not be granted.' " And to the same effect see Gilman v. Fernam, (C. C. A. 9th Cir. 1905) 141 Fed. 940, 72 C. C. A. 666.

2. Contents

In general. — A rule of the Circuit Court of Appeals which provides that "whenever it shall be necessary or proper in the opinion of the presiding judge in any Circuit or District Court that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rules or order for the safekeeping, transportation and return of such original papers as to him may seem proper," fixes the limit within which the presiding judge may act in such matter and he is not authorized to make an order for incorporating original papers introduced in evidence in the record on appeal, instead of copies, merely for the purpose of saving expense to the parties, nor unless in his opinion an inspection of the originals by the appellate court, as distinguished from authenticated copies, is either necessary or would be useful or aidful in the determination of the appeal. Dorgan v. Mfg. Co. v. Brennan, (W. D. Ky. 1907) 156 Fed. 213, wherein the court said: " Though in this matter acting for the Circuit Court of Appeals under rule 14, we have not overlooked sections 698 [the above text], and 760 [ supra, p. —] of the Revised Statutes (under which we may say that our ruling would have been precisely the same), but we have preferred to be guided entirely by the rule of the court where the appeal is pending, particularly as it has fixed the limits within which the presiding judge may act for it after the case has passed from his court." Under this section the Supreme Court at the October term, 1899, passed the following rule: "The record in causes of admiralty and maritime jurisdiction, where, under the requirements of law, the facts have been found in the court below, and our power to review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case." The Adriatic, (1899) 103 U. S. 731, 26 U. S. (L. ed.) 605.

"In this section the distinction is recognized between that which constitutes the final record and that which may be made part of the record for the purposes of appeal." In re Cooper, (1892) 143 U. S. 472, 12 S. Ct. 463, 36 U. S. (L. ed.) 292.

"Ordinarily the whole of the record, as the word is technically used, in suits at common law, and of the corresponding portions of proceedings in equity, the latter as designated by R. S. sec. 750, [ supra, p. 153], should be brought here, in order that this court may properly shape its judgments, excepting, of course, what precedes the mandate on a prior appeal or writ of error." Nashua, etc., R. Corp. v. Boston, etc., R. Corp., (C. C. A. 1st Cir. 1894) 61 Fed. 237, 21 U. S. App. 50, 9 C. C. A. 468.

A transcript of appeal in admiralty should contain all the evidence adduced upon both sides. When such evidence is not reduced to writing in the lower court, and there is no rule of the lower court, requiring it to be reduced to writing, it would seem that an appeal can be heard only upon the merits, where the evidence adduced appears by an agreed statement of facts, or where a statement is made by the court of the evidence adduced or of the facts proved. The Edward H. Blake, (C. C. A. 5th Cir. 1899) 92 Fed. 202, 34 C. C. A. 297.

Only the process, pleadings, orders, judgment of the court and such matters as are properly preserved in the bill of exceptions, can be deemed as constituting the record, unless made so by agreement of parties or order of court. Motions based on matters dehors the record are expressly held to be not a part of the record unless preserved in a bill of exceptions or otherwise saved. Eldorado Coal, etc., Co. v. Mariotti, (C. C. A. 7th Cir. 1914) 215 Fed. 51, 131 C. C. A. 339.
So, where in the printed record there appeared what purported to be a motion made by the plaintiff in error in the District Court to dismiss the suit for want of jurisdiction for matters that appeared upon the face of the declaration and neither the motion nor any ruling thereon was preserved in the bill of exceptions, as a motion it was therefore not before the court on appeal. Eldorado Coal, etc., Co. v. Mariott, (C. C. A. 7th Cir. 1914) 215 Fed. 61, 121 C. C. A. 359.

On an appeal in admiralty, evidence which is not made a part of the bill of exceptions, although it may be appended, will not be considered. The Wyandotte, (C. C. A. 4th Cir. 1906) 145 Fed. 321, 35 C. C. A. 117.


Copies of proofs.—"While, therefore, we do not say that even since the Revised Statutes the Circuit Courts may not in their discretion, under the operation of the rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, we do say that now they are not by law required to do so; and that if such practice is adopted in any case the testimony presented in that form must be taken down, or its substance stated in writing and made part of the record, or it will be entirely disregarded here on appeal. So, too, if testimony is objected to and ruled out, it must still be sent here with the record, subject to the objection, or the ruling will not be considered by us. A case will not be sent back to have the rejected testimony taken even though we might, on examination, be of the opinion that the objection to it ought not to have been sustained. Ample provision having been made by the rules for taking the testimony and saving exceptions, parties, if they prefer to adopt some other mode of presenting their case, must be careful to see that it conforms in other respects to the established practice of the court." Bleese v. Garlington, (1875) 92 U. S. 1, 23 U. S. (L. ed.) 521. See Equity Rule 46 promulgated by the Supreme Court, Nov. 4, 1915.

A Florida Cent. R. Co. v. Schultz, (1879) 100 U. S. 844, 25 U. S. (L. ed.) 605, the court directed the appellant to bring up proofs claimed to have been omitted, according to a statement thereof to be filed by the appellees, and for failure to do so it imposed the penalty of dismissal of the appeal. Yet it carefully reserved the power to make special order as to costs if in this way unnecessary papers were brought up.

A discretionary decision cannot be reviewed unless the record contains the testimony and documents upon which such decision is based. Walker v. Giles, (C. C. A. 2d Cir. 1914) 218 Fed. 637, 134 C. C. A. 395.

Examination of witnesses.—It is always desirable upon appeals in admiralty to have the record so prepared that it will show which witnesses were examined in the presence of the district judge and which were not. The Gypsum Prince, (C. C. A. 2d Cir. 1895) 67 Fed. 612, 35 U. S. App. 165, 14 C. C. A. 573.

Collision rules.—Alleged faults based upon the violation of collision rules will be disregarded where they are not incorporated in the record and there are no statements in the briefs of counsel which can be taken as admitting the existence of any particular rule. The Clara, (C. C. A. 2d Cir. 1893) 55 Fed. 1021, 14 U. S. App. 348, 5 C. C. A. 380.

Removed case.—Where a removed case is brought to the Circuit Court of Appeals, either on a writ of error or by appeal, the petition for removal is an essential part of the record, without which the court will not proceed to a final adjudication. Larned v. Jenkins, (C. C. A. 8th Cir. 1901) 109 Fed. 100, 48 C. C. A. 252.

Partial record.—Where the evidence as to a particular question of fact is conflicting, but the record shows that during the trial the jury and the trial judge, by consent of all the parties, made an ocular inspection, what such inspection conveyed to the minds of the court cannot be known from the record and in such case the appellate court cannot have the entire record before it. Rebillard v. Minneapolis, etc., R. Co., (C. C. A. 8th Cir. 1914) 216 Fed. 503, 133 C. C. A. 9, L. R. A. 1915B 953.

3. Composition

Making up the record.—"Considering the duty which solicitors and attorneys practicing in the federal tribunals owe to the courts and to each other, it is to be expected that ordinarily the clerk will receive joint directions with reference to facilitating and simplifying the transcript on appeal. Without such joint directions the clerk ought to send up the whole of the record in the strict sense of the word as made by R. S. sec. 750 [supra, p. 119], having, of course, reference to the limitation imposed by
the fact of prior appeals if there have been any; and the nature of any portions omitted, even under a joint stipulation, should be indicated so that the appellate court, which has its own interests and rights in the condition of the transcript, may be advised concerning them." Nashua, etc., R. Corp. v. Boston, etc., R. Corp., (C. C. A. 1st Cir. 1884) 61 Fed. 237, 1 U. S. App. 50, 9 C. C. A. 465, citing Keene v. Whittaker, (1839) 13 Pok. 459, 10 U. S. (L. ed.) 246; Curtis v. Petitpain, (1855) 18 How. 109, 15 U. S. (L ed.) 280.

But as to the proofs, entries, and papers on file necessary on the hearing of the appeal required by this section, the decisions refer the clerk in the absence of a joint stipulation to the selection made by the appellant. The good faith and discretion of his solicitor are necessary to the ordinary and sufficient guide in determining this selection, though, as the clerk is made by this statute the certifying officer, some duty rests on him by implication, and he might well refuse to certify a transcript with such palpable and substantial omissions as, in his opinion, to justify his assuming the responsibility of refusal. In that event the appellant deeming himself aggrieved has his remedy by applying to the appellate court for a mandamus, and perhaps by seeking summary instructions to the clerk of the court appealed from. If the party appealed against deems the certificate of the clerk irregular, or the transcript incomplete, his remedy is not by motion to dismiss unless in extreme cases; but he may have ample relief by other methods. Nashua, etc., R. Corp. v. Boston, etc., R. Corp., (C. C. A. 1st Cir. 1884) 61 Fed. 245, 21 U. S. App. 50, 9 C. C. A. 468.

The power of the court to direct what papers shall constitute that record which shall be transmitted to the appellate court by the transcript will not be questioned whenever such action becomes necessary because of the fact that the disputed paper has not been admitted to the files in the regular way. This power is an essential grant of the section, if not already inherent in the court without the statute. Southern Bldg., etc., Assoc. v. Carey, (W. D. Tenn. 1902) 117 Fed. 334.

The Circuit Court of Appeals, in a case where the facts are unquestioned, will not authorize the withdrawal from the file of the court of a record on a previous appeal and cause it to be refiled in a second appeal. The court is not authorized to make the record for the hearing of the cause upon appeal, but the record must come to the court as a whole and be complete in itself. Merriman v. Chicago, etc., R. Co., (C. C. A. 7th Cir. 1903) 120 Fed. 240, 56 C. C. A. 536.

The transcript of the record is understood to be transmitted from the lower court, as such, under its seal, to the Supreme Court, so that the clerk in making and certifying the transcript acts as an officer of and under the general direction and control of the lower court in the first instance, subject, of course, to the further order of the Supreme Court on proceedings on suggestion of diminution of the record. Therefore a direction of the lower court in a doubtful case, where the clerk is requested to insert in the transcript by one party what he is requested to leave out by the other, would seem to be proper. Hoe v. Kahler, (S. D. N. Y. 1856) 27 Fed. 145.

The practice of bringing into the record, by bill of exceptions, pleadings, or papers which the court has refused to allow a party to file, is not known to the federal courts in equity cases; but inasmuch as a consideration of such documents may be necessary to enable the appellate court to determine whether or not they were properly rejected, it would seem that in the absence of any statute or rule regulating the practice in that regard, the trial court may properly, by an order, direct the clerk to certify the pleadings or other document rejected to the appellate court for that purpose. Southern Bldg., etc., Assoc. v. Carey, (W. D. Tenn. 1902) 117 Fed. 326.

The court of bankruptcy from which an appeal is taken has no jurisdiction to designate what records shall be certified on which the appellate court shall determine the appeal. In re A. L. Robertshaw Mfg. Co., (E. D. Pa. 1905) 135 Fed. 220.

Where the parties to an appeal to the Circuit Court of Appeals in bankruptcy are unable to agree as to the contents of the appeal record, it is the duty of the appellant to file a precipice with the clerk, pointing out specifically what records, in his judgment, should be certified, leaving appellant, if in his opinion the records certified are insufficient, to suggest a diminution of the record and ask for certiorari. In re A. L. Robertshaw Mfg. Co., (E. D. Pa. 1905) 135 Fed. 220. See this case as cited and quoted in Bankruptcy, vol. 1, p. 816.

Form of record.—Where, on an appeal, there is no question raised as to the credibility of any witness or as to the weight of his testimony, the testimony should not be included in the record in the form of the stenographer’s minutes, that is in the form of the questions and answers, but should be set forth in narrative form. The testimony should be presented in such form as to assist the court by concentrat- ing its attention to the parts material to the assignments of error. Radford v. U. S., (C. C. A. 2d Cir. 1904) 129 Fed. 49, 63 C. C. A. 491.
4. Conclusion

Where the record is sent up, accompanied with a statement of facts but without the evidence, such statement is conclusive as to all the facts which it contains; and if the evidence is annexed, nevertheless the statement is conclusive as to all the facts contained in it. Wis
cart v. Dauchy, (1796) 3 Dall. 321, 1 U. S. (L. ed.) 619. And where the record is sent up with the evidence but no statement of facts, such evidence cannot be considered as a statement of facts. It would, therefore, seem to follow that there can be no error. Jennings v. Perse
verance, (1796) 3 Dall. 336, 1 U. S. (L. ed.) 625.

5. Defective Record


The Circuit Courts of Appeals will not dismiss an appeal on motion on the ground that the record filed is insufficient: that being a matter to be determined at the hearing on the merits, or to be corrected by certiorari for a diminution of the record. Merriman v. Chicago, etc., R. Co., (C. C. A. 7th Cir. 1903) 190 Fed. 520, 56 C. C. A. 536.

Under this section, it devolves on an appellant to see to it that a record is brought up to such court showing such of the proceedings of the trial court as are necessary for the proper presentation of the errors assigned, and for want of such a record the court has power to dismiss the appeal. This power, however, ought not generally to be exercised unless the omission arose from negligence or indifference, and instead, where good faith is shown, the appellate will be directed to designate such additional papers, documents, and proof used on the hearing below as he deems necessary for a proper presentation of the case, and the appellant will be ordered to file the same as a part of the record under penalty of a dismissal of the appeal. Kansas v. Meri

A certificate that certain portions of the record are omitted, and memoranda of others inserted by direction of the appellant's counsel, is sufficient to bar a motion for dismissal and throw on the parties the necessity of seeking some other method of relief if either thinks the record essentially defective. Nashua, etc., R. Corp. v. Boston, etc., R. Corp., (C. C. A. 1st Cir. 1894) 61 Fed. 237, 21 U. S. App. 59, 9 C. C. A. 468.

6. Amendments

Amendments.—A Circuit Court of Ap-
peals is without power to dismiss an appeal on motion of the appellant and re-}
mund the case to the court below with directions to permit the amendment of a pleading on a showing that facts were inadverently omitted therefrom, which was not known to appellant until after the appeal was taken. Stand v. Griffith, (C. C. A. 9th Cir. 1903) 135 Fed. 739, 68 C. C. A. 377.


In Woodward v. Brown, (1839) 13 Pet. 1, 10 U. S. (L. ed.) 31, on receipt of a supplemental certificate from the clerk of the court below, the Supreme Court al-

lowed an amendment of a clerical error on motion of one party. The same was per-

And this has been done under some cir-

7. Return of Record

Should a request of the court below be made for a return of the record in order that it might proceed further with the cause, the Supreme Court might, in a proper case and under proper restrictions, make the necessary order; but such an order cannot be made on application of the parties. The court below alone can make the request. Roemer v. Simon, (1875) 91 U. S. 149, 23 U. S. (L. ed.) 267.

8. Transmission of Papers

Where an inspection of original docu-
ments was material to the decisions of a prize cause, the Supreme Court ordered the original paper to be sent up from the court below. The Elsinour, (1818) 1 Wheat. 439, 4 U. S. (L. ed.) 130; Craig
"Construing this statute in the light of those from which it was taken and the practice that had prevailed in the courts which it was undoubtedly intended to confirm, we think the power of the courts below and of this court over the transmission of original papers to this court on appeal is and should be confined to such as require actual inspection as originals, in order to give them their full effect in the determination of the suit. We will not undertake to control the discretion of the courts below in sending up papers which in their judgment require inspection, but where papers come up that ought not to be sent up we will look closely to the language of the order below to see whether they are included in its provisions." Craig v. Smith, (1879) 100 U. S. 226, 25 U. S. (L. ed.) 577.

III. NEW EVIDENCE

1. Order for Additional Proof

Cases of prize are usually heard, in the first instance, upon the papers found on board the vessel, and the examinations taken in preparatioi; and it is in the discretion of the court thereupon to make or not to make an order permitting the introduction of additional testimony. The claimant may move for the order and show the grounds of the application by affidavit, or otherwise, at any time before the final decree is rendered. Such an order may be made in the Supreme Court. It is always in the discretion of the court, and that discretion is controlled by the circumstances of each case. The order is made with great caution, because of the temptation it holds out to fraud and perjury and is made only when the interests of justice clearly require it. The Sally Magee, (1865) 3 Wall. 461, 18 U. S. (L. ed.) 197.

In The Georgia, (1868) 7 Wall. 32, 19 U. S. (L. ed.) 122, a case in prize was heard on additional proofs, although the record did not show that an order had been made on behalf of either party to take further proofs. As both parties had taken proofs, at large, bearing upon the capture, without objection, the inference was unavoidable that there must have been an order for the same, or if not, that the depositions were taken by mutual consent.

2. Mode of Taking New Proof


3. Allowance of New Proof

On a motion for a commission to take further evidence, some excuse, satisfactory to the appellate court, should be shown for the failure to examine the witnesses in the court below, such as that the evidence was discovered when it was too late to procure such examination, or that the witnesses had been subpoenaed and failed to appear and could not be reached by attachments and the like. The Mabe, (1870) 77 U. S. 419, 19 U. S. (L. ed.) 963; The Juniata, (1875) 91 U. S. 368, 23 U. S. (L. ed.) 208; The Lurline, (C. C. A. 2d Cir. 1892) 57 Fed. 396, 14 U. S. App. 150, 5 C. C. A. 165.

But even though a perfectly satisfactory excuse is not given by the appellant for not taking testimony in question in the lower court the court may nevertheless admit new testimony when in its opinion substantial justice requires the admission of such testimony and where all the prejudice resulting to the appellee because it was not taken in the court below can be corrected in disposing of the costs of the case. Red River Line v. Cheatham, (C. C. A. 5th Cir. 1894) 60 Fed. 517, 23 U. S. App. 19, 9 C. C. A. 124.

Appellate courts in admiralty treat an appeal as a new trial, in which new pleadings and new proofs are permitted, in furtherance of justice. But it is not a matter of course to allow parties who have withheld evidence available to them in the District Court to present such evidence on appeal. It has, however, been the practice in the second circuit to take said testimony, without excusing its nonproduction below, where neither side objected. Singlehurst v. La Compagnie Générale Transatlantique, (C. C. A. 2d Cir. 1892) 50 Fed. 104, 1 U. S. App. 126, 1 C. C. A. 487.

Parties should endeavor to procure all the testimony material to the issues presented by the pleadings in the first instance. The practice of bolstering up a lost cause by additional testimony ought not to be encouraged. Pacific Steam Whaling Co. v. Grismore, (1902) 117 Fed. 68, 54 C. C. A. 454.

IV. CERTIFICATE OF CLERK

In Blitz v. Brown, (1868) 7 Wall. 693, 19 U. S. (L. ed.) 250, where there was no certificate by the clerk, the writ of error was dismissed, and leave to cause the certificate to be supplied was denied; but in the later case of Hodges v. Vaughan, (1873) 19 Wall. 12, 22 U. S. (L. ed.) 46, leave was granted the plaintiff in error to withdraw the transcript and supply the certificate.

In U. S. v. Gomez, (1883) 1 Wall. 690, 17 U. S. (L. ed.) 677, a certificate from the clerk of the court below that the record was complete except the transcript sent up from the late Board of Land Commis-
Sec. 1013. [Where both parties appeal to the supreme court, one record sufficient.] Where appeal is duly taken by both parties from the judgment or decree of a circuit or district court to the Supreme Court, a transcript of the record filed in the Supreme Court by either appellant may be used on both appeals, and both shall be heard thereon in the same manner as if records had been filed by the appellants in both cases. [R. S.]


"Circuit" Courts mentioned in this section were abolished by Judicial Code, § 289, supra, this title, vol. 5, p. 1082.

Applicable to appeals to the Circuit Court of Appeals, see notes under the text of R. S. sec. 698, supra, p. 174.

Appeals by both parties.— Subject to the same rules and regulations as in case of writs of error, both parties may appeal in an equity, admiralty, or prize suit, from the final decree of the subordinate court, but the appeal when entered in the appellate court is also subject to the same restrictions as are prescribed in case of writs of error. Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below. and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appellate court are correct, except in support of the decree from which the appeal of the other party is taken. The Maria Martin, (1870) 12 Wall. 31, 20 U. S. (L. ed.) 251; Bush v. The Alonso, (1868) 2 Cliff. 548, 550, 4 Fed. Cas. No. 2223.

One record for separate appeals.— Where four separate appeals were taken from the same decree and the record contained a waiver in one instrument by all parties to the action below of the issuing of citations on "all the appeals," and where further the record was made up as if in one appeal, it was held that all the parties to the action below appeared as parties to all the appeals under consideration. And although the appeal bond ran only to one of the parties to the appeal as obligee, such defect in the bond could not prevent the attaching of jurisdiction of all parties appearing and waiving process, since the giving and acceptance of an appeal bond is not jurisdictional. U. S. Trust Co. v. Western Contract Co., (C. C. A. 6th Cir. 1897) 81 Fed. 454, 54 U. S. App. 67, 26 C. C. A. 472.

V. DISPOSITION OF CASE

"After an appeal in equity to this court we cannot upon motion set aside a decree of the court below and grant a rehearing. We can only affirm, reverse, or modify the decree appealed from, and that upon the hearing of the cause. No new evidence can be received here." Roemer v. Simon, (1875) 91 U. S. 150, 23 U. S. (L. ed.) 267.
and under the seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument: Provided, That either the court below or the circuit court of appeals may order any original document or other evidence to be sent up in addition to the printed copies of the record or in lieu of printed copies of a part thereof; and no written or typewritten transcript of the record shall be required.

[36 Stat. L. 901.]

This and the following section 2 constituted the Act of Feb. 13, 1911, ch. 47, entitled "An Act To diminish the expense of proceedings on appeal and writ of error or certiorari."

The proviso as to sending up "any original document or other evidence" is a re-enactment of part of R. S. sec. 698, supra, p. 174.

For a table of fees of clerks for preparing the record, etc., see the order of the Supreme Court entered February 28, 1888, given in JUDICIAL OFFICERS, vol. 4, pp. 732, 733; and see the notes thereto.

Purpose of Act.—The object of this Act was to diminish the expense of proceedings on appeal or writ of error or certiorari. Meyers v. U. S., (C. C. A. 2d Cir. 1914) 218 Fed. 372, 134 C. C. A. 180, wherein it was held that where the defendant in error refused to stipulate that the record was correct, under this section and District Court rule 26, the time for filing the record would be extended until the defendant in error did so stipulate.

Scope of statute.—Petition to revise.—Although this act mentions only reviews by writ of error or appeal, a petition to revise under section 246 of the Bankruptcy Act (Bankruptcy, vol. 1, p. 791) is the equivalent of an appeal for the purposes of this statute. In re Burr Mfg. Co., (C. C. A. 2d Cir. 1914) 215 Fed. 898, 132 C. C. A. 238.

Clerk's fees.—Fee for indexing.—In Colt's Patent Firearms Mfg. Co. v. New York Sporting Goods Co., (C. C. A. 2d Cir. 1911) 186 Fed. 825, 108 C. C. A. 489, it was held that as this section makes no provision for indexing, they should be prepared by the clerk of the Circuit Court of Appeals, and since his fee for preparing and indexing the record under, the fee bill in force is fixed at a stated sum per page of the whole, and is indivisible, until such fee bill is changed or further legislation enacted parties would be required to pay the full fee thereby prescribed, to be held by the clerk until its return was authorized. In Rainey v. Grace, (1914) 231 U. S. 703, 34 S. Ct. 242, 58 U. S. (L. ed.) 445; In re Burr Mfg. Co., (C. C. A. 2d Cir. 1914) 215 Fed. 898, 132 C. C. A. 238.

Judgment awarding preliminary injunction.—Where the court below upon motion and affidavits, and before the taking of any proofs, awarded a preliminary injunction, and the defendant appealed under section 129 of the Judicial Code, supra, this title, vol. 5, p. 629, the case is not within this section. Smith v. Farbenfabriken of Elberfeld Co., (C. C. A. 6th Cir. 1912) 191 Fed. 804, 117 C. C. A. 133, wherein the court said: "We are unable to see how such an order can be brought within the definition of the statute by any permissible liberality of construction. Such an order is not final from any point of view or for any purpose." But the court referred with approval to a former (apparently unreported) ruling by the same...
court, that the statute applied to an appeal "from the usual decree in a patent cause, determining the validity of the patent and ordering an accounting," because "it is a decree made upon what is commonly called a final hearing, on pleadings and proofs; if on such hearing the decree is for the defendant, it is final in every sense; and, even if for complainant, it is not uncommonly thought of and spoken of as a final decree."

SEC. 2. [Appeals, etc., to Supreme Court — use of printed record in court below as part of transcript — use of uncertified copies of record — clerk’s fee — no written transcript of printed record required.] That in any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to or by writ or error or of certiorari from the Supreme Court of the United States, in which the record has been printed and used upon the hearing in the court below and which substantially conforms to the printed record in said Supreme Court, if there have been at the time of filing the record in the court below twenty-five copies of said printed record, in addition to those provided in the preceding section, lodged with the clerk of the court below, one copy thereof shall be used by the clerk of the court below in the preparation and as a part of the transcript of the record of the court below; and no fee shall be allowed the clerk of the court below in the preparation of the transcript for such part thereof as is included in said printed record so lodged with him. And the clerk of the court below in transmitting the transcript of record to the Supreme Court of the United States for review shall at the same time transmit the remaining uncertified copies of the printed record so lodged with him, which shall be used in the preparation and as a part of the printed record in the Supreme Court of the United States, and the clerk’s fee for preparing the record for the printer, indexing the same, supervising the printing and binding and distributing the copies shall be at such rate per folio thereof, exclusive of the printed record so furnished by the clerk of the court below, as the Supreme Court of the United States may from time to time by rule prescribe; and no written or typewritten transcript of so much of the record as shall have been printed as herein provided shall be required. [36 Stat. L. 301.]

See note to the preceding section 1 of this Act.
For a table of fees of the clerk of the Supreme Court for preparing the record, etc., see Supreme Court Rule 24.

Final decree.—The provision as to a clerk’s fee for supervision of the printing of the bond applies to a decree which while technically an interlocutory one is in character and scope a final one. Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co., (1914) 235 U. S. 383, 35 S. Ct. 132, 59 U. S. (L. ed.) 282 (approving Smith v. Farbenfabriken, (C. C. A. 6th Cir. 1912) 197 Fed. 894, 117 C. C. A. 133), wherein the court said: "The Automobile Supply Company appealed to the court below from an interlocutory decree in favor of the complainant, the Lovell-McConnell Company, finding that the patents sued on had been infringed, and awarding an injunction, and directing an accounting for damages and profits. On such appeal the Automobile Supply Company furnished the clerk of the court below a complete printed record accompanied with a written index of the contents of the same, and, in consequence of a demand made by the clerk deposited under protest the sum of $696 as a fee due the clerk for supervising the printed record so furnished. When, after a hearing, the court reversed the decree of the trial court, the Automobile Supply Company called upon the clerk either to refund the money charged for supervision, or to include it in his statement of the costs to be entered on the mandate. The clerk, being doubtful as to his duty in the matter, refused to do either, and insisted that the propriety of the charge be tested to the end that he might act advisedly in the premises. The Automobile Supply Company thereupon moved to direct the clerk to include the supervision fee in the mandate, or to refund the amount of the deposit which had been made. The court held that the charge for supervision was
lawful, and therefore properly taxable as costs, and directed the clerk to retain the money and include a charge for the same in the mandate. The application before us was then made by the Lovell-McConnell Company, the party cast and ultimately bound for the costs, both the parties, however, entering into the agreement as to the record and the submission on the merits which we at the outset stated. Considering the Act of Congress of Feb. 13, 1911, 36 Stat. L. 901, c. 47, in Rainey v. Grace, 231 U. S. 703, [34 S. Ct. 2424], 88 U. S. (L. ed.) 446, it was held that the provisions of the act were applicable to the circuit courts of appeals, and it was consequently decided that where a printed transcript of the record was filed in compliance with the statute with the clerk of the Court of Appeals, no supervision fee could be charged by such clerk. Of course, if that ruling is here applicable, the court below clearly erred in allowing the charge for supervision, and the only possible question, therefore, is whether the statute, although generally applicable to records filed in the Circuit Court of Appeals, is not so applicable in this case. It is insisted that it is not—and the court below so held—because, as the statute only provides for an appeal from a 'final judgment or decree,' it does not apply to a case like the one under consideration, where the appeal was from a decree interlocutory in character. But without affixing to the statute a latitudinarian meaning upon the theory that to do so is essential to give effect to its purpose and intent, and to bring every interlocutory decree within its reach, we are of opinion that to exclude an interlocutory decree of the character of the one here involved from the operations of the statute would be to frustrate its plain purpose by a too rigid and unreasonable adherence to its letter. We so conclude because, while in a technical sense the decree here in question was interlocutory, when its character and the scope of the subject-matter which the appeal brought under review and the relief under it which it was competent to afford are considered, we are of opinion it must follow that such decree was, within the intentment of this statute, a final decree, and therefore that error was committed in permitting the supervision charge. Indeed, this view was taken in a well considered opinion by the Circuit Court of Appeals for the Sixth Circuit in a case decided before the ruling in the Rainey Case, supra (Smith v. Farbenfabriken von Elberfeld Co., [C. C. A. 6th Cir. 1912] 107 Fed. 894, 117 C. C. A. 133 [quoted at the end of the last paragraph in the notes to supra, at p. 891], and we approve the reasoning by which the ruling in that case was sustained. It results that the Circuit Court of Appeals erred in its order approving the charging and retaining the fee for supervision, and such order is therefore reversed." See also In re Burr Mfg. Co., [C. C. A. 2d Cir. 1914] 215 Fed. 898, [132 C. C. A. 238].

Sec. 998. [Citation.] When the writ is issued by a circuit court to a district court, the citation shall be signed by the judge of such district court, or by the judge of such circuit court, or by a justice of the Supreme Court, and the adverse party shall have at least twenty days' notice. [R. S.]


The appellate jurisdiction of the Circuit Court was taken away by Act of March 3, 1891, ch. 517, § 4, supra, p. 143. See the last part of section 11 of the same Act, superseded by, and embodied in, Judicial Code, § 132, supra, this title, vol. 6, p. 945, as to power of judges of the Circuit Courts of Appeals in the allowance of writs of error. Circuit Courts were abolished and the powers and duties of Circuit Courts imposed upon District Courts by Judicial Code, §§ 289-291, supra, this title, vol. 5, p. 1082.


By whom signed.—A citation from a lower federal court must be signed by a judge thereof or by a justice of the Supreme Court, and a citation from a circuit court, that it is signed by the clerk. U. S. v. Hodges, (1845) 3 How. 534, 44 U. S. (L. ed.) 714;


A district judge sitting as a judge of the Circuit Court had authority to allow an appeal and sign the citation even if the decree was rendered by the circuit judge. Rodd v. Hearty, (1872) 17 Wall. 354, 21 U. S. (L. ed.) 627;


Amendment of return.—A return to a citation may be amended to show that the
person served with it was a proper person for such service. McClellan v. Fayatte, (C. C. A. 8th Cir. 1892) 49 Fed. 259, 4 U. S. App. 98, 1 C. C. A. 241.

Irregular citation.—Where the transcript has been filed and the appellees have entered a regular appearance by counsel they cannot complain that the citation is irregular. Freeman v. Clay, (C. C. A. 6th Cir. 1891) 48 Fed. 849, 2 U. S. App. 151, 1 C. C. A. 115.

Sec. 999. [Citation, Supreme Court.] When the writ is issued by the Supreme Court to a circuit court, the citation shall be signed by a judge of such circuit court, or by a justice of the Supreme Court, and the adverse party shall have at least thirty days' notice; and when it is issued by the Supreme Court to a State court, the citation shall be signed by the Chief Justice, or judge, or chancellor of such court, rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice. [R. S.]

Circuit Courts were abolished and the powers and duties of Circuit Courts imposed upon District Courts by Judicial Code, §§ 289-291, supra, this title, vol. 5, pp. 1092, 1083.
Section 11 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, supra, p. 170, makes all provisions then in force regulating the methods and systems of review, through appeals or writs of error, applicable in respect of Circuit Courts of Appeals.

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I. PURPOSE

"The citation is intended as notice to the appellee that an appeal has been taken and will be duly prosecuted. . . . The purpose is notice, in that the appellee may appear and be heard." Dodge v. Knowles, (1885) 114 U. S. 430, 5 S. Ct. 1108, 1197, 29 U. S. (L. ed.) 144. See to the same effect Farmers' Loan, etc., Co. v. Chicago, etc., R. Co., (C. C. A. 7th Cir. 1896) 73 Fed. 316, 34 U. S. App. 626, 19 C. C. A. 477.

II. NECESSITY AND SUFFICIENCY

Appeal allowed in open court.—If an appeal is allowed in open court during the term in which a decree is rendered a citation is required as matter of procedure if the security is not furnished until after the term. Still, an appeal otherwise regular will not be dismissed absolutely for want of a citation if it appears by clear and unmistakable evidence outside of the record that the allowance was made in open court at the proper term, and that the appellee had actual notice of what had been done. The citation, if security is taken out of court or after the term, is only necessary to show that the appeal which was allowed in term had not been abandoned by the failure to furnish the security before the adjournment. If by accident it has been omitted, a motion to dismiss an appeal allowed in open court and at the proper term will never be granted until an opportunity to give the requisite notice has been furnished, and this whether the notice was made after the expiration of two years from the rendition of the decree or before. Dodge v. Knowles, (1885) 114 U. S. 436, 5 S. Ct. 1197, 29 U. S. (L. ed.) 296, citing Chicago, etc., R. Co. v. Blair, (1879) 100 U. S. 681, 25 U. S. (L. ed.) 587.

If the appeal is allowed in open court security may be taken by the court and no citation is necessary, but if the security is not given until after the term is over a citation must be issued and served. Sage v. Central R. Co., (1877) 96 U. S. 715, 24 U. S. (L. ed.) 644; Haskins v. St. Louis, etc., R. Co., (1883) 100 U. S. 106, 3 S. Ct. 72, 27 U. S. (L. ed.) 873.

But where no citation was ever issued on a writ of error to the District Court, and the defendants in error do not appear, the writ will be dismissed, as notice of writ of error given in open court at the same term when judgment is rendered is not equivalent to the citation required by this

Citation is essential to the validity of the writ, and without it the writ would be quashed. Lloyd v. Alexander, (1803) 1 Chanc. 365, 2 U. S. (L. ed.) 137; Kitchen v. Randolph, (1876) 93 U. S. 86, 23 U. S. (L. ed.) 810.

Sufficient notice of an appeal is given by filing the bond and the approval of it in open court. Goodwin v. Fox, (1897) 190 U. S. 775, 7 S. Ct. 779, 30 U. S. (L. ed.) 815.


A citation is required when an appeal is taken and perfected in open court during the term at which the decree complained of is entered; alter, where at a subsequent term the appeal is allowed, although the solicitors of the appellee be present. Chicago, etc., R. Co. v. Blair, (1879) 100 U. S. 661, 25 U. S. (L. ed.) 587.

The mere presence of counsel in court at the time of an allowance of an appeal, at another term than that of the decision appealed from, and notice of the motion or prayer for allowance, will not discharge with the necessity for a citation. Castro v. U. S., (1885) 3 Wall. 46, 18 U. S. (L. ed.) 165; Chicago, etc., R. Co. v. Blair, (1879) 100 U. S. 661, 25 U. S. (L. ed.) 587.

An appeal not taken in open court, but claimed in the clerk's office, is a nullity, without a citation returnable at the next term of the court. Villalobos v. U. S., (1848) 6 How. 81, 12 U. S. (L. ed.) 352.

An order to an appellee to appear and argue the cause if he saw it was of itself the legal equivalent of a citation for all the purposes of an appeal. Dodge v. Knowles, (1885) 114 U. S. 430, 5 S. Ct. 1108, 1197, 29 U. S. (L. ed.) 144.

Reversal of decree.—A decree will be reversed where it appears that the appellee was not cited and did not appear, and that the court heard the argument, made a decree, and sent a mandate under the mistaken belief that the citation had been regularly issued and served upon him. Ex p. Crenshaw, (1841) 15 Pet. 119, 10 U. S. (L. ed.) 692.

III. BY WHOM SIGNED

Error to federal court.—Upon writs of error from the Supreme Court to the District Courts of the United States, as well as to the courts of the several states, any justice of the Supreme Court, not necessarily the justice assigned to the circuit in which the other court is held, may, in or out of court, allow the writ of error, sign the citation, take the requisite security for the prosecution of the writ and grant the supersedeas when the writ itself does not operate as a stay of proceedings. Hugdins v. Kemp, (1855) 18 How. 530, 15 U. S. (L. ed.) 611; Sage v. Central R. Co., (1877) 96 U. S. 712, 24 U. S. (L. ed.) 641; Peugh v. Davis, (1884) 110 U. S. 227, 4 S. Ct. 17, 28 U. S. (L. ed.) 127; Hudson v. Parker, (1895) 156 U. S. 277, 15 S. Ct. 450, 32 U. S. (L. ed.) 424.

In the case of Insurance Co. of Valley of Virginia v. Mordecai, (1858) 21 How. 105, 16 U. S. (L. ed.) 94, Chief Justice Taney declared that the Act of Congress required the citation “to be issued by the judge or justice who allows the writ of error, and it cannot be legally issued by any other judge or court”; but the later cases indicate a more liberal construction of the statute which provides that the citation “shall be signed by a judge of such Circuit [now District] Court or a justice of the Supreme Court;” and while it is required by the next section that every judge or justice signing a citation on any writ of error shall take good and sufficient security for the prosecution of the writ or appeal, it does not follow that when, in a given instance, a bond has been approved by one of the judges of the Circuit, now District, Court, another judge of that court who might have granted the appeal and approved the bond may not sign the citation. His signing thereof without requiring security is equivalent to an express approval by him of the bond already approved by the other judge. See Farmers' Loan, etc., Co. v. Chicago, etc., R. Co., (C. C. A. 7th Cir. 1896) 73 Fed. 314, 34 U. S. App. 626, 19 C. C. A. 477.

Error to state court.—The statute requires that the citation must be signed by the chief justice, or judge, or chancellor of the state court rendering or passing the judgment or decree complained of, or
by a justice of the Supreme Court of the United States. It has been the settled doctrine of this court that a writ of error to a state court must be allowed by one of the judges above mentioned, or it will be dismissed for want of jurisdiction. Bartemeyer v. Iowa, (1871) 14 Wall. 26, 20 U. S. (L. ed.) 792.

The judgment of a state court in error will not be reviewed by the Supreme Court unless it appears upon the record that the writ has been allowed by a justice of the Supreme Court or of the state court. Gleason v. Florida, (1869) 9 Wall. 779, 19 U. S. (L. ed.) 730; Northwestern Union Packet Co. v. Home Ins. Co., (1872) 154 U. S. 558, 12 S. Ct. 1168, 20 U. S. (L. ed.) 463.

A writ of error allowed by an associate justice of the Court of Appeals of a state and a citation signed by him, the record containing nothing to warrant an inference that the associate judge was at the time acting as chief judge pro tem. of the court, will be dismissed for want of jurisdiction. Havnoro v. New York, (1868) 170 U. S. 408, 18 S. Ct. 631, 42 U. S. (L. ed.) 1087. And see Butler v. Gage, (1891) 138 U. S. 52, 11 S. Ct. 235, 34 U. S. (L. ed.) 899.

A citation to a state court may not be signed by a district judge. Palmer v. Donner, (1869) 7 Wall. 541, 19 U. S. (L. ed.) 99.

When the appeal is from the Supreme Court of the District of Columbia to the Supreme Court of the United States a justice of the District Court may sign the citation. Richards v. Mackall, (1885) 113 U. S. 539, 5 S. Ct. 535, 28 U. S. (L. ed.) 1132.

A writ of error from the federal Supreme Court to the Supreme Court of the state of Nebraska sufficiently conformed to the requirements of this section where it was signed "John B. Barnes, presiding judge of the Supreme Court of Nebraska, in absence of Sedgwick, C. J., from this state," and the truth of this recital was not challenged. Missouri Valley Land Co. v. Wiese, (1903) 208 U. S. 234, 28 S. Ct. 294, 52 U. S. (L. ed.) 466; Missouri Valley Land Co. v. Wrch, (1908) 208 U. S. 250, 28 S. Ct. 299, 52 U. S. (L. ed.) 473.

One's remedy to review a state court judgment in the United States Supreme Court is not exhausted by a refusal of his application to a justice of the state court for a writ of error from the United States Supreme Court; but, on such refusal, an application must be made to a justice of the latter court before the remedy is exhausted. Ex p. Chadwick, (N. D. Cal. 1908) 159 Fed. 576.


IV. DESIGNATION OF PARTIES AND ADDRESS

The parties must be properly designated and described in citations and in the writs of error also or the writ will be dismissed. Peale v. Phipps, (1850) 8 How. 256, 12 U. S. (L. ed.) 1070; Kail v. Wetmore, (1867) 6 Wall. 451, 18 U. S. (L. ed.) 862.

The citation should be addressed to the actual parties to the suit at the time the appeal was allowed and prosecuted. Dav-enport v. Fletcher, (1853) 16 How. 142, 14 U. S. (L. ed.) 879; Bigler v. Waller, (1870) 12 Wall. 142, 12 U. S. (L. ed.) 260.

In Louisiana, errors in a citation by calling the defendant the wife of one not her husband and omitting to state that the plaintiff was a trustee are not material. Peale v. Phipps, (1850) 8 How. 256, 12 U. S. (L. ed.) 1070.

V. SERVICE

In general.—The meaning of the statute is not that the citation shall be served thirty days before the return day, but that the defendant in error shall have at least thirty days' notice before he can be compelled to go to a hearing. National Bank v. Bank of Commerce, (1878) 99 U. S. 606, 25 U. S. (L. ed.) 362, distinguishing vlah v. Mandeville, (1809) 5 Cranch 321, 3 U. S. (L. ed.) 113.


The service of a citation by mail is not sufficient. Tripp v. Santa Rosa St. R. Co., (1892) 144 U. S. 126, 12 S. Ct. 655, 36 U. S. (L. ed.) 372.

On the road made.—Service may be had upon his attorney or counsel with like effect as upon the party himself, but when counsel of record is dead notice cannot be served on his personal representative, nor even on his partner if not regularly appearing on the records as counsel in the cause. Bacon v. Hart, (1861) 1 Black 38, 17 U. S. (L. ed.) 52.

No attorney or solicitor can withdraw his name after he has once entered it upon the record without the leave of the court; and while his name continues there the opposite party has a right to treat him as the authorized attorney or solicitor and service on him is valid. U. S. v. Curry, (1848) 6 How. 106, 12 U. S. (L. ed.) 363.

In Fairfax v. Fairfax, (1809) 5 Cranch 18, 3 U. S. (L. ed.) 54, where the defendant below intermarried after the judgment
and before the service of the writ of error, the service of citation upon the husband was held sufficient.

Non-service or irregular service.—An appeal although allowed out of term is not avoided by the non-service of a citation, but the court will impose such terms upon the appellants as, under the circumstances, may be legal and proper. Dayton v. Laub, (1876) 94 U. S. 112, 24 U. S. (L. ed.) 33.

It is not sufficient ground to dismiss a writ of error that the citation was served and made returnable less than thirty days after the writ was granted. Seagrist v. Crabtree, (1888) 127 U. S. 778, 8 S. Ct. 1394, 32 U. S. (L. ed.) 323; Andrews v. Thum, (C. C. A. 1st Cir. 1894) 64 Fed. 149, 21 U. S. App. 459, 12 C. C. A. 77.

Where the defendant in error was served in another state by the marshal of that state with a citation of a writ of error, it is an irregularity in the service of the citation which could only have been taken advantage of by a motion to dismiss made promptly on the appearance limited to that special purpose. U. S. v. Yates, (1848) 6 How. 605, 12 U. S. (L. ed.) 575; Buckingham v. McLean, (1851) 13 How. 150, 14 U. S. (L. ed.) 90; Renaud v. Abbott, (1880) 116 U. S. 277, 6 S. Ct. 1194, 29 U. S. (L. ed.) 629.

VI. RETURN

The appeal and citation when issued more than thirty days before the first day of the next term of the Supreme Court must be returnable on the first day of said term. The judge of the Circuit Court who is required to sign such citation has no discretion to fix any earlier return day. Ex p. Jugiro, (S. D. N. Y. 1891) 44 Fed. 754.

VII. PROOF OF ISSUANCE

Though no citation appears in the record it may be proved aloud that one was issued. Innerarity v. Byrne, (1847) 5 How. 295, 12 U. S. (L. ed.) 159.

VIII. WAIVER

Notice is required by law, and where none is given, the failure to comply with the requirement is fatal, if not waived. The appeal or writ of error must be dismissed, but the defect may be waived in various ways, as by consent or appearance, or the fraud of the other party. Bacon v. Hart, (1861) 1 Black (U. S.) 38, 17 U. S. (L. ed.) 52; Bigler v. Waller, (1870) 12 Wall. 142, 20 U. S. (L. ed.) 280.

The citation is required for the benefit of the defendant in error, and he may waive it, and therefore any irregularity therein may be cured by an appearance in court. Buckingham v. McLean, (1851) 13 How. 150, 14 U. S. (L. ed.) 90; Carroll v. Dorsey, (1857) 20 How. 204, 15 U. S. (L. ed.) 603.


VI. RETURN

It is the practice of the Supreme Court for the clerk to enter at the first term to which any writ of error or appeal is returnable the appearance of the Attorney-General in every case to which the United States is a party by entering his name on the docket, and if the Attorney-General does not withdraw such appearance at the first term, it is conclusive upon him as to an appearance. Farrar v. U. S., (1830) 3 Pet. 459, 7 U. S. (L. ed.) 741.

An appellant cannot ask to have an appeal dismissed for want of a citation when the appellee is in court represented by counsel, and makes no objection to the want of one. Pierce v. Cox, (1869) 9 Wall. 786, 19 U. S. (L. ed.) 786.

Sec. 1000. [Bond in error and on appeal.] Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid. [R. S.]

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I. PURPOSE

The purpose of the statute was, in the event of an appeal or writ of error, that the appellee or defendant in error should, by reason of the stay of proceedings demanded by his opponent, be fully indemnified for all damages and costs sustained thereby if the appeal or writ of error should prove ineffectual; in other words, that he should sustain no loss in consequence of any ineffectual effort to reverse the decree or judgment by reason of his hand being stayed pending such effort. It was not, however, designed to give one a better security than he had by the decree or judgment. It was indemnity, not guaranty of payment that was sought for; indemnity for the delay, not additional security for the debt. Louisville, etc., R. Co. v. Pope, (C. C. A. 7th Cir. 1896) 74 Fed. 1, 20 C. C. A. 253.

II. NECESSITY OF SECURITY

1. In General


2. Appeal from Admiralty Court

An appeal from a decree of the District Court in Admiralty is not regular unless the appellant gives sufficient security to answer the costs in case of affirmation. Such security is necessary to the regularity of the appeal even though execution has been issued on the decree in the District Court in the absence of the security required to operate as a supersedeas. Hayford v. Griffith, (1853) 5 Blatchf. 34, 11 Fed. Cas. No. 6,293.

3. Suits by Poor Persons


4. Criminal Cases

Criminal as well as civil cases are affected by this section, where the judgment against the defendant awards costs, provided, however, that it is not applicable to a writ of error on a conviction of a crime punishable by death. American Surety Co. v. U. S., (C. C. A. 5th Cir. 1917) 239 Fed. 680, 152 C. C. A. 514.

III. OMISSION TO TAKE SECURITY


Where the judge signing the citation omitted to take the bond, the case was ordered to stand dismissed unless within thirty days from the rising of the court such a bond should be given approved by any judge authorized to allow a writ of error and sign a citation on the judgment. Catlett v. Brodie, (1824) 9 Wheat. 555, 6 U. S. (L. ed.) 159.

The failure to take such security is an irregularity, but it does not necessarily avoid the citation. The security is required, however, in the due prosecution of the appeal, and if the case is docketed here in time it will not ordinarily be dismissed because of the neglect or omission of the justice or judge to require the security until the appellant has been afforded a reasonable opportunity of curing the defect. Brown v. McConnect, (1888) 124 U. S. 489, 8 S. Ct. 559, 31 U. S. (L. ed.) 496.

While the omission of the bond does not necessarily avoid an appeal, and the court in proper cases may permit the bond to be supplied, it will not do so where no application for such relief has been made after a lapse of nearly four years since the decree. Beardsley v. Arkansas, etc., R. Co., (1895) 159 U. S. 123, 15 S. Ct. 756, 39 U. S. (L. ed.) 919.

Where through a mistake or accident no bond has been filed, the Supreme Court will not dismiss the appeal, if it is in all other respects quite regular, except on failure to comply with an order to give the

IV. BOND FOR CLERK'S FEE

The appellants must give fee bond before the clerk is obliged to file the transcript of record. Owings v. Tierman, (1836) 10 Pet. 447, 9 U. S. (L. ed.) 489.

Where the ground of a dismissal of an appeal is that the appellants neglected to secure the clerk's fees, the dismissal will not be set aside. Selma, etc., R. Co. v. Louisiana Nat. Bank, (1876) 94 U. S. 253, 24 U. S. (L. ed.) 32.

V. TO WHOM GIVEN

A bond on appeal must be given to a party to the judgment. Davenport v. Fletcher, (1853) 16 How. 142, 14 U. S. (L. ed.) 879.

Where the suit is by the people, on relation, an appeal bond to the people or to the relator is sufficient, as it may be sued on by either. Spalding v. People, (1844) 2 How. 66, 11 U. S. (L. ed.) 161.

VI. CONTENTS AND SUFFICIENCY OF BOND

1. Parties

A bond must state the proper number of plaintiffs in error or the writ will be dismissed. Kail v. Wetmore, (1867) 6 Wall. 451, 18 U. S. (L. ed.) 582.


2. Name of Court


3. Nature of Action


4. Amount for Which Sureties Bound

An appeal bond in which the sureties are not each bound for the full amount, but each for a separate part thereof, may be accepted by the judge in his discretion. New Orleans Ins. Co. v. Albrow Co., (1884) 112 U. S. 506, 5 S. Ct. 289, 28 U. S. (L. ed.) 809.

5. Conditions

Where an appeal has been taken to the Supreme Court the condition of the bond that the appellants "shall duly prosecute their said appeal with effect, and moreover pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed in said court," meets all the requirements of this section. Gay v. Parpert, (1879) 101 U. S. 391, 25 U. S. (L. ed.) 841.

A condition that the appellant "shall prosecute its writ of error to effect, and answer all damages and costs if it shall fail to make the plea good," is sufficient. Chatauegay Ore, etc., Co. v. Blake, (S. D. N. Y. 1888) 35 Fed. 804.

A condition to answer all costs and damages "in the event the decree is affirmed" is not sufficient. Peace River Phosphate Co. v. Edwards, (C. C. A. 5th Cir. 1895) 70 Fed. 728, 30 U. S. App. 513, 17 C. C. A. 358.

An appeal bond must provide that the appeal be prosecuted with effect, must name the obligees, and must not be for less than the proper amount, or the appeal will be dismissed. Swan v. Hill, (1894) 155 U. S. 394, 15 S. Ct. 178, 39 U. S. (L. ed.) 197.

Where the funds are deposited in court, and the party appealing by his appeal renders them accessible, the bond may be made to provide for the payment of interest while the appeal is pending. Turner v. Indianapolis, etc., R. Co., (1879) 8 Biss. 527, 24 Fed. Cas. No. 14,260.

VII. EXECUTION AND APPROVAL

When executed.—A bond is not defective because it is executed before the judgment sought to be reviewed was in fact entered, the bond not having been delivered until after entry of judgment. Chatauegay Ore, etc., Co. v. Blake, (S. D. N. Y. 1888) 35 Fed. 804.


"The supersedeas bond, to be effectual and operate as such, must be approved by the judge who allows the appeal and signs the citation. The statute so reads, and the Supreme Court has so held. If not approved by him or a defective bond is filed, a judge of the appellate court probably may approve or take such action as will cure the defect." Gay v. Hudson River Electric Power Co., (N. D. N. Y. 1911) 190 Fed. 812.

When this section speaks of signing a citation upon a writ of error and requires the judge signing it to take security that the appellant shall prosecute his writ or appeal to effect, it means that the judge who allows an appeal or writ of error shall take such security. Providence Washington Ins. Co. v. Wagner, (N. D. N. Y. 1888) 37 Fed. 69.

But it has been held that the required bond may be approved by any judge or justice who is authorized to sign the cita-
tion and to allow the writ of error or appeal. It is not essential to its validity that it be approved by the justice or judge who allows the writ of error or appeal or signs the citation. Brown v. Northwestern Mut. Life Ins. Co., (C. C. A. 5th Cir. 1902) 119 Fed. 148, 55 C. C. A. 654.

It is sufficient if the bond is approved by a judge out of court even though there be an entry on the minutes and on the order book of the court requiring the bond to be approved by the court. Hudgins v. Kemp, (1855) 16 How. 550, 15 U. S. (L. ed.) 611.


It is not ground for dismissal of an appeal that the bond was approved by the clerk instead of the judge, but under direction of the court, and the irregularity should be cured by filing a proper bond. Chicago Dollar Directory Co. v. Chicago Directory Co., (C. C. A. 7th Cir. 1895) 65 Fed. 465, 24 U. S. App. 525, 13 C. C. A. 8.

VIII. ACTIONS ON BONDS

Against whom.—All the parties to an appeal bond or each separately must be included in an action brought thereon, or a plea in abatement may be made by the defendant. Dowlin v. Standifer, (1838) Hempst. 290, 7 Fed. Cas. No. 4,041a.


When maintained.—After the affirmation of judgment by the Supreme Court and the filing of their decision in the lower court a suit may be maintained on the appeal bond without an order from the lower court that judgment be executed. Davis v. Patrick, (C. C. A. 5th Cir. 1893) 57 Fed. 909, 12 U. S. App. 629, 6 C. C. A. 632.

A party who, on an appeal from a decree for the recovery of the possession of real property unless the balance of the purchase price should be paid before Jan. 1, 1899, secures an extension of the time for such payment until Nov. 1, 1899, has so prosecuted his appeal to effect, within the meaning of a supersedeas bond to secure the security party from loss in the use and possession of the premises, as to preclude any recovery on such bond for the use and occupation of the property between those dates. Crane v. Buckley, (1908) 203 U. S. 441, 27 S. Ct. 55, 51 U. S. (L. ed.) 290.

Pleading by Surety.—In an action upon an appeal bond the breach assigned must be a single breach and deny each alternative of the conditions of a bond. Tucker v. Lee, (1829) 3 Cranch (C. C.) 684, 24 Fed. Cas. No. 14,221.

Avornment of damages.—Damages must be especially alleged in an action on an appeal bond which is conditioned under the above section. Tucker v. Lee, (1829) 3 Cranch (C. C.) 684, 24 Fed. Cas. No. 14,221.

And the bond is approved by a judge out of court even though there be an entry on the minutes and on the order book of the court requiring the bond to be approved by the court. Hudgins v. Kemp, (1855) 16 How. 550, 15 U. S. (L. ed.) 611.


It is not ground for dismissal of an appeal that the bond was approved by the clerk instead of the judge, but under direction of the court, and the irregularity should be cured by filing a proper bond. Chicago Dollar Directory Co. v. Chicago Directory Co., (C. C. A. 7th Cir. 1895) 65 Fed. 465, 24 U. S. App. 525, 13 C. C. A. 8.

IX. LIABILITY OF SURETIES

When liable.—Before the surety can be forced to pay it must be legally shown that the principal is unable to pay. Hodge v. Plot, (1822) Hempst. 14, 12 Fed. Cas. No. 4,055a.

But it is not necessary in order to charge the sureties in an appeal bond that an execution on the judgment recovered in the appellate court should be issued against the principal. Babbitt v. Finn, (1879) 101 U. S. 7, 25 U. S. (L. ed.) 820.

The sureties are not discharged in case the judgment of a Superior Court is removed into a higher court for re-examination and a new bond is given to prosecute the second appeal, if the judgment is affirmed in the court of last resort. Nothing will discharge the surety given to prosecute the appeal from the court of original jurisdiction, but the reversal of the judgment in some court having jurisdiction to correct the alleged error. Babbit v. Finn, (1879) 101 U. S. 7, 25 U. S. (L. ed.) 820.

But a surety is discharged if the plaintiff in error gets the judgment reversed in the Circuit Court of Appeals and the defendant in error, although he might have done so, fails to carry the case to the Supreme Court. Anderson v. Messenger, (N. D. Ohio 1913) 208 Fed. 75.

A surety on an appeal bond is not discharged by the surrender of his principal or by his arrest on a ca. as. Dowlin v. Standifer, (1838) Hempst. 290, 7 Fed. Cas. No. 4,041a.


Where the appellant dies pending the appeal and two terms elapse before further proceeding, the sureties are not liable for he appellant's failure to prosecute his writ of appeal to effect. Jeffers v. Forrest, (1840) 5 Cranch (C. C.) 674, 13 Fed. Cas. No. 7,429.


Where a case is remanded by the Supreme Court with directions "that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be
had," such a mandate does not prevent the refusal of an execution by the Circuit (now District) Court against the sureties on an appeal bond given in the District Court. 26 p. Sawyer, (1874) 21 Wall. 255, 22 U. S. (L. ed.) 617.

Amount of liability generally.—A bond conditioned to prosecute the appeal to effect does not make the sureties absolutely liable for the amount of the original judgment. Metropolitan Bank v. Swann, (1831) 4 Cranch (C. C.) 139, 2 Fed. Cas. No. 902.

The surety is liable to the full amount of the bond in satisfaction of the damages incurred by reason of the appeal without any deduction for property which has been taken on execution against the principal in partial satisfaction. Ives v. Merchants' Bank, (1851) 12 How. 159, 13 U. S. (L. ed.) 936.

On failure to make an appeal good, the sureties in the appeal bond become liable to the extent of the penalty of the bond, and have no right to have a pro rata application of proceeds made under the original decree, towards the extinguishment of their liability. Sessions v. Pintard, (1854) Hemst. 676, 21 Fed. Cas. No. 12,674.

Interest.—The penalty of the bond fixes the extent of the sureties' liability, and in an action against them interest may be recovered from the time of the commencement of the action. Ives v. Merchants' Bank, (1851) 12 How. 159, 13 U. S. (L. ed.) 936.


X. DAMAGES AND COSTS

In general.—The security which a judge signing a citation on a writ of error, which is to be a superseded, shall take is to be for the costs and such damages as the Supreme Court may award for the delay. Renner v. Columbia Bank, (1822) 2 Cranch (C. C.) 310, 20 Fed. Cas. No. 11,690.

Where an appeal bond is conditioned to answer all damages, the damages are those arising from the non-satisfaction of the affirmed judgment. Tucker v. Lee, (1829) 3 Cranch (C. C.) 684, 24 Fed. Cas. No. 14,221.

A bond conditioned under this section covers not merely the damages ensuing from the appeal, but also the amount of the judgment. Rosewicke v. Tarr, (C. C. Mass. 1892) 51 Fed. 368, (C. C. A. 1st Cir. 1892) 53 Fed. 112, 5 U. S. App. 197, 3 C. C. A. 466.

There is no doubt that a superseded bond, conditioned according to the statute, for prosecuting the appeal, with effect and answering all damages and costs, covers not merely compensation for the delay arising from the appeal, but also the amount of the decree appealed from, so far as the latter directs the payment of money by the appellant to the appellee. American Surety Co. v. North Packing, etc., Co., (C. C. A. 1st Cir. 1910) 178 Fed. 810, 102 C. C. A. 268.

The measure of damages for the breach of the condition of a bond to "answer all damages and costs," which works a supersedeas, in a writ of error to reverse a personal judgment for money, or in an appeal from a decree which directs the payment of money from the appellant to the appellee, is the amount due to the appellee by the terms of the judgment or decree, just damages for delay, and costs. Wood v. Brown, (C. C. A. 8th Cir. 1900) 104 Fed. 203, 43 C. C. A. 474.

The measure of damages for such a breach, in an appeal from an order directing the issue of an execution under a decree in chancery for the payment of money, is the same as for the breach of the condition of such a bond in an appeal from the decree. It is the amount due to the appellee under the decree, just damages for delay, and costs. Wood v. Brown, (C. C. A. 8th Cir. 1900) 104 Fed. 203, 43 C. C. A. 474.

Use and possession of property.—The 'obligee in a bond which supersedes an order confirming a sale of real estate, and directs the immediate execution of a deed and delivery of possession thereof to the purchaser, is entitled, after that order has been affirmed on appeal, to recover as damages for the breach of the obligation of the bond the value of the use and possession. Brown v. Northwestern Mut. Life Ins. Co., (C. C. A. 8th Cir. 1902) 119 Fed. 148, 55 C. C. A. 654.

Usurpation of public office.—The measure of damages on an appeal bond for the usurpation of a public office is the amount of salary during the time the rightful incumbent was kept out of office. U. S. v. Addison, (1867) 6 Wall. 291, 18 U. S. (L. ed.) 919.

Bond in injunction cases.—A superseded bond, given under this section and Supreme Court rule 29, does not suspend the operation of a prohibitory injunction granted by the decree appealed from, but, unless otherwise ordered by the trial judge in allowing the appeal, as authorized by equity rule 93, such injunction remains in full force pending the appeal, and its violation is punishable as a contempt. Hence damages sustained by the appellee by a violation of the injunction pending appeal are not the result of a superseded bond, and cannot be recovered in an action thereon. Green Bay, etc., Canal Co. v. Norrie, (S. D. N. Y. 1902) 118 Fed. 923.

Foreclosure suit.—The appeal bond of a foreclosure suit in the ordinary form does not operate as security for the original decree, nor for the interest which accrued.
pending the appeal, nor, by consequence, for the balance of these amounts or either of them, after applying the proceeds of the mortgaged property, nor for the costs unpaid in the original suit which are a part of the decree, nor for the use and detention of the property pending the appeal, but only the depreciation of the property in market value pending the appeal, or its deterioration by waste, or want of repair, or the accumulation of taxes or burdens, and the nonpayment of the costs of the appeal. Kourtz v. Omaha Hotel Co., (1882) 107 U. S. 378, 2 S. Ct. 911, 27 U. S. (L. ed.) 609.

On an appeal from a decree for the foreclosure of a mortgage the appeal bond is not intended as security for either the amount of the decree or the interest accruing pending the appeal, but for such damage as may rise from the delay incident to the appeal. Jerome v. McCarter, (1874) 21 Wall. 17, 22 U. S. (L. ed.) 615; Kourtz v. Omaha Hotel Co., (1882) 107 U. S. 378, 2 S. Ct. 911, 27 U. S. (L. ed.) 609.

On an appeal from a decree of foreclosure no new obligations are assumed in respect to the debt, and the damages which the appellant and his surety bind themselves to answer by a supersedeas are such only as follow from the delay in the sale of the property. Wayne County v. Kennicott, (1880) 103 U. S. 554, 26 U. S. (L. ed.) 486.

In ejectment.—Where the judgment of the Circuit Court in an action of ejectment was against the defendant, in which nominal damages only were awarded, and defendant sued out a writ of error in order to bring the case before the Supreme Court, that court cannot grant a motion to enlarge the security in the appeal bond, for the purpose of covering apprehended damages which the plaintiff below thinks he may sustain by being kept out of his land. Roberts v. Cooper, (1856) 19 How. 373, 15 U. S. (L. ed.) 697.

Costs.—The surety on a bond given on appeal from a Circuit Court to the Circuit Court of Appeals, conditioned in effect as required by this section and R. S. sec. 1012 (supra, p. 170) and rule 13 of the Circuit Court of Appeals, that the appellant should prosecute his appeal to effect and to answer all costs if he should fail to make his plea good, is liable not only for the costs in the appellate court, but also for those in the court below. Fidelity, etc., Co. v. Expanded Metal Co., (C. C. A. 3d Cir. 1910) 183 Fed. 588, 106 C. C. A. 114.

Rule 13 of the Fifth Circuit does not so affect this section as to prevent a bond standing as security for a superseded decree for the payment of money, at least in so far as that decree is not otherwise secured. Pease v. Rathburn-Jones Engineering Co., (C. C. A. 5th Cir. 1915) 228 Fed. 273, 142 C. C. A. 566.

XI. JUDGMENT

Where, on writ of error, the judgment is affirmed, the practice is to enter judgment on the bond provided for in this section on motion in the trial court, after the mandate goes down from the appellate court, and not in the appellate court. Clarkdale v. Williamson, (C. C. A. 5th Cir. 1912) 104 Fed. 412, 114 C. C. A. 374.


Where the statutes of a state authorize a summary judgment against the sureties on an appeal or supersedeas bond, the District Courts of the United States in that state may render such judgment. Egan v. Chicago G. W. R. Co., (N. D. Ia. 1908) 163 Fed. 344.

Summary judgment may be rendered by the District Court where the amount on appeal is not sufficient to permit the case to go to the Supreme Court. The Blanche Page, (1879) 17 Blatchf. 221, 3 Fed. Cas. No. 1,525.

XII. BOND ON SECOND APPEAL


Sec. 1001. [No bond required of United States, etc.] Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a circuit court, either by the United States or by direction of any Department of the Government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by
direction as aforesaid, shall be paid out of the contingent fund of the Department under whose directions the proceedings were instituted. [R. S.]


Circuit Courts were abolished and the powers and duties of Circuit Courts imposed upon District Courts by Judicial Code, §§ 289-291, supra, this title, vol. 5, pp. 1082, 1083.

Section 11 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, supra, p. 170, makes applicable to the Circuit Courts of Appeals all provisions then in force regulating the methods and system of review, through appeals or writs of error, "including all provisions for bonds or other securities."

Reason for provision.—The interpretation of R. S. sec. 1000 (supra, p. 157) that when it speaks of signing a citation upon a writ of error, and requires the judge signing it to take security that the "apellant shall prosecute his writ or appeal to effect," it means that the judge who allows an appeal or a writ of error shall take such security, denotes why it was deemed necessary to relieve the United States by this section from giving such security. Providence Washington Ins. Co. v. Wagner, (N. D. N. Y. 1888) 37 Fed. 59. Since a sovereign can be sued only by his own consent, he may prescribe the conditions on which he will be sued. Treat v. Farmers' Loan, etc., Co., (C. C. A. 2d Cir. 1911) 186 Fed. 760, 108 C. C. A. 98.


Effect of state statutes.—The adoption of state practice in the federal court under R. S. sec. 914, supra, p. 21, does not have the effect to abrogate this section so as to require the United States to give a bond for costs and damages in a suit in which one is required under state practice. U. S. v. Bryant, (1884) 111 U. S. 499, 4 S. Ct. 601, 26 U. S. (L. ed.) 496.

Suits by and against receivers of national banks.—This section is applicable to an action brought by a receiver of a national bank. Pepper v. Fidelity, etc., Co., (C. C. Conn. 1903) 125 Fed. 822.

But on motion therefor, defendants, sued by a nonresident receiver of a national bank, are entitled to require the plaintiff to give security for costs, where such security would be required by the laws of the state, under the conformity statute (R. S. sec. 914, supra, p. 21), unless the plaintiff by a certificate filed brings himself within the provisions of this section. Schofield v. Palmer, (N. D. Va. 1904) 134 Fed. 763.

No bond for the prosecution of a suit or to answer in damages or costs is required on writs of error or appeals issuing from or brought to the Supreme Court or the Circuit Court of Appeals by direction of the comptroller of the currency in suits by or against insolvent national banks, or the receivers thereof. Pacific Bank v. Mixter, (1885) 114 U. S. 693, 5 S. Ct. 944, 29 U. S. (L. ed.) 221; Robinson v. Southern Nat. Bank, (S. D. N. Y. 1899) 94 Fed. 22, overruling Platt v. Adrianse, (S. D. N. Y. 1899) 90 Fed. 772.

Receivers of federal courts appealing in good faith from the judgments of the state courts should not be required to give supersedeas bonds. Central Trust Co. v. St. Louis, etc., R. Co., (E. D. Ark. 1890) 41 Fed. 551.

Real party in interest.—A private party who is authorized to use the name of the United States in an action brought for the protection of private interests, should not be entitled to the benefits of this section, as he is the real party in interest. U. S. v. Choctaw, etc., R. Co., (1895) 3 Okl. 404, 41 Pac. 729.

Record on appeal.—If the appeal is intended to be taken by the United States, or at the direction of any department of the government as provided for in this section, it should be shown by the record. Stretton v. Shaheen, (C. C. A. 5th Cir. 1910) 176 Fed. 735, 100 C. C. A. 389.

Costs.—The only costs which this section seems to contemplate are the costs of the appellate court. Treat v. Farmers' Loan, etc., Co., (C. C. A. 2d Cir. 1911) 185 Fed. 760, 108 C. C. A. 98.

Where, in a proceeding to review a decision by the board of general appraisers assessing duties, the United States is the appellant and the decision is against the United States, the costs taxable by law against the latter are to be paid out of the proper fund according to the provisions of this section. U. S. v. Davis, (C. C. A. 5th Cir. 1893) 54 Fed. 147, 12 U. S. App. 47, 4 C. C. A. 251.


Territorial courts.—The provisions of this section do not apply to a case which is brought up from the District Court of a territory to the Supreme Court of the territory. U. S. v. Choctaw, etc., R. Co., (1895) 3 Okl. 404, 41 Pac. 729.
R. S. sec. 1002. This section read as follows:

"Sec. 1002. Writs of error shall be prosecuted from the final judgments of district courts acting as circuit courts to the Supreme Court in the same manner as from the final judgments of circuit courts."


This section was annulled by force of the Act of Feb. 6, 1889, ch. 113, § 5, which, as Sanborn, J., said, in In re Clerkship of Circuit Ct., (1899) 90 Fed. 352, repealed all the laws then in force which had conferred Circuit Court powers upon District Courts, "so that from the time of its approval, there was no district court in any state in the Union which could exercise the powers of a circuit court."

And Circuit Courts were abolished by Judicial Code, § 299, supra, this title, vol. 5, p. 1082.

Sec. 1003. [Writs of error to state courts, manner of issue.] Writs of error from the Supreme Court to a State court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. [R. S.]


Judicial Code, § 237 (as amended), supra, this title, vol. 5, p. 723, providing for jurisdiction of the Supreme Court to review, by writ of error, the judgments and decrees of state courts, also provides that "the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

Allowance of writ.—Writs of error to state courts have never been allowed as of right. It has always been the practice to submit the record of the state court to a judge of the Supreme Court, whose duty it was to ascertain whether any question cognizable on appeal was made and decided in the proper court of the state, and whether the cause upon the face of the record, justified the allowance of the writ. Twitchell v. Philadelphia, 7 Wall. 321, 19 U. S. (L. ed.) 223.

The foundation of the jurisdiction of the Supreme Court over the judgments of state courts is in the writ of error; and no writ of error to a state court can issue without allowance, either by the proper judge of the state court or by a judge of the Supreme Court, after examination. Gleason v. Florida, (1869) 9 Wall. (U. S.) 779, 19 U. S. (L. ed.) 730.


Direction of writ.—The writ must be directed either to that tribunal which can execute it, to that in which the record and judgment to be examined are deposited, or to that whose judgment is to be examined. The judgment to be examined must be that of the highest court of the state having cognizance of the case, but the record of that judgment may be brought from any court in which it may be legally deposited and in which it may be found by the writ. Gelston v. Hoyt, (1818) 3 Wheat. 246, 4 U. S. (L. ed.) 381.

Form of writ.—It is not necessary that the writ of error express upon its face that it is issued upon a final judgment of the highest court in the state. The writ of error is the act of the court; its object is to cite the parties to the Supreme Court and to bring up the record, by which method the court ascertains whether the judgment is final. Buel v. Van Ness, (1823) 8 Wheat. 312, 5 U. S. (L. ed.) 624.

Amendments.—For the amendment of writs of error as to particulars in form, see notes under R. S. sec. 1005, supra, p. 196.

Sec. 1004. [Writs of error returnable to Supreme Court — how issued.] Writs of error returnable to the Supreme Court or a circuit court
of appeals may be issued as well by the clerks of the district courts, under the seal thereof, as by the clerk of the Supreme Court or of a circuit court of appeals. When so issued they shall be as nearly as each case may admit agreeable to the form of a writ of error issued by the clerk of the Supreme Court or the clerk of a circuit court of appeals. [R. S.]

This section was amended "so as to read as" above given by the Act of Jan. 22, 1912, ch. 12, 37 Stat. L. 54.

As originally enacted this section read as follows:

"Sec. 1004. Writs of error returnable to the Supreme Court may be issued as well by the clerks of the circuit courts, under the seals thereof, as by the clerk of the Supreme Court. When so issued they shall be, as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several circuit courts by the clerk of the Supreme Court, in pursuance of section nine of the act of May eight, seventeen hundred and ninety-two, chapter thirty-six."

Act of May 8, 1792, ch. 36, 1 Stat. L. 278.

Circuit Courts were abolished and the powers and duties of Circuit Courts imposed upon District Courts by Judicial Code, §§ 289-291, supra, this title, vol. 5, pp. 1082, 1083.

Previous to the amendment, the statute made no provision for the issue of writs from the Supreme Court to the Circuit Court of Appeals, nor from the latter courts to the Circuit and District Courts, the statute having been passed before the Circuit Courts of Appeals were organized.


Construction.—The correct construction of the amendment is that the writ of error may be issued by the clerk of the court to which it is returnable or by the clerk of the court whose judgment is to be reviewed. In re Issuing Writs of Error, (C. C. A. 6th Cir. 1912) 199 Fed. 115, 17 C. C. A. 603.

Error to Circuit Court.—Prior to the abolishment of the Circuit Court, a writ of error returnable to the Circuit Court of Appeals could be issued by the clerk of the Circuit Court of Appeals whose judgment it was sought to review. Northern Pac. R. Co. v. Amato, (C. C. A. 2d Cir. 1892) 49 Fed. 381, 1 U. S. App. 113, 1 C. C. A. 468.

Error to state court.—The writ of error may be issued by the clerk of the Circuit (now District) Court in the state to whose court it is directed; and it need not purport on its face to be upon a final judgment of the highest court of the state in which a decision could be had. Buel v. Van Ness, (1828) 8 Wheat. 312, 5 U. S. (L. ed.) 624.

Essentials of form.—A writ of error issued out of the United States Circuit Court of Appeals to a United States District Court should run in the name of the President and be attested by the Chief Justice of the Supreme Court and by the clerk of the Circuit Court. Long v. Farmers' State Bank, (C. C. A. 8th Cir. 1908) 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 555.

Indorsement of filing.—Failure by the clerk, inadvertently, to note the filing of the writ of error by an indorsement made on the writ itself, is not a ground for its dismissal. The substantial requirements of the law are satisfied when the record shows that the writ of error was actually lodged with the clerk. It is the lodgment of the writ with that officer, rather than the notation of the filing, which renders it operative. U. S. Nat. Bank v. First Nat. Bank, (C. C. A. 8th Cir. 1897) 79 Fed. 296, 49 U. S. App. 67, 24 C. C. A. 597. See also Mutual Life Ins. Co. v. Pinney, (1910) 178 U. S. 327, 20 S. Ct. 906, 44 U. S. (L. ed.) 1058, reversing (C. C. A. 9th Cir. 1896) 76 Fed. 617, 48 U. S. App. 28, 22 C. C. A. 425, which was disapproved in U. S. Nat. Bank v. First Nat. Bank, supra, this paragraph.

Insufficient writ.—In Boudrant v. Watson, (1880) 103 U. S. 278, 26 U. S. (L. ed.) 447, the writ of error in the case is set forth and was held not to have a single requisite of a writ of the Supreme Court nor even to have been colorably issued.

Service of writ.—Under this section writs of error may be issued either by the clerk of the Supreme Court or the clerks of the Circuit Courts. By section 11 of the Court of Appeals Act all of the existing provisions of law regulating methods of review are made applicable to the Circuit Courts of Appeal. Under this, writs of error returnable to this court may be issued from the office of the clerk of the Circuit Court of Appeals or of the clerk of the Circuit Court in which the judgment was rendered. Northern Pac. R. Co. v. Amato, (C. C. A. 2d Cir. 1892) 49 Fed. 381, 1 U. S. App. 113, 1 C. C. A. 468. The writ runs in the name of the President and bears the test of the Chief Justice. It is directed to the judges of the Circuit Court, and commands them to return, with the writ, into this court, a transcript of the record. Such a writ must be served, and it is so served when
it is deposited with the clerk of the court in which the judgment was rendered. This deposit of the writ is its service, and the file mark, which is it the duty of the clerk to place thereon, is but evidence to show the facts of service and its date. Kentucky Coal, etc., Co. v. Howes, (C. C. A. 6th Cir. 1907) 155 Fed. 183, 82 C. C. A. 337.

Delay in return of writ.—In Altenberg v. Grant, (C. C. A. 6th Cir. 1897) 83 Fed. 980, 54 U. S. App. 312, 28 C. C. A. 244, affirmed (C. C. A. 6th Cir. 1898) 85 Fed. 345, 54 U. S. App. 669, 29 C. C. A. 156, an objection that the writ of error was returned and the record filed with the Circuit Court of Appeals one day after it was made returnable, was not regarded as of serious moment, requiring the dismissal of the writ.

Consolidated causes.—Where there was a consolidation of causes in the court below solely for convenience in trying them, and the verdict and judgments were separate, had no dependence upon one another and no relation except that they rested upon a similar and to some extent a common record, it was a technical irregularity to sue out only one writ of error to review the two separate judgments. But where the defendant in error made no objection on that account, it was held that the irregularity might be waived by the court. Louisville, etc., R. Co. v. Summers, (C. C. A. 6th Cir. 1903) 125 Fed. 719, 60 C. C. A. 457, petition for writ of certiorari denied (1903) 192 U. S. 607, 24 S. Ct. 851, 48 U. S. (L. ed.) 585; Waters-Pierce Oil Co. v. Van Elderen, (C. C. A. 8th Cir. 1906) 137 Fed. 537, 70 C. C. A. 235.

Sec. 1005. [Amendment of writ of error.] The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the title of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form; Provided, The defect has not prejudiced, and the amendment will not injure, the defendant in error. [R. S.]


Purpose of section.—The theory of this Act is that a colorable writ shall operate as a writ of error, the court being given the power to amend it in so far as it is informal. Cotter v. Alabama G. S. R. Co., (C. C. A. 6th Cir. 1894) 61 Fed. 747, 22 U. S. App. 372, 16 C. C. A. 36.

Amendments prior to enactment of section.—Before the enactment of this section it was held that a writ of error did not give this court jurisdiction and could not be amended if the return day was wrongly stated, Virginia Valley Ins. Co. v. Mordecai, (1858) 21 How. 195, 16 U. S. (L. ed.) 94; Porter v. Foley, (1858) 21 How. 393, 16 U. S. (L. ed.) 154; or if the return day was not stated, Carroll v. Dorsey, (1857) 20 How. 204, 15 U. S. (L. ed.) 803; or if the real parties were transposed, Hodge v. Williams, (1858) 22 How. 87, 16 U. S. (L. ed.) 327; or either party described only as “the heirs” of a person named, Wilson v. Life, etc., Ins. Co., (1838) 12 Pet. 146, 9 U. S. (L. ed.) 1032; or either party described by the name of one person and others,” Devereux v. Altenberg, (1834) 8 Pet. 586, 8 U. S. (L. ed.) 1033; Davenport v. Fletcher, (1853) 16 How. 142, 14 U. S. (L. ed.) 879; Miller v. McKenzie, (1870) 10 Wall. 582, 19 U. S. (L. ed.) 1043; or by the name of a person “& Co.,” Mus- sina v. Cavazos, (1867) 6 Wall. 355, 361, 18 U. S. (L. ed.) 810; The Protector, (1870) 11 Wall. 82, 20 U. S. (L. ed.) 47; or if there was a defect in the title, Moulder v. Forrest, (1869) 154 U. S. 587; or where a transcript was not filed at the term next succeeding the issuing of the writ or the taking of the appeal, Carroll v. Dorsey, (1857) 20 How. 204, 15 U. S. (L. ed.) 803.

When amendment allowed.—The power to amend a defective writ conferred by this section is very liberal, and it is not fatal that more than six months have passed since the final decree sought to be reviewed was pronounced, as an amendment may be allowed “at any time” in the discretion of the court. Cotter v. Alabama G. S. R. Co., (C. C. A. 8th Cir. 1894) 61 Fed. 747, 22 U. S. App. 372, 10 C. C. A. 35.

After a writ of error has been served and returned to the Supreme Court the record is no longer before the court below and cannot be amended in that court, although at an adjourned session of the same term it appears that the writ of error has been dismissed in the court above at the request of the party praying an amendment. U. S. v. Hoos, (1803) 1 Cranch (C. C.) 116, 26 Fed. Cas. No. 15,386.
"The naming of the defendant in the writ of error and naming and serving him in the citation is not necessary to the jurisdiction of the appellate court. The jurisdictional feature would appear to be that the writ of error to a judgment intended to be corrected should have actually been sued out within the time limited. If it is actually sued out within the time limited, although it may be defective, yet such defects, even to the extent of inserting a party omitted before, may under section 1005 be corrected, although the period within which a new writ of error could be sued out from the date of the original judgment has elapsed. When, however, the amendment is allowed, any necessary party to the appellate proceedings who was omitted from the writ of error and citation must be notified and brought before the court. As the judgment to be awarded by the appellate court may affect his interests, he is entitled as of right to notice and to be heard upon the appeal." Gilb r. Hopkins, (C. C. A. 4th Cir. 1915) 208 Fed. 849, 117 C. C. A. 849. See also Cinchfield Fuel Co. v. Titus, (C. C. A. 4th Cir. 1915) 266 Fed. 574, 141 C. C. A. 330.

Discretion of court.—The amendment rests in the discretion of the court and will not be allowed if there is any danger of prejudice to the adverse party, or if there is any other good reason against it; as, for instance, that the main question presented by the record has often been decided by the Supreme Court. Pearson v. Yewdall, (1877) 95 U. S. 292, 24 U. S. (L. ed.) 438.

The right to amend a writ of error, defective in the statement of the parties thereto, is not absolute under this section, but the court in its discretion may allow the requisite amendment to be made upon such terms as it may deem just. Pearson v. Yewdall, (1877) 95 U. S. 292, 24 U. S. L. ed.) 438.

Colorable writ.—A paper purporting to be a writ of error, in the name of the chief justice of the Supreme Court of the state, bearing the test of that chief justice, signed by the clerk and sealed by the seal of that court, but not in the name of the President or under the authority of the United States, is not a writ of error so colorably issued as to allow amendment. Bondurant v. Watson, (1880) 103 U. S. 278, 26 U. S. (L. ed.) 447.

Attaching return to transcript.—The fact that a writ of error is not returned attached to a transcript nor made a part of the record does not render it void. Such defect may be amended. Cotter v. Alabama G. S. R. Co., (C. C. A. 6th Cir. 1894) 61 Fed. 747, 22 U. S. App. 372, 10 C. C. A. 36.

Cases of petition and allowance.—The absence of a formal petition for a writ of error and the lack of a formal allow-


Effect of notice required.—The fact that the time for notice required by K. S. sec. 999, supra, p. 184, could not elapse between the date of a writ of error and the return day presents no objection to the allowance of an amendment of the writ when it is made returnable on a day other than that of the commencement of the term next ensuing the issue of the writ. National Bank v. Bank of Commerce, (1878) 96 U. S. 806, 25 U. S. (L. ed.) 362.

Amendment of error as to parties.—Where an appeal was taken by two of three defendants, against whom a joint decree for a sum of money was rendered, and the record fails to show that the third defendant, who made default in the court below, was in any manner joined in the appeal, or notified to join, or severed for failure or refusal to join, the defect is not one of form only, which the Circuit Court of Appeals may permit the appellants to cure by amendment, under this section, but is fatal to jurisdiction of the appeal. Copeland v. Waldron, (C. C. A. 9th Cir. 1904) 133 Fed. 217, 66 C. C. A. 271.

The right to amend a writ of error and citation by adding omitted plaintiffs depends primarily upon whether the record shows enough to authorize the amendment under this section. If it appears from the record that the omission was accidental, the amendment should be allowed. Thomas v. Green County, (C. C. A. 6th Cir. 1906) 146 Fed. 909, 77 C. C. A. 487. See also Martin v. Burford, (C. C. A. 9th Cir. 1910) 176 Fed. 554, 100 C. C. A. 169.

The inclusion as plaintiffs in error of persons who were not parties to the action does not vitiate the writ as to those who were parties, but is an error which may be corrected by dismissing the writ as to such persons, or by striking out their names. Thomas v. Green County, (C. C. A. 6th Cir. 1906) 146 Fed. 909, 77 C. C. A. 487.

Particular amendments allowed.—Under this section the court has allowed writs of error to be amended in the following instances:


One wanting a date to the testen. Courte v. Stead, (1800) 4 Dall. 22, 1 U. S. (L. ed.) 724.

One attested by the judge of the federal District Court, and by the District Court clerk. Long v. Farmers' State Bank, (C. C. A. 8th Cir. 1906) 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 555.


One not under the seal of the court from
which it was issued and not bearing date of the day of its issuance. Alaska United
One containing a wrong return day. Hampton v. Rouse, (1872) 15 Wall. 684,
One omitting to state with certainty the return day. Sea v. Connecticut Mut.
One containing no return day at all. Mosesman v. Higginson, (1890) 4 Dall. 12,
One omitting to state the district in which the court was held. Course v. Stead,
(1800) 4 Dall. 22, 1 U. S. (L. ed.) 724.
One describing either party by the name of a partnership and not by the names of
the individuals composing it. Moore v. Simonds, (1879) 100 U. S. 145, 25 U. S.
(L. ed.) 590; Gumbel v. Pitkin, (1885) 113 U. S. 545, 5 S. Ct. 616, 28 U. S. (L.
893.
One defective by reason of absence of party, amended by inserting party omitted.
Gilbert v. Hopkins, (C. C. A. 4th Cir. 1918) 198 Fed. 249, 117 C. C. A. 849; Clinchfield
One giving the Christian name of the plaintiff below and defendant in error as
Henry, when, as appeared from the record, it should have been George. Pacific Bank
One naming only one defendant in error when there were more. Knickerbocker Life
One giving the wrong person as the plaintiff in error. Walton v. Marietta
One containing the names of improper plaintiffs in error, by striking out such
One issuing to a state court and issued and signed by the clerk of that court. Mil-
Application to amend necessary.—But where no application is made for leave to
amend in such manner will be made. Sea v. Connecticut Mut. Life Ins. Co.,
Appeal instead of writ of error.—In Kerr v. U. S., (C. C. A. 7th Cir. 1907) 159
Fed. 428, 86 C. C. A. 408, it was held that where a judgment on a scire facias on a
forfeited recognizance was sought to be reviewed on appeal instead of on a writ of
error, the objection could not be waived by appearance nor cured by amendment. But
see now Act of Sept. 6, 1916, ch. 448, § 4, 39 Stat. L. 726, set forth in note to Judi-
cial Code, § 274b, supra, this title, vol. 5, p. 1061.

Sec. 1006. [Amendments in prize appeals.] The Supreme Court may,
if, in its judgment, the purposes of justice require it, allow any amendment,
either in form or substance, of any appeal in prize causes. [R. S.]

See a similar provision in R. S. sec. 4538 in title Paize.
Cited generally in The Sydney, (S. D. N. Y. 1891) 47 Fed. 260; Cooke v. Copenhagen,
(C. C. A. 4th Cir. 1903) 126 Fed. 148, 61 U. S. A. 211.

Sec. 1007. [Supersedesas.] In any case where a writ of error may be a
supersedesas, the defendant may obtain such supersedesas by serving the writ
or [of] error, by lodging a copy thereof for the adverse party in the clerk’s
office where the record remains, within sixty days, Sundays exclusive, after
the rendering of the judgment complained of, and giving the security
required by law on the issuing of the citation. But if he desires to stay
process on the judgment, he may, having served his writ of error as aforesaid,
give the security required by law within sixty days after the rendition
of such judgment, or afterward with the permission of a justice or judge
of the appellate court. And in such cases where a writ of error may be a
supersedesas, executions shall not issue until the expiration of ten
days. [R. S.]

Act of Sept. 24, 1799, ch. 20, 1 Stat. L. 85; Act of June 1, 1872, ch. 255, 17 Stat. L.
198.
The words "ten days" at the end of the section were inserted by Act of Feb. 8, 1875, ch. 80, 18 Stat. L. 318, in place of the words "the said term of sixty days," appearing in the section as originally enacted.

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I. CONSTRUCTION GENERALLY

R. S. sec. 987 (in EXECUTION, vol. 3, p. 230) and the text section 1002 serve two distinct purposes and manifestly were not intended to modify or limit each other in respect of the separate and distinct relief contemplated by them. Sanborn v. Bay, (C. C. A. 8th Cir. 1911) 194 Fed. 37, 114 C. C. A. 57.

The overruling of a motion for a new trial is the "remnder of the judgment complained of" within the meaning of R. S. sec. 1007, and where the writ of error, accompanied with the proper security, was sued out and duly served within sixty days thereafter, it was held that the supersedeas must stand. Sanborn v. Bay, (C. C. A. 8th Cir. 1911) 194 Fed. 37, 114 C. C. A. 57.

II. POWER TO ALLOW SUPERSEDEAS

In general.—The Supreme Court has authority in a case properly before it on appeal to issue a writ of supersedeas when necessary to render its jurisdiction effectual. Ex p. Milwaukee R. Co., (1886) 5 Wall. 329, 18 U.S. (L. ed.) 329. And a writ of supersedeas from the Circuit Court of Appeals is not void because it is not directed to be issued by the court as a court, but by a judge of that court. In re McKenzie, (1901) 180 U. S. 526, 21 S. Ct. 468, 46 U. S. (L. ed.) 657.

After expiration of sixty days.—A justice of the Supreme Court has no power to allow a supersedeas in cases where an appeal was not taken or a writ of error sued out and served within sixty days, Sundays exclusive, after the rendition of the decree or judgment complained of. Kitchens v. Randolph, (1876) 93 U. S. 87, 23 U. S. (L. ed.) 810.

Neither has the District Court nor any judge thereof power to allow a supersedeas after the expiration of sixty days after judgment. New England R. Co. v. Hyde, (C. C. A. 1st Cir. 1900) 101 Fed. 397, 41 C. C. A. 404.

Nor has a judge of the Circuit Court of Appeals such power. Logan v. Goodwin, (C. C. A. 8th Cir. 1900) 101 Fed. 654, 41 C. C. A. 573.

But where an appeal is allowed within sixty days without taking a bond the appellate court may allow a supersedeas after that time. Peugh v. Davis, (1864) 110 U. S. 227, 4 S. Ct. 17, 28 U. S. (L. ed.) 127.

Nunc pro tunc order.—To make a nunc pro tunc order effectual for the purpose of a supersedeas it must appear that the delay was the act of the court and not of the parties, and that no injustice will be done. Sage v. Central R. Co., (1876) 93 U. S. 419, 23 U. S. (L. ed.) 933.

Extent of operation of supersedeas.—Where a qualified acceptance of a bond on appeal shows that the judge who took it considered the security only sufficient for a stay of the execution of that part of the decree appealed from, which was for the payment of money, the appeal only operates as a supersedeas to that extent, and where the appeal was taken within the sixty days the justice of the Supreme Court assigned to the circuit has power to grant in his discretion on application a further stay of execution. A motion to the court for a supersedeas is not the proper remedy. Covington Stock-Yards Co. v. Keith, (1887) 121 U. S. 248, 7 S. Ct. 581, 30 U. S. (L. ed.) 914.

A supersedeas is a matter of right, and its allowance does not rest in the discretion of court or judge. It is the effect, as a matter of law, of a compliance by the appellant with the provisions of the Acts of Congress. The only function of the judge is to determine whether the security professed for "damages and costs" is good and sufficient. McCourt v. Singers-Bigger, (C. C. A. 8th Cir. 1906) 150 Fed. 102, 80 C. C. A. 56.

III. APPLICABILITY GENERALLY OF SECTION

Supersedeas in criminal case.—A justice of the Supreme Court may issue a supersedeas upon a writ of error from that court in a criminal case, and as there is no security required in such a case the supersedeas may be obtained by merely serving the writ within the time prescribed without giving any security, provided the justice who signs the citation directs that the writ shall operate as a supersedeas. In re Claassen, (1891) 140 U. S. 209, 11 S. Ct. 736, 35 U. S. (L. ed.) 409.

But while a writ of error to review a conviction for a noncapital crime, with a supersedeas to stay the execution of the sentence, is a matter of right, an appearance or bail is required to entitle the accused to go at large pending the writ of error. Hardeman v. U. S., (C. C. A. 8th Cir. 1911) 184 Fed. 289, 106 C. C. A. 411.

Suit in rem in admiralty.—This section applies to a suit in rem in admiralty,
and no summary judgment can be rendered by this court against the sureties in the appeal bond executed on the appeal to this court, until the expiration of ten years from the rendition thereof by this court. The New Orleans, (1879) 17 Blatchf. 216, 18 Fed. Cas. No. 10,181.

IV. WHEN WRIT OF ERROR MAY BE SUPERSEDED

In general.—A writ of error is not a supersedeas unless a copy of the writ be filed in the clerk’s office for the adverse party within the time set by statute. Baltimore, etc., R. Co. v. Harris, (1869) 7 Wall. 574, 19 U. S. (L. ed.) 100; Foster v. Kansas, (1884) 112 U. S. 201, 5 S. Ct. 87, 26 U. S. (L. ed.) 629; Moore v. Dunlop, (1804) 1 Cranch C. C. 180, 17 Fed. Cas. No. 9,759; Ex p. Ben, (1800) 1 Cranch C. C. 532, 3 Fed. Cas. No. 1,285.

A writ of error does not operate as a supersedeas unless it is filed in the clerk’s office within the time fixed by the statute. The time is computed from the date of the judgment. It is well settled that after the expiration of the sixty days, neither a justice of the Circuit Court, nor a judge thereof, nor a judge of the Circuit Court of Appeals has the power to allow a supersedeas. Robinson v. Furbur, (S. D. Tex. 1911) 189 Fed. 918.

The security must also be sufficient, and when it is desired to make the appeal a supersedeas the security must be given within the prescribed time from the rendering of the decree. Catlett v. Brodie, (1824) 9 Wheat. 553, 6 U. S. (L. ed.) 158; Providence Rubber Co. v. Goodyear, (1867) 6 Wall. 156, 18 U. S. (L. ed.) 762; Bigler v. Walker, (1870) 12 Wall. 142, 20 U. S. (L. ed.) 269.

It is not necessary, however, provided everything has been done required by the statute, for a court or the judge to make an order that the writ of error or an appeal act as a supersedeas. They become so per se upon compliance with the statute. Butchers’ Ass’n v. Slaughter House Co., (1870) 1 Woods 50, 4 Fed. Cas. No. 2,234; Arnold v. Frost, (1877) 9 Ben. 267, 1 Fed. Cas. No. 558; Tiernan v. Booth, (N. D. Ill. 1880) 4 Fed. 620.

In Silagy v. Foote, (1857) 20 How. 290, 15 U. S. (L. ed.) 625, it was said that whereas an appeal from a decree is taken within ten days from the rendition of the decree, it is in time to operate as a supersedeas; and so also if taken within ten days after the decree is settled and signed.

Where the chief justice of the Court of Appeals of Kentucky entered an order directing that the writ of error should operate as a supersedeas, and the appellant failed to serve the writ of error by lodging a copy thereof for the adverse party in the clerk’s office where the record remained as required by R. S. sec. 1007, it was held that the error, if any, could be taken advantage of only by motion or other proceeding in the Supreme Court of the United States, where the appeal was pending, Ohio River Contract Co. v. Gordon, (1916) 247 Ky. 404, 199 S. W. 451.

An appeal in chancery must be perfected by giving an appeal bond within the statutory time in order to act as a supersedeas. Adams v. Law, (1853) 16 How. 144, 14 U. S. (L. ed.) 880.

V. SECURITY REQUIRED

Money judgment.—In cases where "the decree is for the recovery of money not otherwise secured," the practice of the court heretofore has been to require a bond, with one or more sureties, for double the amount of the decree and costs, and such practice should not be departed from, except in those cases where the appellee is made secure in other ways, and where such requirement, under some special circumstances, will operate as a hardship on the appellee. American Nicholson Pavement Co. v. Elizabeth, (1874) 1 B. & A. Pat. Cas. 463, 1 Fed. Cas. No. 310.

Removed cases.—On a case removed to the federal court from a state court where the action is based upon a state statute the superseded bond on an appeal to the Supreme Court will be limited to the effect that it would have in the case of an appeal to the state court. East Tennessee, etc., R. Co. v. Southern Tel. Co., (1884) 112 U. S. 306, 5 S. Ct. 165, 28 U. S. (L. ed.) 746.

Sufficiency of bond.—The bond required by this section must be sufficient to secure the whole judgment in case it should be affirmed, if the writ of error operate as a supersedeas. Catlett v. Brodie, (1824) 9 Wheat. 553, 6 U. S. (L. ed.) 168; The Holland & Case, (C. C. Ore. 1886) 28 Fed. 117.


And where a final decree awards compensation to a master, the bond on appeal must include that sum or execution may issue therefor. Myers v. Dunbar, (1874) 12 Blatchf. 380, 17 Fed. Cas. No. 9,990.

The usual practice, however, of requiring the bond in double the amount ought not always to be insisted upon, as the law did not require that the security should be in any fixed proportion to the decree. It was only necessary that it should be sufficient. American Nicholson Pavement Co. v. Elizabeth, (1874) 1 B,

And on the death of the appellant additional security will not be required when it does not appear that the land in dispute is being neglected. Harwood v. Dieckhoff, (1886) 117 U. S. 200, 6 S. Ct. 669, 29 U. S. (L. ed.) 857.

Where no security is taken at the time of entering an order allowing an appeal, or the appellant within the time limited by the statute files with the clerk a bond with sureties conditioned according to law and approved by a justice of the lower court, by whom on the same day a citation was signed, the power of the judge over the appeal and the security is thereupon, in the absence of fraud, exhausted, and the control of supersedeas as well as of the appeal is transferred to the Supreme Court. Draper v. Davis, (1880) 102 U. S. 370, 26 U. S. (L. ed.) 121; Butchers’ Ass’n v. Slaughter House Co., (1870) 1 Woods 50, 4 Fed. Cas. No. 2,234.

But see Black v. Zacharie, (1845) 3 How. 483, 11 U. S. (L. ed.) 699, where the lower court, the day after granting the supersedeas, revoked its order on the ground that the security was not sufficient, and it was held that the judge of the lower court being exclusive judges of what security should be taken, their decision was not subject to review by the Supreme Court, and the latter court would not issue a supersedeas.

Bond taken before writ of error allowed. — It is irregular to take, approve, and file a supersedeas bond, reciting the allowance of a writ of error before any such writ had in fact been allowed. But it is competent for the court to reapprove the bond on the issuance of the citation and such approval may be inferred or presumed. McLean v. Vyett, (C. C. A. 8th Cir. 1892) 49 Fed. 259, 4 U. S. App. 98, 1 C. C. A. 241.

Suit to enforce bond. — A suit to enforce a supersedeas bond is one of which a District Court has jurisdiction by virtue of section 24 of the Judicial Code. American Surety Co. v. Shulz, (1915) 237 U. S. 158, 35 S. Ct. 525, 59 U. S. (L. ed.) 892, the opinion in which case is extensively quoted in note to Judicial Code, § 24, supra, this title, JUDICIARY, vol. 4, p. 931, under heading 12. Suit on Federal Supersedeas Bond.

VI. SERVICE OF WRIT OF ERROR

This section, so far as it provides as to the manner of serving the writ, is permissive and not mandatory, and does not preclude service in any other manner. The filing of the original writ with the clerk, by lodging a copy with him, constitutes a service for the purpose of a supersedeas. McCarley v. McGhee, (N. D. Ala. 1901) 108 Fed. 494.


And where a decree is not for the payment of a specific sum of money the amount of the supersedeas bond is in the discretion of the court. U. S. v. New Orleans, (E. D. La. 1881) 8 Fed. 112; Longworth Co. v. Pope, (C. C. A. 7th Cir. 1896) 74 Fed. 1, 45 U. S. App. 25, 20 C. C. A. 253.

Parties to bond. — Where a bond does not show the individual names of an appellant’s firm, nor does it show that the firm was a party to the action, and it is accompanied by no citations or assignment of errors, the judgment will not be stayed. In re Woeriashoffer, (C. C. A. 5th Cir. 1896) 74 Fed. 915, 41 U. S. App. 411, 21 C. C. A. 175.

But where security is sufficient it is immaterial that the bond was signed by one of the plaintiffs only. McClellan v. Fryatt, (C. C. A. 8th Cir. 1892) 49 Fed. 259, 4 U. S. App. 98, 1 C. C. A. 241.

Omission of stipulation as to damages. — The omission from an appeal bond of the statutory stipulation as to damages required to effect a supersedeas does not necessarily entitle the party to whom the property is adjudged to a discharge of the receiver and possession of the property pending the appeal. The subsequent custody is a matter which the court will regulate upon the equitable circumstances of each case independently of the fact whether there has been a statutory supersedeas of the final decree or not. Ferguson v. Dent, (W. D. Tenn. 1886) 29 Fed. 1.

Control over security. — The amount of a supersedeas bond as well as the sufficiency of the security is within the discretion of the judge below and will not be interfered with by the Supreme Court. If, however, there be a subsequent change in the circumstances of the case, or of the parties or the sureties, so that the security does not continue to be good and sufficient, the Supreme Court may, on proper application, so adjudge and order as justice may require. Providence Rubber Co. v. Goodyear, (1884) 6 Wall. 153, 18 U. S. (L. ed.) 762; Jerome v. McCar- ter, (1874) 21 Wall. 17, 22 U. S. (L. ed.) 516; Martin v. Hazard Powder Co., (1876) 93 U. S. 302, 23 U. S. (L. ed.) 585; Williams v. Claffin, (1850) 103 U. S. 772, 26 U. S. (L. ed.) 606; Mexican Constr. Co. v. Reusens, (1868) 118 U. S. 49, 6 S. Ct. 945, 30 U. S. (L. ed.) 77.

But additional security on a supersedeas bond will not be required when it does not appear that the decree appealed from is collectible under ordinary execution and is not fraudulently induced. From the papers that the suit was instituted to subject lands to the payment of a debt and that no personal decree of money
It is not necessary to make it a supersedeas that the writ of error be served as was required by the twenty-third section of the Judiciary Act or the supersedeas bond be filed within ten days (Sundays excepted) after the rendering of the judgment complained of. The supersedeas bond may be executed within sixty days after the rendition of the judgment, and the writ may be served at any time before or simultaneous with the filing of the bond. Western Union Tel. Co. v. Eyser, (1873) 19 Wall. 419, 22 U. S. (L. ed.) 43.

The Judiciary Act of 1789, ch. 20, § 23, required the writ to be served in ten days instead of sixty, and under that Act it was held, in Hogan v. Ross, (1850) 11 How. 294, 13 U. S. (L. ed.) 702, that the Supreme Court in the exercise of its appellate power is not authorized to award a supersedeas to stay the proceedings on the judgment of the inferior court, upon the ground that a writ of error is pending unless the writ was sued out within ten days after the judgment.

In the Slaughter-House Cases, (1869) 10 Wall. 271, 19 U. S. (L. ed.) 915 (citing Gelston v. Hoyt, (1818) 3 Wheat. 246, 4 U. S. (L. ed.) 381; McGuire v. Massachusetts, (1865) 3 Wall. 386, 18 U. S. (L. ed.) 164; Green v. Van Buskerk, (1865) 3 Wall. 448, 18 U. S. (L. ed.) 245), it was said: "Exceptional cases arise where the judgment or decree given on appeal in the highest court of the state is required by law of the state to be returned to the subordinate court for execution, and in such cases it is held that the writ of error from this court may operate as a supersedeas if granted and served at any time within ten days from the return entry of the proceedings, in the court from which the record was removed, but in all other cases the writ of error must be issued and served within ten days from the date of the judgment or decree, in order that it may operate as a supersedeas and stay execution."

VII. COMPUTATION OF TIME

When time begins to run.—The time within which the writ of error must be served in order that it may operate as a supersedeas must be computed from the date of the judgment which is the subject of review. Wurts v. Hoagland, (1851) 105 U. S. 701, 26 U. S. (L. ed.) 1139; Bunch v. Coddingame (1867) 5 Bunch. 252, 11 Fed. Cas. No. 6,203.

But a judgment or decree does not become final for the purposes of a writ of error or appeal until the motion for a rehearing which the court sees fit to entertain is disposed of. A supersedeas cannot be granted until the rehearing is taken or a writ of error is sued out, and this cannot be done until a motion for a new trial, if made, is denied. Sanborn v. Bay, (C. C. A. 8th Cir. 1911) 194 Fed. 37, 114 C. C. A. 57.

The judgment of a federal court is not final, so that the jurisdiction of the appellate court may be invoked, while the judgment is still under the control of the trial court through the pendency of a motion for a new trial. Clarke v. Eureka County Bank, (C. C. Nev. 1894) 131 Fed. 146.

In an action at law, in which the judgment is reviewable only by writ of error, unless such writ is issued and served within sixty days, a judge of an appellate court has no power to grant a supersedeas, and the allowance of an appeal by the trial court is without effect. Robinson v. Furbur, (D. Tex. 1911) 180 Fed. 918.

So it has been held that the time to appeal does not commence to run pending a motion for a new trial or for a rehearing, or to rescind, or set aside a decree. Brockett v. Brockett, (1844) 2 How. 238, 11 U. S. (L. ed.) 251; Washington, etc., R. Co. v. Bradley, (1868) 7 Wall. 575, 19 U. S. (L. ed.) 274; Rutherford v. Pennsylvania Mut. Life Ins. Co., (D. Md. 1880) 1 Fed. 450; Brown v. Evans, (C. C. Nev. 1883) 18 Fed. 56.


And under R. S. secs. 1007 (the above text) and 1012 (supra, p. 170), a justice of the Circuit Court of Appeals may, on the application of appellant taking a second appeal after the dismissal of his first appeal, permit him to give a supersedeas bond after the expiration of the sixty days; the dismissal of the first appeal being due to the failure of the clerk of the trial court to send up the record in due season. Sutherland v. Pesoe, (C. C. A. 9th Cir. 1911) 186 Fed. 787, 108 C. C. A. 657.

But a motion to set aside a decree, made by persons not parties to the suit but who are permitted to intervene only for the purpose of an appeal from the decree as originally rendered, will not operate to suspend the decree for the purpose of suing out a writ of error. Sage v. Central R. Co., (1876) 93 U. S. 412, 23 U. S. (L. ed.) 933.

The exclusion of Sundays by the words of the statute applies not only to the lodging of the copy of the writ of error or the taking of the appeal, but also to the giving of security to operate as a supersedeas. Danville v. Brown, (1888) 126 U. S. 608, 9 S. Ct. 149, 32 U. S. (L. ed.) 507.

Allowance of appeal relates back.—Where a party appeals from the decision of the lower court to the United States Supreme Court, the appeal is taken or a writ of error is sued out, and this appeal is to relate back to the time when the original application was made for an appeal to the judge of the lower court and

Acceptance of security relates back.—Where the court allowing the appeal accepts the security to prosecute after the expiration of the time allowed by law for and it has been held that the time of the allowance of the appeal. The Dos Hermanos, (1825) 10 Wheat. 306, 6 U. S. (L. ed.) 328.

Nunc pro tunc order.—In The Roanoke, (1855) 3 Blatchf. 390, 20 Fed. Cas. No. 11,876, it was held that the court had no power to permit such service to be made nunc pro tunc, as if made within such ten days, and that all the requirements of the statute necessary for the stay of execution must be complied with within ten days.

Extension of time.—The party cannot extend the time by agreement that all executions should be stayed for a certain time and that a writ of error be served within that time. Thompson v. Voss, (1802) 1 Cranch C. C. 108, 23 Fed. Cas. No. 13,979.

Ten days' stay of execution.—The provision that where a writ of error may operate as a supersedeas, execution shall not issue until the expiration of ten days after the rendition of the judgment, has references only to the judgments of the courts of the United States. Doyle v. Wisconsin, (1876) 94 U. S. 50, 24 U. S. (L. ed.) 64. Sundays are to be excluded in the computation of the ten days. Danielson v. Northwestern Fuel Co., (C. C. Minn. 1893) 55 Fed. 49.

VIII. EFFECT OF SUPERSEDEAS
In general.—A writ of error and supersedeas bond suspends the execution of judgment until the case has been determined. U. S. v. Dunne, (C. C. A. 9th Cir. 1932) 173 Fed. 254, 97 C. C. A. 1234.
The supersedeas provided for in this section stays process for the execution of the judgment or decree brought under review by a writ of error or appeal to which it belongs. It operates on the judgment or decree, not on the questions involved considered apart from the particular suit in which they were decided. Spraul v. Louisiana, (1887) 123 U. S. 516, 8 S. Ct. 263, 31 U. S. (L. ed.) 233.


Damages for violation of injunction.—A supersedeas bond, given under this section and Supreme Court rule 29, does not suspend the operation of a prohibitory injunction granted by the decree appealed from, but, unless otherwise ordered by the trial judge in allowing the appeal, as authorized by equity rule 93, such injunction remains in full force pending the appeal, and its violation is punishable as a contempt. Hence damages sustained by the appellee by a violation of the injunction pending appeal are not the result of the supersedeas bond, and cannot be recovered in an action thereon. Green Bay, etc., Canal Co. v. Norrie, (S. D. N. Y. 1902) 118 Fed. 923.

IX. EFFECT OF APPEAL
In general.—Where in an admiralty cause an appeal is taken from the decree of the District Court, and security on appeal is given, the decree of the District Court is by such appeal rendered of no effect. Dutcher v. Woodhull, (1874) 7 Ben. 313, 8 Fed. Cas. No. 4204.
On second appeal.—When a new and second appeal is allowed on a dismissal of the first appeal, for want of prosecution, but the court passed a supplemental decree for the execution of the original decree, the second appeal is not a supersedeas to all further proceedings in the lower court to execute the original decree. Carr v. Hoxie, (1839) 15 Pet. 460, 10 U. S. (L. ed.) 247.

X. STAY OF PROCEEDINGS
In general.—The operation of a judgment is not suspended so as to allow an application for a new trial in any case beyond a period of forty-two days from the time of its rendition, as provided by R. S. sec. 987 (in Execution, vol. 3, p. 280). Cambuston v. U. S., (1877) 95 U. S. 236, 24 U. S. (L. ed.) 448.
And the lower court will not order an execution against bond to be stayed pending a writ of error by the Supreme Court where the writ was not sued out in time to operate as a supersedeas. Poyles v. R. U. Law, (1827) 3 Cranch C. C. 118, 9 Fed. Cas. No. 5,024.

Effect of bond.—A bond given on an appeal from a decree dismissing a bill to restrain collection of a judgment does not operate to prevent the enforcement of the judgment. Knox County v. Harshman, (1889) 132 U. S. 14, 10 S. Ct. 8, 33 U. S. (L. ed.) 249; Grundy v. Young, (1807) 1 Cranch C. C. 443, 11 Fed. Cas. No. 6,880;
And a superseded bond is ineffectual as to a judgment of ouster where the writ was executed on the same day but before the bond was filed. Boyle County v. Gorman, (1873) 19 Wall. 661, 22 U. S. (L. ed.) 226.


Execution may be quashed.—Where the writ of error, bond, and citation have been given in due season to operate as a supersedeas, execution issued thereafter is wholly irregular and may be quashed either in the court below or by the court of review. Stockton v. Bishop, (1844) 2 How. 74, 11 U. S. (L. ed.) 184.

Where a judgment is practically separable in ejectment against defendants holding separate possession of specific parcels of land, it will not be enforced as to those of the defendants who joined with the others in suing out a writ of error, but who severally gave a superseded bond as required by law. Ex p. French, (1879) 100 U. S. 1, 25 U. S. (L. ed.) 529.

The failure to supersede a judgment or stay the process upon it in no way affects the right to a review of the proceedings which resulted in it or to its reversal. Logan v. Goodwin, (C. C. A. 8th Cir. 1900) 194 Fed. 490, 43 C. C. A. 668.

XI. SUPERSEDEDAS IMPROPERLY ORDERED
In general.—A superseded bond is a nullity where the writ of error has been allowed but not issued. Ex p. Ralston, (1837) 3 Pet. U. S. 613, 7 S. Ct. 317, 30 U. S. (L. ed.) 606.

And the court will not sanction the disposition of its receiver by a writ issued by the clerk upon a discovery of a defect in the superseded bond, although the final decree if not superseded might authorize it. The proper practice is to apply to the courts to execute the decree. Ferguson v. Dent, (W. D. Tenn. 1886) 29 Fed. 1.

The proper remedy where a superseded bond has improperly ordered is a motion to discharge the superseded, and not to discharge the appeal, or that a superseded may be discharged and the appeal still maintained. Hudgins v. Kemp, (1855) 18 How. 530, 16 U. S. (L. ed.) 511.

And where the writ of error was not sued out or served within the time required to make the bond operate as a supersedeas, a motion to vacate it will be denied as unnecessary. Western Air Line Constr. Co. v. McGillis, (1888) 127 U. S. 778, 8 S. Ct. 1389, 32 U. S. (L. ed.) 324.

XII. VACATING SUPERSEDEDAS
A superseded bond will be vacated when the approval of the bond thereof was obtained by fraud and perjury. Florida Cent. R. Co. v. Schutte, (1879) 100 U. S. 644, 25 U. S. (L. ed.) 605.

So in Title Guaranty, etc., Co. v. U. S., (1912) 222 U. S. 401, 32 S. Ct. 168, 56 U. S. (L. ed.) 248, it is held that a motion to vacate a superseded must prevail, it appearing that although the writ of error was allowed and lodged in the office of the clerk more than six months after the entry of the judgment, the bond was approved to operate as a supersedeas. The court said: "Under these circumstances it is apparent that the order for supersedeas was improvidently granted. No other conclusion is possible in view of sec. 1007, Rev. Stat., making the allowance of a writ and the judgment of the same in the office of the clerk within sixty days after the date of a judgment an essential prerequisite to the granting of a supersedeas. It is, nevertheless, insisted, first, that this case is not within the rule, because as the Judiciary Act of 1891 (March 3, 1891, ch. 517, 26 Stat. 826) by the sixth section allows one year for the prosecution of error from this court to the judgments of the Circuit Court of Appeals and in express terms fixes no period for the allowance of a supersedeas, therefore, as the supersedeas was allowed within the year, it was in time. This, however, ignores the provision of sec. 11 of the Act of 1891 [supra, p. 170] as follows: 'And all the provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error.' . . . Hudson v. Parker, (1895) 156 U. S. 277, 282, [15 S. Ct. 430, 39 U. S. (L. ed.) 424]. Nor would a different result arise from the concession argumentatively that from a consideration of the context of section 11 of the Act of 1891 the passage which we have quoted should be restricted to writs of error from the Circuit Courts of Appeals to inferior courts and to appeals from such courts to the Circuit Courts of Appeals. Nothing is contained in the Act of 1891 regulating the time for an appeal to the Circuit Court of Appeals to this court or a writ of error from this court to such courts
must be taken in order to operate as a supersededas. The general provision of Rev. Stat. sec. 1007 under the hypothesis stated would therefore be applicable. It thus results that the mistake in allowing the supersededas in the case which is before us is equally demonstrated by the correct application of the Act of 1891 as well as by yielding to the erroneous construction of that act which is pressed in argument." But where a supersededas bond has been approved by the District Court, has been made a part of the record in the case and has been filed in the Circuit Court of Appeals and the case entirely transferred to that court, the District Court has no right to make any further order, such as one to vacate the supersededas. Kendrick v. Roberts, (N. D. Ga. 1914) 214 Fed. 268. Motions to vacate a supersededas, made before the record is printed, must be accompanied by a statement of the facts on which they rest, agreed to by the parties, or supported by printed copies of so much of the record as will enable the court to act understandingly, without reference to the transcript on file. Power v. Baker, (1884) 112 U. S. 710, 5 S. Ct. 361, 28 U. S. (L. ed.) 825.

Sec. 700. [Cases tried by the circuit court without the intervention of a jury.] When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment. [R. S.]

See R. S. sec. 606, supra, p. 121, and notes thereto.
R. S. sec. 649, to which the text refers, is given supra, p. 130. For convenience of reference the notes on R. S. secs. 649 and 700 are here combined.
Findings of fact and conclusions of law in admiralty cases, see Act of Feb. 16, 1875, ch. 77, § 1, supra, p. 130.
"Circuit" Courts were abolished and their powers and duties imposed upon District Courts by Judicial Code, §§ 239, 291, supra, this title, vol. 5, pp. 1082, 1083.

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I. R. S. secs. 649 and 700, in general
1. Purpose and Scope of the Sections
R. S. sec. 649, referred to in the text, reads as follows: "Sec. 649. Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may
be either general or special, shall have the same effect as the verdict of a jury." See notes to that section, supra, p. 150.

The Act of March 3, 1866, from which R. S. secs. 649 and 700 were derived, was passed to "preserve to the parties submitting a cause to a trial before the court, both as to law and fact, the benefit of a review or re-examination of questions of law in the appellate court," as therefore obtained only in cases in which the facts were found by a jury or were admitted by the parties upon a case stated and submitted upon the questions of law. Flanders v. Tweed, (1869) 9 Wall. 425, 19 U. S. (L. ed.) 678.

Prior to the enactment of this Act it was held by the Supreme Court that when the case is submitted to the judge to find the facts without the intervention of a jury he acts as a referee by consent of the parties, and no bill of exceptions will lie to his admission or rejection of testimony, nor to his judgment on the law, Weems v. George, (1851) 13 How. 190, 14 U. S. (L. ed.) 108; and that no exception can be taken where there is no jury, and where the question of law is decided in delivering the final judgment of the court, U. S. v. King, (1843) 7 How. 833-853, 12 U. S. (L. ed.) 934. Section 4 of the Act of March 3, 1866, was passed to allow the parties where, a jury being waived, the cause was tried by the court, a review of such rulings of the court, in the progress of the trial, as were excepted to at the time, and duly presented by bill of exceptions, and also a review of the judgment of the court upon the question whether the facts specially found by the court were sufficient to support its judgment. In other respects the old law remains unchanged. Flanders v. Tweed, (1869) 9 Wall. 425, 19 U. S. (L. ed.) 678; Kearney v. Case, (1870) 12 Wall. 275, 20 U. S. (L. ed.) 396; Martin v. Fairbanks, (1855) 112 U. S. 670, 5 S. Ct. 321, 29 U. S. (L. ed.) 962; Key West v. Baer, (C. C. A. 6th Cir. 1895) 66 Fed. 440, 30 U. S. App. 140, 13 C. C. A. 572.

2. To What Courts and to What Cases Applicable

a. To What Courts


And this section was applicable to the Circuit Court of Appeals. Paul v. Delaware, etc., R. Co., (E. D. N. Y. 1904) 130 Fed. 951.

There was no authority either at common law or by statute under which the facts were in an action at law could be tried by the judge of a District Court of the United States without a jury; and where a case was so tried by stipulation, the judgment was not reviewable by the Circuit Court of Appeals. U. S. v. Louisville, etc., R. Co., (C. C. A. 6th Cir. 1909) 167 Fed. 306, 93 C. C. A. 58.


b. To What Cases


On a motion to revive a judgment at law where there is no right of trial by jury, and consequently a waiver of the jury is not necessary, the mode of preserving questions is the same as in a proceeding under this section, and where the court has made no special finding of the facts, the only questions for consideration are those arising upon the rulings of the court in the progress of the hearing on the motion. Crawford v. Foster, (C. C. A. 7th Cir. 1897) 83 Fed. 975, 53 U. S. App. 699, 28 C. C. A. 242.

This section is not applicable to default cases; and in an action of replevin brought in a federal court within the state of Illinois, in which the defendant makes default, the court is authorized to assess the damages without a jury under the Illinois Practice Act. Midland Contracting Co. v. Toledo Foundry, etc., Co., (C. C. A. 7th Cir. 1907) 154 Fed. 797, 83 C. C. A. 489.

3. Compliance with Statute Essential to Reriew

If the parties who consent to waive a jury desire to secure the right to a re-
view in the Supreme Court of any question of law arising on the trial, they must comply with the statute. If this is not done, they stand as they did before the statute, concluded by the judgment of the court on all matters submitted to it. Flanders v. Tweed, (1869) 9 Wall. 425, 19 U. S. (L. ed.) 678; Kearney v. Case, (1870) 12 Wall. 275, 20 U. S. (L. ed.) 395.

This section is not exclusive of other methods of submitting cases to the court, though if the requirements of the statute are not complied with the parties are concluded by the judgment. Kearney v. Case, (1870) 12 Wall. 275, 20 U. S. (L. ed.) 395. And this is true as to exceptions taken at the trial and as to the effect of the facts found. Flanders v. Tweed, (1869) 9 Wall. 425, 19 U. S. (L. ed.) 678; Smith v. Weeks, (C. C. A. 1st Cir. 1893) 53 Fed. 758, 5 U. S. App. 240, 3 C. C. A. 844; Merrill v. Floyd, (C. C. A. 1st Cir. 1892) 53 Fed. 172, 5 U. S. App. 224, 3 C. C. A. 494.

Whenever cases are submitted for trial without a jury, it must plainly appear that the waiver was made as prescribed by the Act of Congress. Swift v. Jones, (C. C. A. 4th Cir. 1906) 145 Fed. 489, 76 C. C. A. 253.

The trial of issues of fact by the court without a jury was unknown to the common law. Such questions were exclusively for the jury, and in case questions of fact were submitted to the judge without a jury, by agreement of the parties, it was held that, in determining such issues, the judge was not acting in any official capacity, but as an arbitrator. Campbell v. Boyreau, (1855) 21 How. 223, 16 U. S. (L. ed.) 98. Manifestly, therefore, the judge has no power, without the consent of the parties, to determine issues of fact, and only by virtue of the provision of R. S. 449, supra, p. 130, does the judge’s decision upon a question of fact become a judicial act. U. S. v. Ramsey, (C. C. Idaho 1907) 158 Fed. 488.

Reference to referees.—An agreement in open court by the parties to an action at law in a federal court that the cause may be referred to a referee to make findings of fact is a waiver of the right to a jury trial on condition that the facts be found by a referee, and confers no power upon the judge to ignore such findings and himself determine the issues of fact, and as the judge has no power, unless by consent, to reject the findings of the referee, and in case they are set aside the cause stands for trial precisely the same as though it had never been referred. U. S. v. Ramsey, (C. C. Idaho 1907) 158 Fed. 488.

The master’s power, if any, in an action at law was brought in the Circuit Court, the trial judge under such sections has no power, even with the acquiescence of both parties, to order a trial before a special master authorized to hear and pass on the issues of fact, and report his findings to the court. Swift v. Jones, (C. C. A. 4th Cir. 1906) 145 Fed. 489, 76 C. C. A. 253, wherein the court said: “Without, therefore, in any manner questioning the right of a party in an action at law to refer his cause to an arbitrator, either through the judge acting as arbitrator, or the selection of referees contemplated by state statute, or otherwise to be chosen, we hold that it is well recognized that neither by agreement of parties nor by the laws of the state can a federal court sitting in such state depart from the prescribed modes of procedure and rules embodied in the Act of Congress for its guidance. Graham v. Bayne, (1855) 18 How. 60, 15 U. S. (L. ed.) 266; Kelsey v. Forsyth, (1858) 21 How. 85, 16 U. S. (L. ed.) 22; Richmond v. Smith, (1879) 15 Wall. 429, 21 U. S. (L. ed.) 200. And hence when it appears that the reference of the lower court was not in any sense intended as an arbitration, or a purpose to have the referee to whom it was referred try and determine the same as an arbitrator, but that plainly the purpose of the reference was to have him ascertain the facts, in lieu of the jury or the judge of the lower court, by written consent of the parties, thereby substituting his judgment as to the facts of the case for that of the jury or the lower court, and that the judgment of the lower court was the result merely of his findings as distinguished from rendering judgment upon its own findings in a proper case, we think it clear that such practice should not be sanctioned or adopted as a rule applicable to the trial of cases in this circuit. To do so would be, in effect, to create a new and additional method of disposition of common-law cases, neither provided for nor contemplated by the Acts of Congress on the subject.”

4. Effect of State Laws and Practice


And an agreement of parties or the laws of a state cannot authorize a federal


A state statute permitting the waiver of a jury trial in actions at law by oral consent in open court entered in the minutes, does not apply to federal courts in the trial of actions at law as a substitute for a written waiver of a jury required by the federal statute. Erkel v. U. S., (C. C. A. 9th Cir. 1909) 169 Fed. 623, 95 C. C. A. 151.

Whatever may be the practice as to references of common-law actions in the courts of the state, in a federal court the reference of such a case can be made only on consent of both parties. Elkin v. Denver Engineering Works Co., (C. C. A. 3d Cir. 1910) 181 Fed. 684, 105 C. C. A. 1.

Ruling on questions of law.—The court cannot be required to rule on specific propositions of law presented by the parties in accordance with a state practice. Streeter v. Chicago Sanitary Dist., (C. C. A. 7th Cir. 1904) 133 Fed. 124, 68 C. C. A. 150.

The statute does not contemplate separate conclusions of law such as are common in the state practice, and judgment should be directed on the findings of fact. Fowler v. Gowing, (C. C. A. 2d Cir. 1908) 105 Fed. 891, 91 C. C. A. 569.

A. F. A. facts.—The state legislature in so far as the same presents the method for the ascertainment of the fact under consideration, contrary to and inconsistent with the legislation of Congress on the same subject, must and should give way to the plain provisions of the federal law. It is the duty of the trial courts to adhere rigidly to the enactments of Congress prescribed for their government, and the presumptions are all unfavorable to the waiver of the right of trial by jury. Swift v. Jones, (C. C. A. 4th Cir. 1908) 146 Fed. 409, 76 C. C. A. 253.

The making of special findings by a federal court on a waiver of a jury, and the effect thereof, is governed by the federal statutes and not by state statutes. Jones v. U. S., (C. C. A. 8th Cir. 1905) 135 Fed. 518, 68 C. C. A. 68.


II. WAIVING A JURY

1. Presumption Against Waiver


2. Waiver Without Written Stipulation


Where waiver of a jury trial is effected either by express oral consent or by personal attendance upon the trial without objection, but without the filing of a written stipulation, rulings of the court upon the trial are not reviewable, for such a submission to the decision of the court is not made in the pleadings. R. S. secs. 649 and 700. Wm. Edwards Co. v. La Dow, (C. C. A. 6th Cir. 1916) 230 Fed. 378, 144 C. C. A. 520.

Rulings of a Circuit Court in the progress of the trial of an action at law by the court without a jury cannot be reviewed by an appellate court, unless a written stipulation waiving a jury is signed and filed with the clerk in accordance with R. S. sec. 649, so as to bring the case within the provisions of R. S. sec. 700; in the absence of such a stipulation the only question which can be considered is whether the judgment rendered is sustained by the pleadings. Defiance v. Schmidt, (C. C. A. 6th Cir. 1903) 123 Fed. 1, 59 C. C. A. 159.

The foregoing rule is subject to an exception that was pointed out in Wayne County v. Kennicott, (1880) 103 U. S. 554, 26 U. S. (L. ed.) 496, that when a case is presented to the trial court for decision on an agreed statement of the facts prepared and signed by counsel, an appellate court, on writ of error, may always determine whether the judgment rendered was such as should have been rendered on the agreed facts. Cudahy Packing Co. v. Sioux Nat. Bank, (C. C. A. 8th Cir. 1895) 69 Fed. 782, 32 U. S. App. 600, 18 C. C. A. 409.

3. Stipulation in Writing Essential

When the agreement waiving a jury is not in writing, the facts found cannot be noticed by the appellate court for any purpose. Ruah v. Newman, (C. C. A. 8th Cir. 1893) 58 Fed. 158, 12 U. S. App. 635, 7 C. C. A. 136; 1 App. Jur. 136 (1896); 1 C. C. A. 5th Cir. 1896) 72 Fed. 124, 30 U. S. App. 713, 18 C. C. A. 469.

An oral waiver of trial by jury does not satisfy the statute. Illinois Surety Co. v. U. S., (C. C. A. 6th Cir. 1918) 229 Fed. 527, 143 C. C. A. 598, wherein the court said: "The statutes require that issues of fact in actions at law be tried by jury . . . unless the jury be waived by a stipulation in writing. When the facts may be tried by the court and its rulings may be reviewed as provided in the statute . . . this case having been tried without a jury, and there having been no written stipulation waiving a jury trial, it is well settled that none of the questions decided at the trial can be re-examined in this court on writ of error." To the same point see Erkel v. U. S., (C. C. A. 9th Cir. 1909) 169 Fed. 623, 95 C. C. A. 151.

And exceptions taken to the admission or exclusion of evidence, or any exceptions to the findings of fact by the referee, or to his refusal to find facts as requested, cannot be reviewed. Roberts v. Benjamin, (1888) 124 U. S. 65, 8 S. Ct. 393, 31 U. S. (L. ed.) 334.


There can be no reservation in such stipulation of a right to go to the jury. Smith v. Weeks, (C. C. A. 1st Cir. 1893) 58 Fed. 758, 5 U. S. App. 240, 3 C. C. A. 644.

The appellate court will scan the record closely to ascertain if the agreement to refer was in writing. Cudahy Packing Co. v. Sioux Nat. Bank, (C. C. A. 8th Cir. 1895) 69 Fed. 782, 32 U. S. App. 600, 18 C. C. A. 409.

A written stipulation is not essential to a waiver of a jury to assess damages on a bond after default, under R. S. sec. 961, supra, p. 117, declaring that when the sum for which judgment shall be rendered in such suit is uncertain, it shall, if either party request it, be assessed by a jury. Brock v. Fuller Lumber Co., (C. C. A. 1st Cir. 1907) 153 Fed. 272, 82 C. C. A. 402.


But the fact that the stipulation in writing was made may be shown by a statement in the finding of facts by the court, or in the bill of exceptions, or in the record of the judgment entry, Bond v. Dustin, (1884) 112 U. S. 604, 5 S. Ct.
4. What is a Sufficient Stipulation

Parties will be held to a reasonably strict conformity to the regulations of the statute. But in the very special circumstances of this case—the parties supposing that they had made up a case according to the state practice in Louisiana, and the case being an important one, and the court and parties evidently intending that it should be reviewed—the court reversed for mistrial and remanded the case. Flanders v. Tweed, (1869) 9 Wall. 425, 19 U. S. (L. ed.) 678.


The agreement in writing must be explicit and not "tentative," and cannot be aided by parol or by acts in pais. Merrill v. Floyd, (C. C. A. 1st Cir. 1892) 53 Fed. 172, 5 U. S. App. 224, 3 C. C. A. 494.

Parties were allowed to file a stipulation in writing in the Supreme Court agreeing that the facts appearing from the special verdict and stated to have been proved, "shall be taken and considered as the facts in this case for all purposes, and as fully as if they had been specifically found by the Circuit Court." Geekie v. Kirby Carpenter Co., (1885) 106 U. S. 379, 1 S. Ct. 315, 27 U. S. (L. ed.) 157.

No specific form is demanded if the intent of the agreement filed under it is plain. Smith v. Weeks, (C. C. A. 1st Cir. 1893) 53 Fed. 768, 5 U. S. App. 240, 3 C. C. A. 644.


A request, made to the court by each party, to instruct the jury to render a verdict in his favor, is not equivalent to a submission of the case to the court without the intervention of a jury within the intention of the statute. Buttell v.
JUDICIARY


5. Withdrawal of Waiver

A liberal discretion may and should be exercised by the court in allowing either party to withdraw from such a waiver. Burnham v. North Chicago St. R. Co., (C. C. A. 7th Cir. 1888) 88 Fed. 627, 60 U. S. App. 225, 32 C. C. A. 64.

When an amendment, to avoid a variance between pleadings and proof, has been permitted, not affecting the nature or merits of the case, it is in the discretion of the trial court to determine whether any submission which has been made ought to be vacated. Bambergcr v. Terry, (1880) 103 U. S. 40, 26 U. S. (L. ed.) 317.

6. Effect on New Trial

The statute should be strictly construed in favor of the preservation of the right of trial by jury, and therefore the stipulation to waive a jury has only relation to the first trial. When the case is remanded both parties are restored to their original right of trial by jury. Burnham v. North Chicago St. R. Co., (C. C. A. 7th Cir. 1895) 88 Fed. 627, 60 U. S. App. 225, 32 C. C. A. 64.

III. WHAT IS A SUBMISSION UNDER THE STATUTE

A written stipulation which clearly contemplates the trial to the court of an action at law, and requests a special finding, is a sufficient waiver of a jury to authorize determination, upon writ of error, of the sufficiency of the facts found to support the judgment. Anglo-American Land, etc., Co. v. Lombard, (C. C. A. 8th Cir. 1904) 132 Fed. 721, 68 C. C. A. 59.

A recital in a judgment that both parties, announcing "ready for trial," formally waived a jury in open court, is sufficient to show waiver of jury by written stipulation, as required by R. S. sec. 649. Columbus Compress Co. v. U. S. Fidelity, etc., Co., (C. C. A. 5th Cir. 1911) 186 Fed. 487, 108 C. C. A. 465.


Where a question as to the construction of a contract evidenced solely by letters and telegrams is by agreement of the counsel submitted to the court, and the jury is instructed to find a verdict for one of the parties, the case is not a trial by the court under this section, but the construction of the contract is a question of law, and where properly excepted to, is reviewable. Goulding v. Ham mond, (C. C. A. 5th Cir. 1893) 54 Fed. 639, 13 U. S. App. 30, 4 C. C. A. 333.

A request by each party to instruct the jury to return a verdict in his favor is not equivalent to a submission of the case to the court under the above section, but is an admission by each that there is no disputed question of fact, and is a request that the court find the facts, and the parties are concluded. Buttell v. Magone, (1895) 157 U. S. 154, 15 S. Ct. 566, 39 U. S. (L. ed.) 654. See also Minahan v. Grand Trunk Western R. Co., (C. C. A. 6th Cir. 1905) 138 Fed. 37, 70 C. C. A. 463; McCormick v. Waco Nat. City Bank, (C. C. A. 5th Cir. 1906) 142 Fed. 139, 73 C. C. A. 350, 6 Ann. Cas. 544.

The practice of referring suits pending in the courts of the United States to a referee or arbitrator, under a rule of court consented to by the parties, has been sanctioned in a number of instances. Where there has been such a reference only rulings and decisions in the matter of law, after the award, are reviewable on writ of error, and to present a question to an appellate court it is essential that the court trying exceptions to the award should ascertain the facts upon which the judgment or opinion excepted to was founded. York, etc., R. Co. v. Myers, (1855) 18 How. 246, 15 U. S. (L. ed.) 380; Beckers v. Fowler, (1884) 2 Wall. 123, 17 U. S. (L. ed.) 760; Shipman v. Ohio Coal Exch., (C. C. A. 6th Cir. 1895) 70 Fed. 662, 37 U. S. App. 471, 17 C. C. A. 313.

IV. FINDINGS AND REVIEW

1. IN GENERAL

When the record discloses no finding of facts, and the trial court had jurisdiction, there are no questions open for review. Lloyd v. Mc Williams, (1890) 137 U. S. 576, 11 S. Ct. 173, 34 U. S. (L. ed.) 788.

On a petition to revise in matter of law the proceedings of a District Court in bankruptcy, in order that it may appear by the record that the issues raised were presented below, and for other reasons, findings which involve distinct propositions of law, or something as a substitute therefor, are necessary, and they cannot be supplied by a mere opinion of the court. While in some cases involving issues of a substantial character justice may require a relaxation of the rule, or
the consideration of issues not presented to the original tribunal, such course will not be followed where the questions raised relate merely to matters of form or administration, and no material detriment to the estate can result from the action complained of. In re Boston Dry Goods Co., (C. C. A. 1st Cir. 1903) 123 Fed. 226, 90 C. C. A. 118.


It is the duty of the court to make findings upon all the issues on the evidence submitted to it, and the appellate court cannot sustain the judgment unless it find such findings. Packer v. Whittier, (C. C. A. 1st Cir. 1899) 91 Fed. 511, 63 U. S. App. 37, 33 C. C. A. 658.

The circumstance that the witnesses do not contradict each other and there is no conflict in the testimony does not relieve the court from the strict rule to find the facts. Lehmann v. Dickson, (1883) 148 U. S. 71, 13 S. Ct. 481, 37 U. S. (L. ed.) 373.

Where parties to a suit tried to the court without a jury desire a review of the law involved in the case, a special verdict raising the legal propositions must be procured, or propositions of law must be presented and ruled on by the trial judge. Paul v. Delaware, etc., R. Co., (E. D. N. Y. 1904) 130 Fed. 951.

In actions at law, where a trial by jury is waived, the duty of finding the facts is placed upon the trial court. Anglo-American Land, etc., Co. v. Lombard, (C. C. A. 8th Cir. 1904) 132 Fed. 721, 68 C. C. A. 89.

If there need be no finding of a fact stated in an agreed statement of facts. Treat v. Farmers' Loan, etc., Co., (C. C. A. 2d Cir. 1911) 185 Fed. 760, 108 C. C. A. 98.

2. General Findings

If the finding of the court is general and not special it is not reviewable by the Circuit Court of Appeals. J. W. Paxson Co. v. Chosen Freeholders, (C. C. A. 3d Cir. 1912) 201 Fed. 656, 120 C. C. A. 84, wherein the court said: "We are of opinion that the finding of the court was general and not special, and therefore, like the verdict of a jury, is not now reviewable by this court. No request was made for special findings, and unless some other request, or motion equivalent to a motion for peremptory instructions, or judgment non obstante veredicto was made, with proper exception to the refusal thereof, the findings of fact cannot be the subject of assignments of error. The finding of the court was equivalent to a general verdict, though accompanied by a reasoned opinion." Mason v. United States, (C. C. A. 8th Cir. 1915) 219 Fed. 547, 135 C. C. A. 315, wherein the court said: "It plainly appears, however, that the only time the court ruled was when it entered the judgment, and if when the court entered the judgment it did so by reason of certain views it had in regard to the law and evidence, it was too late after judgment to raise the question as to whether these views were correct or not, unless counsel had placed the court upon record before the end of the trial in regard to the same. In form there were no findings made by the court either general or special, unless we consider the judgment entered a general finding, which seems to have been the view of the court and of counsel. Under the law this judgment, so far as it can be called a finding, was equivalent to the verdict of a jury and was not the subject of exception." Section 700 Rev. Stat. U. S. provides as to what rulings in a case tried to a court, without a jury, may be reviewed by the circuit court, with what might seem to be tiring repetition, established rules for the guidance of counsel as to how these questions may be preserved and reviewed. Experience teaches that it would serve no useful purpose to repeat these rulings.

In Sierra Land, etc., Co. v. Desert Power, etc., Co., (C. C. A. 9th Cir. 1916) 229 Fed. 982, 144 C. C. A. 264, the court made the general finding. "And the court, having fully considered the premises, finds the issue in favor of the defendant," and entered a judgment accordingly. It was held that the appellate court could not, on writ of error, inquire into the sufficiency of the testimony to support the finding where there was no application to the court for a declaratory judgment, and no finding that upon the whole case the finding should be for the plaintiff, and an exception to the refusal to grant the application, and that the appellate court was limited to a review of such rulings as were excepted to during the progress of the trial.

In Good Pine Lumber Co. v. Duke, (C. C. A. 5th Cir. 1915) 229 Fed. 714, 144 C. C. A. 124, where the record showed no agreed statement of facts and no special finding of facts by the judge, but a general finding, embodied in the judgment, and no finding that upon the whole case the finding should be for the plaintiff, the court said: "In this state of the record, only the rulings of the court during the progress of the case, duly presented by a bill of exceptions, can be here reviewed."

On writ of error to review a judgment in an action tried by consent of the parties to the court without a jury, where the
judgment was based upon a general finding, no questions are open for review on error other than those arising upon the process, pleadings or judgment. Ladd, etc., Bank v. Lewis A. Hicks Co., (C. C. A. 9th Cir. 1914) 218 Fed. 310, 134 C. C. A. 190.

A general finding upon a trial by the court without a jury has by the statute the same effect as the verdict of a jury. The parties are concluded upon the facts by the determination of the court, and nothing is presented for review except as might have been reviewed had there been a trial by jury. Streeter v. Chicago Sanitary Dist., (C. C. A. 7th Cir. 1904) 133 Fed. 124, 66 C. C. A. 190.

Where, notwithstanding defendant's application for special findings of facts, the court found generally that the plaintiff was entitled to recover, the facts cannot be reviewed on appeal. Berwind-White Coal Min. Co. v. Martin, (C. C. A. Fed Cir. 1903) 190 Fed. 742, 30 C. C. A. 27.


Findings, general or special, have the effect of a verdict of a jury. Norris v. Jackson, (1889) 9 Wall. 125, 19 U. S. (L. ed.) 608; Reed v. Stapp, (C. C. A. 7th Cir. 1892) 52 Fed. 641, 9 U. S. App. 34, 3 C. C. A. 244.

Where an action at law is tried without a jury, under the statute, and only a general finding is made, and the ultimate facts are not agreed upon by the parties, there can be no review of the question whether the judgment is supported by the facts found; and, unless exceptions are taken to the rulings made during the trial, there is no question which can be reviewed by the appellate court. National Surety Co. v. Cincinnati, etc., R. Co., (C. C. A. 6th Cir. 1906) 145 Fed. 34, 76 C. C. A. 19.

If the finding be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by the bill of exceptions. Streeter v. Chicago Sanitary Dist., (C. C. A. 7th Cir. 1904) 133 Fed. 124, 66 C. C. A. 190.

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If the finding be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by the bill of exceptions. Streeter v. Chicago Sanitary Dist., (C. C. A. 7th Cir. 1904) 133 Fed. 124, 66 C. C. A. 190.

The sufficiency of the facts found to support the judgment cannot be reviewed. West v. Houston Oil Co., (C. C. A. 5th Cir. 1905) 138 Fed. 343, 89 C. C. A. 169.


An assignment of error that the court "erred in rendering judgment in favor of the plaintiff and against the defendant presents no question which can be reviewed. Fitzgerald v. Bassford, (C. C. A. 3d Cir. 1906) 142 Fed. 134, 73 C. C. A. 352.

Where there is no formal special finding of facts, but there is a distinct ruling upon a matter of law, the ruling will be reviewed. Lehnen v. Dickson, (1893) 148 U. S. 71, 13 S. Ct. 481, 37 U. S. (L. ed.) 373. See Clement v. Phoenix Ins. Co., (1899) 7 Blatchf. 51, 5 Fed. Cas. No. 2,882. When, by reason of the findings being general, the appellate court cannot determine whether any particular plea which may have been erroneously sustained was not relied on in giving judgment, the case will be remanded. Miller v. Houston City St. R. Co., (C. C. A. 5th Cir. 1893) 55 Fed. 366, 13 U. S. App. 57, 5 C. C. A. 134.

3. General and Special Findings

a. In General


But the finding must be either one or the other, general or special, and its effect is to be determined upon its character in that regard. Powers v. U. S., (C. C. A. 6th Cir. 1903) 119 Fed. 562, 56 C. C. A. 128.

Where the court rendered a general finding upon which no verdict was entered and thereafter signed a bill of exceptions and a paper purporting to be a special finding and there was no order vacating the general finding and substituting the special, such special finding is wholly without authority of law, and the general finding must stand. Corliss v. Pulaski County, (C. C. A. 7th Cir. 1902) 116 Fed. 289, 53 C. C. A. 567.


Parties have no right to require a federal court, in hearing a law case without a jury, to make a special finding. Southern R. Co. v. St. Louis Hay, etc., Co., (C. C. A. 7th Cir. 1907) 153 Fed. 728, 82 C. C. A. 614; Paul v. Delaware, etc., R. Co., (C. C. A. 6th Cir. 1904) 130 Fed. 961.

In Waialua Agricultural Co. v. Oahu R., etc., Co., (1906) 18 Hawaii 81, it was said that however desirable it may be to obtain special findings from the court, the statute does not require them to be made.
If a party desire to have the finding reviewed he must have the court find the facts specially. Coddington v. Richardson, (1870) 16 Wall. 516, 19 U. S. (L. ed.) 520.

If the parties desire a review of the law involved in the case they must either get the court to make a special finding which raises the legal propositions, or they must present to the court their propositions of law and require a ruling on them. Norris v. Jackson, (1869) 9 Wall. 125, 19 U. S. (L. ed.) 608; Springfield Fire, etc., Ins. Co. v. Sea, (1874) 21 Wall. 158, 22 U. S. (L. ed.) 511.

In Berwind-White Coal Min. Co. v. Martin, (C. C. A. 3d Cir. 1903) 124 Fed. 313, 60 C. A. A. 27, it was said: "The defendant presented a number of requests for special findings of fact and conclusions of law, but the court, without passing upon them, found generally that the plaintiff was entitled to recover. There can be no question as to the entry of propriety of this course. The statute expressly provides that the finding of the court on the facts may be general or special, and you can no more compel the latter than you can require a special verdict from a jury. It is true that in Norris v. Jackson, (1869) 9 Wall. 125, 19 U. S. (L. ed.) 608, it is said that, 'if the parties desire a review of the law involved in the case, they must ... get the court to find a special verdict which raises the legal questions;' but it is not to be understood from this that it can be exacted, all that is meant being that the court should be persuaded to do so. Neither is the alternative, which is there suggested, of presenting propositions of law, and requiring the court to rule upon them, of any greater obligation. The right to this has been asserted without success in a number of cases, and the practice must now be considered as settled to the contrary. Mercantile Mut. Ins. Co. v. Folsom, (1873) 18 Wall. 237, 21 U. S. (L. ed.) 827; Cooper v. Oomohundro, (1873) 19 Wall. 65, 22 U. S. (L. ed.) 47; St. Louis v. Western Union Tel. Co., (1897) 166 U. S. 388, 17 S. Ct. 608, 41 U. S. (L. ed.) 1044; Key West v. Baur, (C. C. A. 5th Cir. 1896) 66 Fed. 440, [30 U. S. App. 140], 13 C. C. A. 572; Consolidated Coal Co. v. Polar Wave Ice Co., (C. C. A. 8th Cir. 1901) 106 Fed. 798, 45 C. C. A. 639."

But the court should make special findings of fact when it is doubtful, under the decisions, whether the defeated party could otherwise properly present to an appellate court the questions of law involved. Jolliffe v. Metropolitan Securities Co., (S. D. N. Y. 1908) 164 Fed. 650.

Where a general finding is made and judgment is rendered thereon, it cannot be regarded as superseded by a supposed special finding, which was not entered of record, is only found in the bill of exceptions, and does not purport to qualify or take the place of the general finding. U. S. v. Cleage, (C. C. A. 8th Cir. 1908) 161 Fed. 86, 88 C. C. A. 249.

b. Effect


Whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a special verdict (finding) the question is presented as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant. Powers v. U. S., (C. C. A. 6th Cir. 1903) 119 Fed. 562, 55 C. C. A. 128; York v. Washburn, (C. C. A. 8th Cir. 1904) 129 Fed. 564, 64 C. C. A. 132.

The findings of fact have the same effect as the verdict of a jury, and the Supreme Court does not revise them but merely determines whether they support the judgment. U. S. v. U. S. Fidelity, etc., Co., (1915) 236 U. S. 512, 35 S. Ct. 298, 59 U. S. (L. ed.) 696.

"Sections 649 and 700 of the Revised Statutes . . . provide for general and spe-
pecial findings in cases where a jury trial is waived; and, according to the settled practice, they admit of no appeal on any question except those which arise in the progress of the trial, as, for example, objections to admission of material evidence, or which would arise on general demurrer, or may be taken as questions of law arising on findings of ultimate facts." Continental, etc., Nat. Bank v. Cobbt, (C. C. A. 1st Cir. 1912) 200 Fed. 511, 118 C. C. A. 615. See also Chautauqua Institution v. Zimmerman, (C. C. A. 6th Cir. 1916) 293 Fed. 371, 147 C. C. A. 307.


But if upon rejection of evidence no testimony would remain necessary to support the judgment, the mistake would be one of law and the proper subject of a writ of error. See Arthur v. Hart, (1854) 17 How. 6, 15 U. S. (L. ed.) 30.

The Supreme Court will not be bound by a conclusion of law based on a finding of facts which is inconsistent with a presumption of fact. French v. Edwards, (1874) 21 Wall. 147, 22 U. S. (L. ed.) 534.

V. SPECIAL FINDINGS AND AGREED STATEMENTS OF FACTS

1. Part of Record


And also a general finding or verdict. Wasson v. Saline County, (C. C. A. 7th Cir. 1896) 73 Fed. 917, 34 U. S. App. 689, 20 C. C. A. 227.

2. Time of Making and Filing

To supply a defect in the record, the court may file a finding of facts at a subsequent term, nunc pro tunc. Ætna Fire Ins. Co. v. Boon, (1877) 95 U. S. 117, 24 U. S. (L. ed.) 395.

And when the statement of facts is drawn up and filed by the judge after the term as of the day of the trial, it is but reasonable to presume that he had been requested at the time of the trial to do so. McGavock v. Woodrief, (1857) 20 How. 221, 15 U. S. (L. ed.) 884.

But additional findings cannot afterward be made upon the request of a party. Lang v. Baxter, (C. C. Me. 1895) 60 Fed. 906.

The statement of facts by the judge, filed three months after rendition of judgment, is irregular. Flanders v. Tweed, (1868) 9 Wall. 425, 19 U. S. (L. ed.) 678.


And a paper signed by the parties, filed with the clerk after writ of error sued out and made a part of the record, cannot be considered. Kearn v. Case, (1870) 12 Wall. 275, 20 U. S. (L. ed.) 905; Bethell v. Mathews, (1871) 13 Wall. 1, 20 U. S. (L. ed.) 556.

3. Manner of Making

A special finding should be a clear and concise statement of the ultimate facts, and not a statement, report, or recapitulation of evidence from which such facts may be found or inferred. The ultimate facts must be so stated that, without inferences, or comparisons, or balancing testimony, or weighing evidence, the case may be determined by the application of pertinent rules of law. If any ultimate fact material to the issues is to be inferred from the whole evidence, or from other facts proved or admitted, the inference must be drawn by the trial court, and the fact must be stated in the finding. Like the special verdict of a jury, a special finding can present only questions of law. Anglo-American Land, etc., Co. v. Lombard, (C. C. A. 8th Cir. 1904) 132 Fed. 721, 38 C. C. A. 89.

A special finding should state the ultimate facts on which the law must determine the rights of the parties, and should not contain a statement of the evidence. American Nat. Bank v. Watkins, (C. C. A. 7th Cir. 1902) 119 Fed. 545, 35 C. C. A. 111.

A special finding of facts should be the equivalent of the special verdict of a jury, and should cover all the issues, so that in the event of proceedings in error, if the trial court's conclusions of law are
deemed incorrect, and if the proceedings
are otherwise without error, the appellate
court may, under R. S. sec. 701, infra,
p. 224, direct such judgment as the special
finding requires, without the necessity of
awarding a new trial. Anglo-American
Land, etc., Co. v. Lombard, (C. C. A. 8th
Cir. 1904) 132 Fed. 721, 68 C. C. A. 89.
A mere setting out of the testimony of a
witness, with a statement that the court
finds it to be true, is not a finding of
fact which will support a judgment. Per-
kins v. Von Baumbach, (C. C. A. 8th Cir.
Where only probative facts are found,
leaving the ultimate facts necessary to
support the judgment to be inferred, the
judgment must be reversed, and a new
6th Cir. 1903) 119 Fed. 562, 56 C. C. A.
128.
Instead of writing and filing them the
court might announce its findings in open
court and have them entered on the re-
cord. Ætna Life Ins. Co. v. Hamilton
County, (C. C. A. 8th Cir. 1897) 79 Fed.
Where a court has found what seem to
it to be the ultimate facts in the case it
will not make further special findings of
facts and conclusions of law at the re-
quest of the parties. Lang v. Baxter,
(C. C. Me. 1895) 69 Fed. 905.
When judgment has been rendered on a
general finding, there is no authority for
inserting special findings in the bill of
exceptions signed at a succeeding term of
court. Streeter v. Chicago Sanitary
Dist., (C. C. A. 7th Cir. 1904) 133 Fed.
124, 66 C. C. A. 190.
4. What Constitutes
A special finding is not a mere report of
the evidence, but a statement of the ut-
imate facts on which the law of the case
must determine the rights of the parties;
a finding of the propositions of fact which
the evidence establishes, and not the evi-
dence on which those ultimate facts are
supposed to rest. Powers v. U. S., (C. C.
A. 6th Cir. 1903) 119 Fed. 562, 56 C. C.
A. 128.
The special finding, contemplated by
the statute, corresponds to the special
verdict of a jury, is equally specific
and responsive to the issues, and is spread
at large upon the record, as part thereof,
in like manner as is such a verdict. U. S.
v. Sioux City Stock Yards Co., (C. C. A.
8th Cir. 1909) 167 Fed. 126, 92 C. C. A.
578.
Special findings must be of ultimate
facts, and not the evidence from which
such facts might be inferred or the con-
trary but are not found. Graham v.
Bayne, (1855) 18 How. 60, 15 U. S. (L.
ed.) 265; Burr v. Des Moines R., etc.,
Co., (1883) 1 Wall. 99, 17 U. S. (L. ed.)
561; Norris v. Jackson, (1868) 9 Wall.
125, 19 U. S. (L. ed.) 608; Crews v.
Brewer, (1873) 19 Wall. 70, 22 U. S.
(L. ed.) 63; The Abbotsford, (1878) 95
U. S. 440, 25 U. S. (L. ed.) 168; Union
100 U. S. 37, 25 U. S. (L. ed.) 541; Rai-
mond v. Terrebonne, (1889) 132 U. S.
192, 10 S. Ct. 57, 33 U. S. (L. ed.) 1809;
Grayson v. Lynch, (1896) 163 U. S. 468,
18 S. Ct. 1064, 41 U. S. (L. ed.) 230;
Wilson v. Merchants' Loan, etc., Co.,
(1901) 183 U. S. 191, 22 S. Ct. 55, 46
U. S. (L. ed.) 113; Miller v. Houston
City St. R. Co., (C. C. A. 5th Cir. 1893)
55 Fed. 386, 13 U. S. App. 57, 5 C. C.
A. 134; Lang v. Baxter, (C. C. Me. 1895)
69 Fed. 907; Insurance Co. of North Ame-
rica v. International Trust Co., (C. C. A.
8th Cir. 1895) 71 Fed. 88, 36 U. S. App.
291, 17 C. C. A. 616; Powers v. U. S.,
(C. C. A. 6th Cir. 1903) 119 Fed. 562, 56
Watkins, (C. C. A. 7th Cir. 1902) 119 Fed.
545, 56 C. C. A. 11.
And so as to an agreed statement of
facts see Graham v. Bayne, (1855) 18
Des Moines R., etc., Co., (1883) 1 Wall.
99, 17 U. S. (L. ed.) 561; Kentucky Life,
etc., Ins. Co. v. Hamilton, (C. C. A. 8th
Cir. 1894) 63 Fed. 93, 22 U. S. App. 548,
11 C. C. A. 42; Packer v. Whittier, (C. C.
A. 1st Cir. 1899) 91 Fed. 511, 63 U. S.
App. 37, 33 C. C. A. 655.
An agreed statement of facts as to cer-
tain matters, submitted with leave to
refer to exhibits, and no finding or state-
ment agreed as to the ultimate facts,
cannot be considered as facts found or
agreed, and in the absence of a bill of
exceptions presents no question for re-
view. Glenn v. Fant, (1890) 134 U. S.
398, 10 S. Ct. 635, 33 U. S. (L. ed.)
969.
A special finding of fact, as was said by
Mr. Justice Miller in Burr v. Des Moines
R., etc., Co., (1883) 1 Wall. 99, 17 U. S.
(L. ed.) 561, "is a statement of the ut-
imate facts or propositions which the evi-
dence is intended to establish, and not the
evidence on which those ultimate facts
are supposed to rest. The statement must
be sufficient in itself without inferences
or comparisons, or balancing of testimony,
or weighing evidence, to justify the appli-
cation of the legal principles which must
determine the case. It must leave none
of the functions of a jury to be discharged
by this court, but must have all the suf-
fiency, fullness, and perspicuity of a
special verdict. If it requires of the
court to weigh conflicting testimony or
to balance admitted facts, and deduce
from these propositions of fact on which
alone a legal conclusion can rest, then it
is not such a statement as this court can
act upon."
No mere recital of testimony, either in
the opinion of the court or in the bill of

An opinion of the trial judge setting forth the reasons for his decision in an action at law tried by a federal court without the intervention of a jury cannot be regarded as a special finding within the meaning of the statute. U. S. v. Sioux City Stock Yards Co., (C. C. A. 8th Cir. 1909) 167 Fed. 126, 92 C. C. A. 578.

To found upon such an opinion, much being copied into the judgment entry, become a special finding of the ultimate facts, in the nature of a special verdict. York v. Washburn, (C. C. A. 8th Cir. 1904) 129 Fed. 564, 64 C. C. A. 132.


A special finding should be complete in itself, but may refer to documents in pleadings or otherwise in the record. Wesson v. Seline County, (C. C. A. 7th Cir. 1898) 73 Fed. 917, 34 U. S. App. 686, 20 C. C. A. 227.

The appellate court cannot consider a case referred unless the facts found by the referee, when confirmed by the court, are treated as the finding of the court. Boogher v. New York Life Ins. Co., (1880) 103 U. S. 90, 20 U. S. (L. ed.) 310.

A paper not signed by counsel nor entered on the record, nor made part of the record of the case by bill of exceptions or in any other manner, cannot be considered as an agreed statement of facts. Benedict v. Moiney, etc., Co., (1863) 1 Wall. 99, 17 U. S. (L. ed.) 561.


5. Omissions

In Anglo-American Land, etc., Co. v. Lombard, (C. C. A. 8th Cir. 1904) 132 Fed. 721, 68 C. C. A. 89, it was said: "While the special finding under consideration does not meet the requirements of the Act of Congress, it does sufficiently respond to some of the issues raised by the pleadings, although not responding to others. In this situation the finding may be examined to ascertain whether the ultimate facts found and stated therein are decisive of the controversy, and determine what judgments should be rendered, irrespective of any response which could be made to the issues upon which the finding is silent. If, under a correct application of legal principles, the facts adequately found and stated determine the cases, the imperfection in the special finding becomes immaterial, and the present judgments must be affirmed, or other judgments must be directed in their stead, as the facts found and stated may require. But if the facts found do not, under the application of pertinent rules of law, determine the cases, the judgments must be reversed, and a new trial awarded. In the latter event, the Circuit Court will be precluded from again adjudging in favor of the defendants upon the facts declared by the judgment of reversal to be insufficient to sustain the present judgments, and it will be incumbent upon that court to proceed to the trial and proper determination of the other issues."


6. Effect


Special findings by a trial judge in an action at law in a federal court, where a jury has been waived pursuant to the provisions of R. S. sec. 649, supra, p. 150, have the same effect as special verdicts of a jury, and must embrace a finding on every material issue joined in the case, otherwise the result is a mistrial. Towle v. Boston First Nat. Bank, (C. C. A. 8th Cir. 1907) 153 Fed. 566, 82 C. C. A. 580. See also San Fernando Copper Min., etc., Co. v. Humphreys, (5th Cir. 1904) 130 Fed. 296, 64 C. C. A. 544.

A special finding which states the ultimate fact is conclusive upon the appellate court, even though it contains, in addition, statements of evidence and inferences therefrom. American Nat. Bank v. Watkins, (C. C. A. 7th Cir. 1902) 119 Fed. 545, 56 C. C. A. 111.

A special finding is unassailable when it depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, but is not conclusive if there be no testimony tending to support it. Davis v. Schwartz, (1895) 155 U. S. 631, 15 S. Ct. 237, 39 U. S. (L. ed.) 289.


The conclusive effect of a special finding of fact cannot be made to depend on the character of the proof upon which it rests. If such a finding is regarded as conclusive, and not subject to review when it rests on oral testimony, it must be regarded as equally conclusive when it rests on written evidence or on evidence that is in part written and in part oral. Insurance Co. of North America v. International Trust Co., (C. C. A. 8th Cir. 1895) 71 Fed. 88, 36 U. S. App. 291, 17 C. C. A. 616.

That a special finding does not follow the preponderance of the testimony cannot be reviewed. Sayward v. Dexter, (C. C. A. 9th Cir. 1896) 72 Fed. 768, 44 U. S. App. 376, 19 C. C. A. 176; Dooley v. Pease, (C. C. A. 7th Cir. 1898) 88 Fed. 446; 60 U. S. App. 248, 31 C. C. A. 582.

7. Questions Reviewable

"A special finding made by the trial court under this statute becomes a part of
the record, and the appellate court may without a bill of exceptions determine whether the finding is sufficient to support the judgment. We are now set-tled that the question of law whether the special finding of facts supports the judg-
ment is open for determination by the ap-
pellate court, although no exception was taken to the judgment in the court below or any specific ruling made by the court below on the question of law involved." Chicago, etc., R. Co. v. Barrett, (C. C. A. 6th Cir. 1911) 190 Fed. 118, 111 C. C. A. 158.

Where there are no exceptions to the rulings of the court, the only question for review upon a special finding is whether the facts found are sufficient to support the judgment, and not whether the evi-
dence supports the special finding. Norris v. Jackson, (1889) 9 Wall. 125, 19 U. S. (L. ed.) 808; Flanders v. Tweed, (1889) 9 Wall. 425; 19 U. S. (L. ed.) 478; Cope-
tland v. Phenix Ins. Co., (1889) 9 Wall. 461, 19 U. S. (L. ed.) 739; Jenni-


If the findings be special the review may extend to the determination of the sufficiency of the facts found to support the judgment. No other or different review is permitted. Streeter v. Chicago Sanitary Dist., (C. C. A. 7th Cir. 1904) 133 Fed. 124, 66 C. C. A. 190; Southern R. Co. v. St. Louis Hay, etc. Co., (C. C. A. 7th Cir. 1907) 135 Fed. 728, 82 C. C. A. 614; Mason City, etc., R. Co. v. Boynton, (C. C. A. 8th Cir. 1907) 159 Fed. 599, 85 C. C. A. 421; Chicago Great Western R. Co. v. Minneapolis, etc., R. Co., (C. C. A. 8th Cir. 1910) 176 Fed. 237, 100 C. C. A. 41; Chicago, etc., R. Co. v. Frye-Brunh Co., (C. C. A. 8th Cir. 1911) 184 Fed. 15, 105 C. C. A. 217.

Decisions upon the admission and exclu-
sion of evidence, upon questions of law, upon the question whether or not there is any substantial evidence to warrant the finding, and upon the question whether or not the finding supports the judgment, are the only rulings at the trial that may be reviewed. Barnsdall v. Wallemeyer, (C. C. A. 8th Cir. 1905) 142 Fed. 415, 72 C. C. A. 515.

The true test for determining whether or not a question or ruling in a trial by the court without a jury is reviewable is the answer to the question whether or not it would have been open to review if the trial had been to a jury. The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a ques-
tion of law which arises in the progress of the trial and may be submitted to the jury if it is review-
able on an exception to a ruling upon a re-
quest for a peremptory instruction. In a trial by the court without a jury it is re-
vievable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court which fairly presents this issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered. U. S. Fidelity, etc., Co. v. Woodson County, (C. C. A. 8th Cir. 1906) 146 Fed. 144, 76 C. C. A. 114.

Where a jury is waived, and an action at law is tried by a national court which makes a finding or renders a judgment, no question of fact and no question of mixed law and fact, except those questions of law which are treated by C. C. A. 800 Fed. 787, 111 U. S. App. 372, 28 C. C. A. 130.

Errors alleged in the findings of the court in a trial without a jury are not subject to revision by the Circuit Court of
Appeals, that court being limited in that connection to the question whether there is any evidence on which such findings could be made. Paul v. Delaware, etc., R. Co., (E. D. N. Y. 1904) 130 Fed. 951. A special finding is not a bonâ fide purchaser of a note for value, but took the same subject to any defense affecting the consideration, is one of fact, and is not reviewable on appeal as a conclusion of law. American Nat. Bank v. Watkins, (C. C. A. 7th Cir. 1902) 119 Fed. 645, 56 C. C. A. 111.

The facts found should be sufficient to support the judgment, and this means the essential facts and not those probative facts from which the essential facts may be inferred. Powers v. U. S., (C. C. A. 6th Cir. 1903) 119 Fed. 562, 56 C. C. A. 128.

An assignment that the court erred in making a particular finding of fact is not reviewable on appeal, if there is any evidence on which to base the finding. San Fernando Copper Min., etc., v. Humphrey, (C. C. A. 9th Cir. 1904) 130 Fed. 269, 54 C. C. A. 544.

When a fact was found upon no evidence, and duly excepted to, an error of law is presented. Merrill v. Floyd, (C. C. A. 1st Cir. 1892) 50 Fed. 849, 5 U. S. App. 90, 2 C. C. A. 58; Wright v. Bragg, (C. C. A. 7th Cir. 1899) 96 Fed. 729, 37 C. C. A. 574; King v. Smith, (C. C. A. 9th Cir. 1901) 110 Fed. 95, 49 C. C. A. 46, 54 L. R. A. 708.

And the appellate court will review, if all the testimony be sent up, but not otherwise. Fales v. New York Life Ins. Co., (C. C. A. 6th Cir. 1899) 25 Fed. 234, 30 C. C. A. 38.

In The Francis Wright, (1881) 105 U. S. 381, 387, 26 U. S. (L. ed.) 1100, it was said, by Chief Justice Waite, that "if the Circuit Court neglect or refuse on request to bring up the case on any or upon a question of fact, material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal taken in time and properly presented by a bill of exceptions may be considered here on appeal. So, too, if the court against remonstrance finds a material fact which is not supported by any evidence whatever, and exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case the refusal to find would be equivalent to a ruling that the fact was immaterial; and in the other, that there was some evidence to prove what is found when in truth there was none. Both these are questions of law, and proper subjects for review in an appellate court." It was indicated that the bill of exceptions "must be prepared as in actions at law," where it is used, "not to draw the whole matter into examination again," but only separate and distinct points of law. See also to same effect Merchants' Mut. Ins. Co. v. Allen, (1887) 121 U. S. 67, 7 S. Ct. 821, 30 U. S. (L. ed.) 865; The John H. Pearson, (1887) 121 U. S. 469, 7 S. Ct. 1008, 30 U. S. (L. ed.) 979; The E. A. Packer, (1891) 140 U. S. 580, 11 S. Ct. 784, 35 U. S. (L. ed.) 453.

Upon a special finding, a party may insist upon a finding in his favor on the ground that there is a total lack of evidence to support a contrary finding, or, if he have the burden of the issue, on the ground that the evidence in his favor is adequate, unimpeached, and without conflict or uncertainty. Wright v. Bragg, (C. C. A. 7th Cir. 1899) 96 Fed. 729, 37 C. C. A. 574.

8. Disposal of Case on Error

Evidence which should have been excluded on the trial as irrelevant will be excluded on review under the statute. Black v. Supreme Council, etc., (E. D. Pa. 1903) 120 Fed. 580.

All the facts of the case being ascertained by the special finding, as they would be by special verdict of a jury, there is no reason for awarding a new trial, but judgment will be directed as the special finding requires. Allen v. St. Louis Nat. Bank, (1887) 120 U. S. 20, 7 S. Ct. 440, 30 U. S. (L. ed.) 573; Reed v. Stapp, (C. C. A. 7th Cir. 1892) 92 Fed. 641, 9 U. S. App. 34, 3 C. C. A. 244; Evans v. Kister, (C. C. A. 6th Cir. 1899) 92 Fed. 828, 35 C. C. A. 28.


Where, in an action on an award pursuant to a fire policy, a reversal was required because of an error of the trial court in disposing of a question of law and there was no disputed question of fact in the case, the Court of Appeals will render final judgment instead of remanding the cause for a new trial. Fellman v. Royal Ins. Co., (C. C. A. 6th Cir. 1911) 184 Fed. 577, 106 C. C. A. 857.

VI. RULINGS AND EXCEPTIONS

1. Necessity

"When a party in the Circuit Court waives a jury, and agrees to submit his case to the court, it must be done in writing; and if he wishes to raise any question of law upon the merits in the court above he should request special findings of fact by the court framed like a special
verdict of a jury, and then reserve his exceptions to those findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law, drawn by the court from the facts found, he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits."—Per Taft, J., in Humphreys v. Cincinnati Third Nat. Bank, (C. C. A. 6th Cir. 1896) 75 Fed. 852, 43 U. S. App. 698, 21 C. C. A. 538, followed in Fales v. New York Life Ins. Co., (C. C. A. 6th Cir. 1899) 98 Fed. 234, 39 C. C. A. 38.

In Phenix Securities Co. v. Dittinger, (C. C. A. 9th Cir. 1915) 224 Fed. 892, 140 C. C. A. 336, on writ of error to review a judgment for the plaintiff, there being no finding of facts, the court said: "Upon the assignment that there was no evidence to sustain the judgment, the question arises, as to what extent, may the decision of the court below be reviewed here upon the writ of error? ... The case at bar was submitted to the court for decision upon the pleadings and evidence at the close of the trial, and the question whether there was any evidence to sustain the judgment for the plaintiff was not presented to the court. Under these circumstances, upon a review of the case in this court, we are confined to the consideration of the question whether the complaint stated a cause of action, and whether any objection was taken and exception reserved to the admission of testimony in the course of the trial."

While it is true that "when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment," yet, in order to entitle a party to that review, he must have made the proper objection to the judgment as entered, or moved to modify it and reserved an objection to the action of the court. Press v. Davis, (C. C. A. 7th Cir. 1893) 54 Fed. 287, 9 U. S. App. 546, 4 C. C. A. 318; Barnard v. Randle, (C. C. A. 8th Cir. 1901) 110 Fed. 906, 49 C. C. A. 177.


A defense not brought to the attention of nor ruled on by the court cannot be considered on appeal. Grattan v. C. and P. R. R., (C. C. A. 8th Cir. 1899) 97 Fed. 145, 38 C. C. A. 84.

Where no special finding is made or asked and no exception is taken to any ruling of the court during the trial, no appeal will lie, German Alliance Ins. Co. v. Franklin County, (C. C. A. 7th Cir. 1893) 56 Fed. 783, 9 U. S. App. 676, 6 C. C. A. 118.

On a motion to revive a judgment where there is no special finding of facts and no exception has been saved as to the admission of evidence there is no question raised for review, except as arising upon the hearing of the petition. Crawford v. Foster, (C. C. A. 7th Cir. 1898) 84 Fed. 939, 56 U. S. App. 231, 28 C. C. A. 576.

2. Sufficiency


The rule, in trials by jury, that "if a series of propositions is embodied in instructions, and the jury excepted to a mass, if any one of the propositions is correct the exception must be overruled," should be applied to cases of this kind. Boogher v. New York Life Ins. Co., (1880) 103 U. S. 90, 26 U. S. (L. ed.) 310.

In Philadelphia Casualty Co. v. Fechheimer, (C. C. A. 6th Cir. 1915) 220 Fed. 401, 136 C. C. A. 25, the court held that a general exception to the court's order in overruling en bloc a number of exceptions was too indefinite to present any question for review by the appellate court.

3. Review


When the statute speaks of the "rulings of the court in the progress of the trial," it includes all rulings on questions of law which do not arise upon taking an appeal except the finding of facts is formally made. Clemente v. Phenix Ins. Co., (1889) 7 Blatchf. 51, 5 Fed. Cas. No. 2,882; Key v. West v. Baer, (C. C. A. 5th Cir. 1895) 66 Fed. 443, 30 U. S. App. 140, 13 C. C. A. 372; White v. German Alliance Ins. Co. (C. C. A. 1st Cir. 1900) 103 Fed. 268, 43 C. C. A. 216. It does not include the gen-

A party may allege as error a material defect apparent upon the record proper, which would have been fatal upon a motion in arrest of judgment after verdict. American Credit Indemnity Co. v. Athens Woolen Mills, (C. C. A. 6th Cir. 1899) 92 Fed. 581, 34 C. C. A. 161.

4. Bill of Exceptions

Objections to the admission or exclusion of evidence, or to the court's rulings on propositions of law, in a case tried to the court without a jury, must appear by bill of exceptions in order to be reviewed. Paul v. Delaware, etc., R. Co., (E. D. N. Y. 1894) 130 Fed. 951.

But where a case is tried to the court without a jury, a bill of exceptions cannot be used to bring up the entire testimony for review. Paul v. Delaware, etc., R. Co., (E. D. N. Y. 1894) 130 Fed. 951.


In Dunsmuir v. Scott, (C. C. A. 9th Cir. 1914) 217 Fed. 200, 135 C. C. A. 104, the court said: "The rule is well settled that if a jury trial is waived, and a general finding is made by the court, review in an appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions, and that the bill of exceptions cannot be used to bring up the oral testimony for review."


On writ of error to review a judgment of a Circuit Court in an action tried by stipulation to the court without a jury, as provided by the statute where there was a general finding, in the absence of a bill of exceptions, the record presents only the question whether the pleadings support the finding and judgment. Mexico Nat. R. Co. v. U. S., (C. C. A. 5th Cir. 1903) 125 Fed. 1004, 60 C. C. A. 690; Mexico Nat. R. Co. v. O'Leary, (C. C. A. 5th Cir. 1903) 126 Fed. 363, 61 C. C. A. 582; Marinetta Sawmill Co. v. Scofield, (C. C. A. 7th Cir. 1909) 174 Fed. 562, 98 C. C. A. 344.


A bill of exceptions must be prepared and settled before the end of the term at which the judgment was rendered. Sweet v. Perkins, (F. D. Wis. 1885) 24 Fed. 777.

The Supreme Court will not consider a bill of exceptions filed by order of court at a subsequent term in the absence of consent of parties and notice to the adverse party, where no extension of time for that purpose had been applied for or granted. Muller v. Eilers, (1875) 91 U. S. 249, 23 U. S. (L. ed.) 319.

Sec. 701. [Judgment or decree on review.] The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon. [R. S.]


The Circuit Courts of Appeals Act of March 3, 1891, ch. 517, § 4, supra, p. 143, provided that "the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same." And section 10 of said Circuit Courts of Appeals Act, supra, p. 234, provides for the removal of cases reviewed by the Supreme Court or by the Circuit Court of Appeals superseding pro tanto the provisions in the above text section. But section 11 of said Circuit Courts of Appeals Act, supra, p. 176, provides that "all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this Act in respect of the Circuit Courts of Appeals."

The foregoing sections of the Circuit Courts of Appeals Act were not in the list of repealed provisions in Judicial Code, § 297, supra, this title, vol. 5, p. 1065; and section 291 of said Judicial Code, supra, this title, vol. 5, p. 1083, provides that
Applicable to Circuit Courts of Appeals.


In Farrar v. Wheeler, (C. C. A. 1st Cir. 1906) 145 Fed. 482, 75 C. C. A. 386, it was said: "The series of statutes resulting in section 701 of the Revised Statutes was formally considered in Ballew v. U. S., (1895) 160 L. S. 187, 196, 16 S. Ct. 263, 40 U. S. (L. ed. 388, and sequence, and the flexible powers of the Supreme Court, which powers we hold by the Act establishing the Circuit Court of Appeals, was fully explained. At page 202 of 100 U. S., page 228 of 16 S. Ct., 40 U. S. (L. ed.) 388, the conclusion is as follows: 'From this, and from a review of the legislation on the subject of the powers conferred upon this court as a reviewing court, it follows as a necessary conclusion that general authority was given to it on a writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require.'"

Under this section the Circuit Court of Appeals is vested with power to modify as well as with power to affirm or reverse any judgment of the District Court, and in a case tried without a jury, where the findings of fact made by the court are undisputed, as well as when they are agreed upon by the parties, the proper judgment may be rendered thereon in the appellate tribunal after a reversal of the judgment of the trial court. U. S. v. Illinois Surety Co., (C. C. A. 7th Cir. 1915) 226 Fed. 653, 141 C. C. A. 409.

The Circuit Court of Appeals must affirm the judgment of the trial court if it finds on the record any reason why it considers sound, even though the district judge may have rejected that reason and rested his decree on some other ground. Dean v. Davis, (C. C. A. 4th Cir. 1914) 212 Fed. 88, 128 C. C. A. 623.


Instances of exercise of power.—In New Orleans Ins. Co. v. Piaggio, (1872) 16 Wall. 378, 21 U. S. (L. ed.) 358, the judgment was reversed, and a venire de novo refused and directions entered to the Circuit Court to modify the judgment by disallowing a single item of $5,000, which was specifically distinguished by the verdict of the jury. In New York, etc., R. Co. v. Estill, (1893) 147 U. S. 591, 13 S. Ct. 444, 37 U. S. (L. ed.) 292, wherein the jury found the issues for the plaintiff and allowed a large amount of interest as shown by the record, but assessed the total damages in lump, the Supreme Court directed a new judgment allowing the principal without interest. In American Nat. Bank v. Williams, (C. C. A. 8th Cir. 1906) 101 Fed. 943, 42 C. C. A. 101, the Circuit Court of Appeals reversed the judgment entered on a verdict of the jury and remitted the case with directions to rectify the allowance of interest, and to enter a judgment for the diminished amount and annulling it for the residue.

In Felton v. Spiro, (C. C. A. 6th Cir. 1897) 78 Fed. 576, 47 U. S. App. 402, 24 C. C. A. 321, it appeared that the error occurred after verdict with reference to a motion for a new trial and the Circuit Court of Appeals reversed the judgment, leaving the verdict to stand, but directing further proceedings with regard to what was subsequent thereon.

In Pennsylvania R. Co. v. Jones, (1894) 155 U. S. 333, 15 S. Ct. 136, 39 U. S. (L. ed.) 176, considered and approved in Washington Gas Light Co. v. Lansden, (1899) 172 U. S. 534, 19 S. Ct. 296, 42 U. S. (L. ed.) 543, the judgment below was reversed with directions to permit the plaintiffs below to elect to be nonsuited as to one defendant, and to take judgment on the verdict against the other defendants and with further direction that, if they did not so elect, the entire verdict was to be set aside and a new trial ordered.

In Great Western Coal Co. v. Chicago & Great Western R. Co., (C. C. A. 8th Cir. 1899) 98 Fed. 274, 39 C. C. A. 79, where the declaration contained two counts and a verdict had been rendered
for the plaintiff on the second count, and, by direction of the trial court, for the defendant on the first count, the judgment was reversed, with an order that the judgment on the second count should stand, but that there should be a new trial on the first.

In cases where the only error related to the assessment of damages, it has been ordered that, on a partial remittitur, the judgment be affirmed. In such cases it has sometimes been required that the remittitur be made in the court below and sometimes in the appellate court; and sometimes the judgment has been reversed and remanded to the court below for all proceedings with reference thereto. See Hansen v. Boyd, (1896) 161 U. S. 397, 16 S. Ct. 371, 40 U. S. (L. ed.) 746; Hazard Powder Co. v. Volger, (C. C. A. 8th Cir. 1893) 58 Fed. 122, 12 U. S. App. 655, 7 C. C. A. 466; Farrar v. Wheeler, (C. C. A. 1st Cir. 1906) 143 Fed. 482, 75 C. C. A. 386.

Modifying judgment.—Under this section the Circuit Court of Appeals is vested with power to modify, as well as to affirm or reverse, any judgment of the District Court. U. S. v. Illinois Surety Co., (C. C. A. 7th Cir. 1915) 226 Fed. 653, 141 C. C. A. 409.

Where all questions of fact have been tried and determined without error, the incorporation in the judgment of provisions which are unauthorized does not necessitate a new trial, but only a modification of the judgment. Mason City, etc., R. Co. v. Boynton, (C. C. A. 8th Cir. 1907) 158 Fed. 599, 85 C. C. A. 421.

Where there is error on the face of the record, in the allowance of damages by the jury, the Supreme Court need not direct a new trial, but may modify the judgment by disallowing the erroneous item and remanding the case with directions to enter a judgment for the residue. New Orleans, N. & N. R. Co. v. Mangigio, (1872) 16 Wall. 378, 21 U. S. (L. ed.) 353.

The judgment need not be reversed in its entirety for errors of the court in allowing items to which plaintiff was not entitled, but the Supreme Court may modify the judgment by reducing the amount, and so modified, affirm it. U. S. v. Eaton, (1898) 169 U. S. 323, 18 S. Ct. 374, 42 U. S. (L. ed.) 767.

Criminal case.—On affirmation of a judgment of conviction in a criminal case, the Circuit Court of Appeals may, at least with the consent of the United States attorney, authorize the trial judge to modify the sentence imposed. Scott v. U. S., (C. C. A. 6th Cir. 1908) 165 Fed. 172, 91 C. C. A. 306. And where there is error as to one of the counts in the indictment on which defendant was convicted and no error as to the other counts, the Supreme Court, after reversing the judgment which was on both counts, can annul the verdict upon the one count and leave it to stand unaffected by the other. Ballew v. U. S., (1896) 180 U. S. 157, 15 S. Ct. 283, 40 U. S. (L. ed.) 388.

Special findings control.—The Supreme Court can only direct such judgment as is authorized by the facts specially found by the court below. Pullman's Palace Car Co. v. Metropolitan St. R. Co., (1895) 157 U. S. 94, 15 S. Ct. 503, 39 U. S. (L. ed.) 632.

Rehearing below.—"After an appeal in equity to this court we cannot upon motion set aside a decree of the court below and grant a rehearing. We can only affirm, reverse, or modify the decree appealed from and that upon the hearing of the cause." Roemer v. Simon, (1875) 91 U. S. 150, 23 U. S. (L. ed.) 267, reversing Roemer v. Simon, (1875) 2 B. & A. Pat. Cas. 72, 20 Fed. Cas. No. 11,998.

When the Supreme Court has executed its power in a cause before it and its final decree or judgment requires some further act to be done, it cannot issue an execution but must send a special mandate to the court below to award it. Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. Sibbald v. U. S., (1858) 12 Pet. 488, 9 U. S. (L. ed.) 1167.

In executing a mandate from the Supreme Court, the court below must be guided by the mandate itself. It is the judgment of the Supreme Court transmitted to the inferior court, and when the direction contained in it is precise and unambiguous, it is the duty of the court to which it is directed to carry it into execution, and not to look elsewhere for authority to change its meaning. West v. Brashears, (1840) 14 Pet. 51, 10 U. S. (L. ed.) 350.

But where the court below is referred to testimony to ascertain the amount to be decreed and is authorized to take new evidence on the point, it may sometimes happen that there will be some uncertainty and ambiguity in the decree; and in such case the court below has unquestionably the right to resort to the opinion delivered at the time, in order to assist in expounding it. West v. Brashears, (1840) 14 Pet. 51, 10 U. S. (L. ed.) 350.

Execution of judgment—Effect of state statute.—The rule that it is not within the power of the trial court in entering the
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judgment of the Supreme Court to award a new trial, and it only remains to carry the judgment into execution, cannot apply to an action of ejectment where the party is entitled by the law of the state in which the action arose to a new trial without showing cause, and in regard to which the trial court possesses no discretion. The judgment entered in an action of ejectment in such case by direction of the Supreme Court stands subject to the same control by the lower court as if thus rendered in the first instance. Smale v. Mitchell, (1892) 143 U. S. 99, 12 S. Ct. 353, 36 U. S. (L. ed.) 90.

Rehearing or appeal after mandate.—After mandate no rehearing will be granted, and on a subsequent appeal nothing is brought up but the proceeding subsequent to the mandate. Sibbald v. U. S., (1838) 12 Pet. 488, 9 U. S. (L. ed.) 1167.

Second appeals or writs of error, as the case may be, will lie in certain cases where it is alleged that the mandate of the appellate court has not been properly executed; but the appeal or writ of error in such cases will bring up nothing for re-examination except the proceeding subsequent to the mandate. Needful explanations may be derived from the original record, but the re-examination cannot extend to anything that was decided in the antecedent appeal or writ of error. Stewart v. Salamon, (1878) 97 U. S. 361, 24 U. S. (L. ed.) 1044; Illinois v. Illinois Cent. R. Co., (1902) 184 U. S. 77, 22 S. Ct. 300, 46 U. S. (L. ed.) 440, citing numerous cases to the same effect.

And an appeal from a decree entered upon a mandate and in all respects according to its directions, will be dismissed with costs. Stewart v. Salamon, (1878) 97 U. S. 361, 24 U. S. (L. ed.) 1044. In Roberts v. Cooper, (1857) 20 How. 467, 15 U. S. (L. ed.) 467, in the last trial the Circuit Court was requested to give instructions to the jury contrary to the principles established by this court on the first trial, and nearly all the exceptions now urged against the charge are founded on such refusal. But we cannot be compelled on a second writ of error in the same case to review our decision on the first. It has been settled by the decisions of this court, that after a case has been brought here and decided and a mandate issued to the court below, if a second writ of error is sued out, it brings up for review nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to needless litigation. In chancery, a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate on chances from changes in its members. . . . We can now notice, therefore, only such errors as are alleged to have occurred in the decisions on questions which were peculiar to the second trial."

Remanding case with instructions.—Where the Supreme Court settles the law, but the findings of fact upon which the judgment is to be awarded are not sufficiently specific to fix the judgment, the cause may be remanded with instructions to make further inquiry as to the facts and to apply the law as found, to the facts so found. Little Miami, etc., v. Co. v. U. S., (1885) 106 U. S. 277, 2 S. Ct. 627, 27 U. S. (L. ed.) 724.

In Illinois Cent. R. Co. v. Illinois, (1892) 146 U. S. 387, 13 S. Ct. 110, 37 U. S. (L. ed.) 1018, the decree under review was affirmed in all respects except one as to which the cause was remanded for further investigation of the facts upon which it depended.

Entry of judgment by Supreme Court.—Where the only error disclosed in the appeal record is that the judgment rendered is erroneous, as against the defendants jointly and not severally, the Supreme Court will not set aside the verdict and remand the case for a new trial but will render the judgment which the court below should have rendered and certify the same to the trial court. Germainia Fire Ins. Co. v. Boykin, (1879) 12 Wall. 433, 20 U. S. (L. ed.) 442.

Bill of review after affirmation of decree.—Where the original decree has been affirmed, without reservation of right of review, a bill of review will not lie. Upon this question, in Southard v. Russell, (1853) 16 How. 547, 14 U. S. (L. ed.) 1055, it was said: "The better opinion is that a bill of review will not lie at all for errors of law alleged on the face of the decree after the judgment of the appellate court. . . . Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on appeal, unless the right is reserved in the decree of the appellate court or permission be given on an application to that court for the purpose." This appears to be the practice of the Court of Chancery and House of Lords in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between parties in chancery suits." While this was a dictum, it is quoted with approval in Kingsbury v. Buckner, (1890) 134 U. S. 650, 10 S. Ct. 638, 33 U. S. (L. ed.) 1047, and was followed in Franklin Sav. Bank v. Taylor, (C. A. 7th Cir. 1893) 53 Fed. 854, 9 U. S.
App. 406, 4 C. C. A. 55 (reversing (N. D. II. 1891) 50 Fed. 269), wherein the court regarded it applicable not only to a decree which has been affirmed but also to one entered upon the order of the appellate court.

And this is so although the judgment of affirmation was by an equally divided court...Leslie v. Urbana, (C. C. A. 7th Cir. 1893) 56 Fed. 702; 9 U. S. App. 576, 6 C. C. A. 111.

Execution for costs.—The rules of the Supreme Court and Circuit Courts of Appeals provide that when costs are allowed the clerk shall insert the amount in the mandate, with the bill of items annexed. Rule 24, Supreme Court Rules, 3 S. Ct. xii; Rule 31, Court of Appeals Rules, 150 Fed. cxxxiii, 79 C. C. A. cxxiiii. Therefore it has been held that to authorize a Circuit Court to issue execution for costs awarded by the Circuit Court of Appeals, the mandate should contain a special provision directing the same. American Trust, etc., Bank r. Zeigler Coal Co., (N. D. Ill. 1906) 165 Fed. 512.

In Corn Products Refining Co. v. Chicago Real Estate Loan, etc., Co., (C. C. A. 7th Cir. 1911) 185 Fed. 63, 107 C. C. A. 283, it was held that where, on appeal to the Circuit Court of Appeals, the bill of costs was taxed by the clerk and annexed to the mandate as required by the Circuit Court of Appeals Rule 29 (6), 150 Fed. ciii, 79 C. C. A. ciii, the mandate was sufficient, both for incorporation of the costs in the order with reference to costs in the Circuit Court, and for the issuance of an execution out of the Circuit Court for the collection of the residue after a set-off.


Sec. 1010. [Damages and costs on affirmation in error.] Where, upon a writ of error, judgment is affirmed in the Supreme Court or a circuit court, the court shall adjudge to the respondents in error just damages for his delay, and single or double costs, at its discretion. [R. S.]


"Circuit" Courts mentioned in this section were abolished by Judicial Code, § 289, supra; this title, vol. 5, p. 1082. The Circuit Court of Appeals Act of March 3, 1891, ch. 517, § 4, supra, p. 143, deprived the Circuit Courts of all appellate jurisdiction, but section 11 of said Act, supra, p. 170, continues in force, in respect of Circuit Courts of Appeals, "all provisions of law now in force regulating the methods and system of review, through appeals or writs of error."

I. Affirmance by Supreme Court, 228
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II. Affirmance by Circuit Court of Appeals, 230

I. AFFIRMANCE BY SUPREME COURT
   1. Power of Court, in General

   "Our experience teaches that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages, and we think this a proper case in which to say that hereafter more attention will be given to that subject, and the rule enforced both according to its letter and spirit." Whitney v. Cook, (1879) 99 U. S. 607, 25 U. S. (L. ed.) 446, per Mr. Chief Justice Waite.

   "Does the power to award damages for delay exist where a writ of error is dismissed because of the unsubstantial and frivolous character of the asserted federal right and the conclusive inference that the writ was prosecuted for mere delay, which arises from such ground for dismissal?" was the question which the court propounded to itself and answered in the affirmation of Deming v. Carlisle Packing Co., (1912) 226 U. S. 102, 33 S. Ct. 80, 57 U. S. (L. ed.) 140, a case of a writ of error to a state court.

   Where there was no power on a motion to dismiss to consider whether a case was prosecuted for delay only, a prayer for dismissal on such ground could not be allowed and damages could not be awarded. Amory v. Amory, (1875) 91 U. S. 356, 23 U. S. (L. ed.) 436, distinguished in Deming v. Carlisle Packing Co., (1912) 226 U. S. 102, 33 S. Ct. 80, 57 U. S. (L. ed.) 140.

   Where a judgment is affirmed upon a writ of error there can be no allowance of damages but for the delay. Cotton v. Wallace, (1796) 3 Dall. (Pa.) 302, 1 U. S. (L. ed.) 612.

   2. Allowance of Damages Discretionary

   "It is...solely for the decision of the Supreme Court whether any damages
or interest (as a part thereof) are to be allowed or not in cases of affirmation. If upon the affirmation no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages; and the Circuit Court, in carrying into effect the decree of affirmation, cannot enlarge the amount thereby decreed." Boyce v. Grundy, (1835) 9 Pet. 275, 9 U. S. (L. ed.) 127.

In West Wisconsin R. Co. v. Foley, (1877) 94 U. S. 100, 24 U. S. (L. ed.) 71, it was held that while, with Supreme Court Rule 23 in force, the court could not award as damages for delay more than ten per cent. upon the amount of the judgment, the court could, in the exercise of its discretion, give less.

3. Interest


4. Evidence of Purpose of Delay

In Deming v. Carlisle Packing Co., (1912) 226 U. S. 102, 33 S. Ct. 80, 57 U. S. (L. ed.) 140, a writ of error to a state court, the court said: "That the unsubstantial and frivolous character of the only federal question relied upon of necessity concluded the conclusion that the writ was prosecuted for delay, is, in our opinion, indubitable."

"It is clear that there is no error in this record. The answer does not state facts sufficient to constitute a defense to the action. No counsel have appeared to prosecute the suit, no brief has been filed, and no error assigned. We are entirely satisfied that the case has been brought here for delay." West Wisconsin R. Co. v. Foley, (1877) 94 U. S. 100, 24 U. S. (L. ed.) 71.

There can have been no ground for the writ of error under the former adjudications of this court, and there is no attempt to question these adjudications. We are obliged, therefore, to regard this writ of error as prosecuted for delay." Pennywitt v. Eaton, (1873) 15 Wall. 392, 21 U. S. (L. ed.) 114.

"There is nothing in the record which tends to show error in this judgment or to repel the conclusion that the writ is prosecuted merely for delay." Hennessy v. Sheldon, (1871) 12 Wall. 440, 20 U. S. (L. ed.) 446.

In Prentice v. Pickersgill, (1868) 6 Wall. 511, 18 U. S. (L. ed.) 790, where the defendant pleaded payment and also an arbitration and award, and utterly failed to prove either defense, the court decided that the writ of error was sued out merely for delay.

In Sutton v. Bancroft, (1860) 23 How. 320, 16 U. S. (L. ed.) 454, where damages for delay were awarded, the court said: "The plaintiffs in error were sued on a promissory note executed by them. They did not pretend to have any defense. They entered a false plea, which was overruled on demurrer. They refused to plead in bar. Judgment was entered against them in due form, for want of a plea. They do not pretend to allege any error in the proceedings."

Where the defendants did not except to the ruling of the trial court granting leave to the plaintiff to amend his declaration, and did not assign error in the Supreme Court, and failed to appear and prosecute their writ of error, and it was obvious, from an inspection of the transcript, that there was no error, in view of repeated decisions of the Supreme Court, damages for delay were awarded. Jenkins v. Banning, (1860) 23 How. 455, 16 U. S. (L. ed.) 580.

"No question was raised upon the trial of this case in the court below, for the consideration of this court, nor have the plaintiffs in error, by counsel or otherwise, made one here. The writ of error was obviously sued out for delay." Kilbourne v. State Sav. Inst., (1860) 22 How. 503, 16 U. S. (L. ed.) 370.

5. Damages Awarded

In Deming v. Carlisle Packing Co., (1912) 226 U. S. 102, 33 S. Ct. 80, 57 U. S. (L. ed.) 140, the court directed the imposition of a penalty, in addition to interest, of five per cent on the amount of the judgment recovered in the state court whose judgment was affirmed.

In a case where the Circuit Court of Appeals affirmed a judgment for the plaintiff in a personal injury action as against the contention that the plaintiff was shown to have been guilty of contributory negligence, the Supreme Court, concurring in the view that the evidence was sufficient to sustain the verdict, and there being no question of law involved, affirmed the judgment with ten per cent damages. Texas, etc., R. Co. v. Prater, (1913) 229 U. S. 177, 33 S. Ct. 637, 57 U. S. (L. ed.) 1139.

"As a superseded bond was given in this case, and thus the writ of error has delayed the proceedings on the judgment, and as it appears to us to have been sued out merely for delay, we award damages on the amount of the judgment at the rate of ten per centum, in addition to interest." Wilson v. Everett, (1891) 139 U. S. 616, 11 S. Ct. 664, 55 U. S. (L. ed.) 286. The same award was made under the same circumstances in Gregory Consol. Min. Co. v. Starr, (1891) 141 U. S. 222, 35 S. Ct. 715, 35 U. S. (L. ed.) 715.


II. AFFIRMANCE BY CIRCUIT COURT OF APPEALS

It cannot be said that a writ of error to review a judgment for the plaintiff in an action for personal injury was sued out for delay, so as to authorize ten per cent damages to be assessed under rule 30 of the Circuit Court of Appeals (130 Fed. xxxv) where the Circuit Court of Appeals had construed a state statute in accordance with plaintiff's contention prior to a binding construction thereof to the contrary by the highest state court. Joplin, etc., R. Co. v. Payne, (C. C. A. 8th Cir. 1912) 194 Fed. 387, 114 C. C. A. 305. Nor, in an action for libel, where a state statute involved had not been construed by the state Supreme Court and there was some conflict of authorities on the question, Times-Democrat Pub. Co. v. Mozez, (C. C. A. 8th Cir. 1903) 136 Fed. 761, 69 C. C. A. 418.

But ten per cent. damages were awarded where "the plaintiff in error must have known that no question could, upon the record, be presented to the court for its decision." Chicago Terminal Transfer R. Co. v. Bamberger, (C. C. A. 7th Cir. 1904) 130 Fed. 884, 65 C. C. A. 64.

Sec. 1011. [Reversal on error limited.] There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact. [R. S.]

Act of Sept. 24, 1789, ch. 20, 1 Stat. L. 84; Act of March 2, 1803, ch. 40, 2 Stat. L. 244.

The word "any" was inserted by Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 318, in place of the word "and" appearing in the section as originally enacted after the word "ruling."

This section is applicable to review by the Circuit Court of Appeals on appeal or writ of error. See note to R. S. sec. 1010, supra.

See particularly as to review of judgment rendered on special findings, R. S. sec. 700, supra, p. 205; and see the last division V. infra, p. 231, of the note here following.

I. Matters reviewable generally, 230

II. Applicability generally of section, 230

III. Plea of abatement, 230

IV. Jurisdictional questions, 231

V. Questions of fact and evidence, 231

I. MATTERS REVIEWABLE GENERALLY

Decisions upon the admission and exclusion of evidence, upon questions of law, upon the question whether or not there is any substantial evidence to warrant the finding, and upon the question whether or not the finding supports the judgment, are the only rulings at the trial that may be reviewed. Barnsdall v. Waltemeyer, (C. C. A. 8th Cir. 1905) 142 Fed. 415, 73 C. C. A. 615.

Upon a writ of error only questions of law apparent on the record can be considered; there can be no inquiry whether there was error in dealing with questions of fact. Behn v. Campbell, (1907) 205 U. S. 403, 27 S. Ct. 602, 51 U. S. (L. ed.) 857.

The issue of null null record is an issue of fact, and as such no writ of error lies from the judgment of the District Court on that fact. U. S. v. Cook, (1819) 2 Mason 22, 25 Fed. Cas. No. 14,851.

Re-examination of allowance.—Whether the mere amount of an allowance under a statute can be re-examined in the Supreme Court by virtue of this section was left open in question in Meeker v. Lehigh Valley R. Co., (1915) 236 U. S. 412, 35 S. Ct. 328, 59 U. S. (L. ed.) 644, Ann. Cas. 19166 691.

II. APPLICABILITY GENERALLY OF SECTION

This section is applicable to the Circuit Court of Appeals.—Hall v. Houghton, etc., Mercantile Co., (C. C. A. 8th Cir. 1894) 60 Fed. 350, 10 U. S. App. 644, 8 C. C. A. 661; Paul v. Delaware, etc., R. Co., (E. D. N. Y. 1904) 130 Fed. 951; U. S. Fidelity, etc., Co. v. Woodson County, (C. C. A. 8th Cir. 1900) 143 Fed. 144, 76 C. C. A. 114.

Application to case coming from state court.—"This provision has been a part of the judiciary acts from the beginning, and often has been applied upon writs of error to the Circuit and District Courts, but never to a case coming here from a state court." Buck Stove, etc., Co. v. Vick- ers, (1912) 226 U. S. 205, 33 S. Ct. 41, 57 U. S. (L. ed.) 189.

III. PLEA IN ABATEMENT

In general.—A judgment may not be reversed in the federal courts for error in ruling any plea in abatement. Barnsdall v. Waltzmeyer, (C. C. A. 8th Cir. 1905) 142 Fed. 415, 73 C. C. A. 615; Cunning-

The action of a trial court in not sustaining a plea in abatement interposed by the defendants to an indictment, based on the ground that it was procured by the wrongful conduct before the grand jury of testimony and evidence which was obtained by an illegal search and seizure of their private papers and documents, is not a ground for reversal, the plea having been heard by the trial court upon pleas, answer, replication and evidence introduced by both parties, the question involved being wholly a question of fact. Mounday v. U. S., (C. C. A. 8th Cir. 1915) 225 Fed. 965, 140 C. C. A. 93.

What is plea in abatement.—An answer in an action on a judgment in a federal court, setting up a parol agreement between the parties that in consideration of the defendant's consent to the taking of the judgment the plaintiff should take no steps for its enforcement until the termination of another suit which is still pending, is in effect a plea in abatement under the Wisconsin practice, and under this section. Marinette Sawmill Co. v. Sce, (C. C. A. 7th Cir. 1909) 174 Fed. 592, 98 C. C. A. 344.

A judgment overruling a demurrer to a plea in abatement, without further order or judgment in the cause, is not subject to review under this section. Cunningham v. Rodgers, (C. C. A. 9th Cir. 1909) 171 Fed. 835, 96 C. C. A. 507.

The plea of another action pending is a plea in abatement within the meaning of this section, and judgment thereon is not subject to revision in the Supreme Court. Piquignot v. Pennsylvania R. Co., (1853) 16 How. 104. 14 U. S. (L. ed.) 983; Stephens v. Monongahela Nat. Bank, (1884) 111 U. S. 197, 4 S. Ct. 336, 28 U. S. (L. ed.) 399.

IV. JURISDICTIONAL QUESTIONS


The jurisdiction of the court referred to in the exception in this statute seems to relate to jurisdiction as to subject matter, and clearly shows that pleas in abatement are not to be favored. Hinds v. Keith, (C. C. A: 5th Cir. 1893) 57 Fed. 10, 13 U. S. App. 222, 6 C. C. A. 231.

V. QUESTIONS OF FACT AND EVIDENCE


"When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it. and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the court." Pennsylvania Casualty Co. v. Whiteway, (C. C. A. 9th Cir. 1914) 210 Fed. 782, 127 C. C. A. 332.

So the United States Supreme Court has said in a case as to a finding of fact that there was a contract: "As to the finding of fact that there was a contract by the first administrator giving to the attorneys an interest in the proceeds of the claim, with authority to compromise it, this court is prohibited, by section 1011 of the Revised Statutes, from reversing a case on a writ of error, except in fact. In this case there was a dispute as to the fact, and evidence on both sides, and it was a fair exercise of the judgment of the court, on the evidence before it, to make the finding of fact it did. Under such circumstances, an erroneous finding of the fact cannot be held to be an error of law." Jefferies v. Mutual Life Ins. Co., (1884) 110 U. S. 305, 4 S. Ct. 8, 28 U. S. (L. ed.) 150.
And in another case the Supreme Court has declared: "Questions of fact will not be reviewed by this court in common-law actions, nor can the questions of law presented in such cases be re-examined here unless the matters of fact out of which they arise are, in some authorized form, given in the record." Crow v. Brewer, (1873) 19 Wall. 70, 22 U. S. (L. ed.) 63.

Again the Circuit Court of Appeals has said in this connection: "The court below made its finding upon the statement and the evidence, and it must stand." Section 1011, Rev. St., which governs this court in this matter, provides that 'there shall be no reversal in the supreme court or in a circuit court upon a writ of error ... for any error in fact.' No requests for any declarations of law were made to the court before the trial closed, and that court made no such declarations. No request for any declaration or holding that the evidence was insufficient to sustain a finding or judgment in favor of the defendant in error was made, and none that the court should make any other finding than that it actually did make upon any of the specific questions submitted to it. The result is that none of these questions can be considered. On a writ of error only those questions of law which were presented to and ruled upon in the court below in the trial of the case are subject to review in this court. The finding of the court, whether general or special, performs the office of the verdict of a jury. When it is made and filed, the trial is ended. Even the question whether or not the evidence is sufficient to sustain the finding can only be presented by a request for a peremptory holding that upon the undisputed facts the finding must be otherwise." Citizens' Bank v. Farwell, (C. C. A. 8th Cir. 1894) 63 Fed. 117, 27 C. C. A. 266, 11 C. C. A. 108.

This principle applies in an action to recover damages for personal injuries alleged to be caused by the negligence of another. In a case where this question was considered the court said: "Careful examination of the evidence has fully satisfied us that, as a whole, it sufficed to present, as matter of fact for determination by the jury, the question whether there was negligence on the defendant's part, which, of itself and without contributory negligence on the part of the plaintiff, was the proximate and decisive cause of his injury; and it would be useless to consider the testimony in detail for the purpose of ascertaining whether the jury's conclusion upon this question was right, for, even if we believed it to be wrong, we would have no authority to correct it." Pittsburgh & R. Co. v. Sullivan, (C. C. A. 3d Cir. 1909) 166 Fed. 749, 92 C. C. A. 429.

If a defendant below desires to test, on writ of error in the Circuit Court of Appeals, the sufficiency of the evidence to sustain the verdict, he should ask at the close of the whole evidence a peremptory instruction for a verdict in his behalf. Not having done so, the court cannot consider the evidence with a view of determining whether it was sufficient to warrant a verdict for the plaintiff. Auckland v. Stabler, (C. C. A. 8th Cir. 1895) 50 Fed. 689, 4 U. S. App. 324, 1 C. C. A. 616; German Ins. Co. v. Frederick, (C. C. A. 8th Cir. 1893) 58 Fed. 144, 19 L. J. Co. v. Snowdon, (C. C. A. 8th Cir. 1893) 58 Fed. 342, 12 U. S. App. 704, 7 C. C. A. 264; Lincoln v. Sun Vapor Street Light Co., (C. C. A. 8th Cir. 1894) 59 Fed. 756, 19 U. S. App. 431, 8 C. C. A. 253; Western Coal, etc., Co. v. Ingraham, (C. C. A. 8th Cir. 1895) 70 Fed. 219, 36 U. S. App. 1, 17 C. C. A. 71; Joplin, etc., R. Co. v. Payne, (C. C. A. 8th Cir. 1912) 194 Fed. 387, 114 C. C. A. 305.

Where the evidence is sufficient to require the submission of a case to the jury, an assignment of error based on the denial of defendant's request for a directed verdict cannot be sustained. Chicago, etc., R. Co. v. Newell, (C. C. A. 8th Cir. 1909) 174 Fed. 394, 93 C. C. A. 1.

Special verdict.—Every special verdict, in order to enable the appellate court to act upon it, must find the facts on which the court is to pronounce the judgment according to law, and not merely state the evidence of facts. In this manner it becomes part of the record. Suydam v. Williamson, (1857) 20 How. 427, 15 U. S. (L. ed.) 978.

General verdict.—Where there is no demurrer to the declaration or other exception to the sufficiency of the pleadings, no exception to the rulings of the court in the progress of the trial, in the admission or exclusion of evidence, or otherwise, no request for a ruling upon the legal sufficiency or effect of the verdict, no evidence, and no motion in arrest of judgment, and the only matter presented by the bill of exceptions which the appellate court is asked to review arises upon the exception to the general finding by the court upon the evidence adduced at the trial, and where the trial is held without a jury, the general finding is conclusive of the issues of fact, and there is no question of law presented by the record, and under this section a revision is forbidden. Martinton v. Fairbanks, (1888) 115 U. S. 870, 5 S. Ct. 321, 28 U. S. (L. ed.) 692; World's Columbian Exposition Co. v. Republic of France, (C. C. A. 7th Cir. 1899) 96 Fed. 687, 38 C. C. A. 483.

If a general finding depends upon the weighing of conflicting evidence it is a decision on the fact, the revision of which is forbidden by this section. Martinton v. Fairbanks, (1885) 112 U. S. 870, 5 S. Ct. 321, 28 U. S. (L. ed.) 682.

The jury's finding of facts on conflicting evidence is conclusive. Holk v. Kizer, (C.
to a consideration of the correctness of its finding on the law, if there is any evidence in support of the finding of fact." Interstate Life Assur. Co. v. Dalton, (C. C. A. 9th Cir. 1908) 185 Fed. 76, 91 C. C. A. 210, 29 L. R. A. (N. S.) 722.


The rule in respect to writs of error is that, if there be any substantial evidence tending to support the verdict, it is enough, the proper weight to be given to the evidence not being within the province of the appellate court, which is confined to a consideration of exceptions to admission or rejection of evidence, and to the charge of the court and its refusal to charge. Montana Tonopah Mining Co. v. Dunlap, (C. C. A. 9th Cir. 1912) 196 Fed. 612, 116 C. C. A. 286.


Setting aside verdict as contrary to evidence.—The action of the trial court in setting aside or refusing to set aside a verdict as contrary to the evidence is not subject to review in the Circuit Court of Appeals, being a matter within the discretion of the lower court. J. W. Bishop Co. v. Shelhorse, (C. C. A. 4th Cir. 1905) 141 Fed. 643, 72 C. C. A. 337.

Where the determination of issues of fact is left to the trial judge upon review (other than in equity and admiralty suits) such questions of fact are not brought before the appellate court, which must accept the findings of the trial court thereon. U. S. v. Two Baskets, (C. C. A. 2d Cir. 1913) 205 Fed. 37, 123 C. C. A. 310.

So it is said that "When a jury is waived, and the cause is tried by the court, the general finding of the court for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in an appellate court unless the lack of evidence to sustain the finding has been suggested by a request for a ruling thereon, or a motion for judgment, or some motion to present to the court the issue of law so involved, before the close of the trial." Pennsylvania Casualty Co. v. Whiteway, (C. C. A. 9th Cir. 1914) 210 Fed. 782, 127 C. C. A. 332.

And in another case it is declared that "When in an action at law, a jury is waived and the court tries an issue of fact and makes a special finding upon which the substantial evidence is conflicting, the losing party may not reverse it by writ of error because it was not sustained by the weight of evidence." Barnsdall v. Waltemeyer, (C. C. A. 8th Cir. 1905) 142 Fed. 415, 73 C. C. A. 515.

Therefore, "when an action at law is tried without a jury by a federal court, and it makes a general finding, or a special finding of facts, the Act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, 'for any error of fact' (R. S. sec. 1011), and a finding of fact contrary to the weight of the evidence is an error of fact." Wear v. Imperial Window Glass Co., (C. C. A. 8th Cir. 1915) 224 Fed. 60, 130 C. C. A. 622.


The findings of fact by a consent referee are not reviewable on a writ of error further than to ascertain if they are sufficient to warrant the judgment. U. S. Fidelity, etc., Co. v. Hampton, (C. C. A. 6th Cir. 1908) 134 Fed. 744, 67 C. C. A. 638.

Sec. 10. [Remand of cases reviewed by supreme court and by circuit courts of appeals.] That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ of error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause
shall be remanded to the said district or circuit court for further proceedings to be there taken in pursuance of such determination. [36 Stat. L. 829.]

This section is from the Circuit Court of Appeals Act of March 3, 1891, ch. 517. Sections 5 and 6 of said Act are given in full in the note to Judicial Code, § 238, in vol. 5, p. 794. As to other sections of said Act see section 4 thereof, supra, p. 143, and the note thereto.

"Circuit" Courts, mentioned in the text section, were repealed and their powers and duties imposed upon District Courts by Judicial Code, §§ 289–291, in vol. 5, pp. 1062, 1083.

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I. DISPOSITION OF CASE ON APPEAL OR WRIT OF ERROR

Remand of admiralty case.—Upon determination by the Circuit Court of Appeals of an admiralty appeal the cause should be remanded to the court below, although, prior to the creation of the Circuit Court of Appeals, decrees on admiralty appeals in the Circuit Court were entered there and enforced by that court without remand to the District Court. Chicago Ins. Co. v. Graham, etc., Transp. Co. (C. C. A. 7th Cir. 1901) 108 Fed. 271, 47 C. C. A. 320.

Control of funds in admiralty case.—As the Circuit Court of Appeals does not execute its own decrees, "the funds upon an appeal from the District Court in an admiralty cause remain in the District Court, and the Circuit Court of Appeals has no control over them, or over the District Court in respect to them, except when the cause is reviewed and determined and remanded for further proceedings, in pursuance of the determination." Mignano v. McAndrews, (C. C. A. 2d Cir. 1892) 56 Fed. 1 U. S. App. 312, 4 C. C. A. 253.

Judgments in criminal cases.—"Where error is discovered in the proceedings in a criminal case properly presented to a Circuit Court of Appeals for review, it is empowered to enter such judgment and to impose such sentence as the law prescribes, or to reverse the judgment, and direct the court below to take such further proceedings as the justice of the case may require." Whitworth v. U. S., (C. C. A. 8th Cir. 1902) 114 Fed. 302, 52 C. C. A. 214.

Under this section, in view of part of section 11 of the same Act, as given supra, p. 170, and the Act of March 3, 1879, ch. 176, § 3, set forth in note under the text of said section 11, supra, at p. 170, and the Act of Feb. 6, 1889, ch. 113, § 6, given supra, p. 146, it was held that the Circuit Court of Appeals on reversing the judgment in a criminal case for an excessive sentence may correct the error by remanding with instructions to modify the judgment by remitting the excess. Hanley v. U. S., (C. C. A. 2d Cir. 1903) 123 Fed. 860, 64 C. C. A. 153. See also Bower v. U. S., (1895) 160 U. S. 187, 16 S. Ct. 263, 40 U. S. (L. ed.) 388, where the court, in consideration of all of the provisions above cited in this paragraph, held that it had authority "on writ of error to take such action as the ends of justice, not only in civil but in criminal cases, might require," and in the case sub judice, where there was a general verdict of guilty on an indictment containing two counts, and it appearing that there was error only as to one count, the general judgment was reversed with instructions to enter judgment upon the other count, and for such proceedings with reference to the remaining count as may be in conformity to law.


Where a Circuit Court was without jurisdiction of a cause because of the absence from the complaint of necessary jurisdictional allegations, the Circuit Court of Appeals, in reversing the judgment therein for that reason, may properly remand the cause and direct that plaintiff be permitted to amend the complaint in that respect, especially where the question of jurisdiction was not raised in the trial court. Puget Sound Nav. Co. v. Lavendar, (C. C. A. 9th Cir. 1907) 156 Fed. 156, 84 C. C. A. 259. See also Eaton v. Hugus, (C. C. A. 8th Cir. 1905) 141 Fed. 64, 72 C. C. A. 74, 5 Ann. Cas. 487. Jurisdictional averments as to diversity of citizenship are now amendable in the appellate court in certain cases, provided in Judicial Code, § 274e, supra, this title, vol. 5, p. 1061.

But a Circuit Court of Appeals is without power to dismiss an appeal on motion of the appellant and remand the cause to the court below with directions to permit the amendment of a pleading on a showing that facts were inadvertently omitted therefrom, the omission not being known to appellant until after the appeal was taken.

Upon reversing a decree for the plaintiff in a suit in equity, the Circuit Court of Appeals declined to reserve leave to the court below to permit an amendment of the plaintiff's bill where the record contained no proof to sustain the proposed amendment, and therefore the amendment, if allowed, would require the opening of the case below for further proofs. "It is not at all a case where a complainant has proved his case, but his allegations are found by the appellate court to be inapt." American Bell Telephone Co. v. U. S., (C. C. A. 1st Cir. 1895) 68 Fed. 542, 33 U. S. App. 236, 15 C. C. A. 589, decree affirmed (1897) 167 U. S. 224, 17 S. Ct. 809, 42 U. S. (L. ed.) 144.

In a suit for infringement of a trademark and for unfair competition the Circuit Court of Appeals reversed a decree for the complainant, but of its own motion directed the court below to permit the complainant to amend so as to enable him to obtain preventive relief against the complainant for unfair competition, where the record showed unusual methods of competition to which the defendant had resorted, and the manifestly injurious effects on the complainant's business that a continuance of such methods would have and also the misleading of the public. Dietz v. Horton Mfg. Co., (C. C. A. 8th Cir. 1909) 170 Fed. 865, 96 C. C. A. 41.

Where the Circuit Court of Appeals affirmed a decree dismissing a bill for infringement of a patent, and held that the proof did not show an act of infringement by the defendant, that court refused to instruct the court below to allow amendments of the pleadings and process whereby the case could proceed against a new party also accused of an infringement. National Casket Co. v. Stolts, (C. C. A. 2d Cir. 1906) 135 Fed. 534, 68 C. C. A. 84.

In Post v. Beacon Vacuum Pump, etc., Co., (C. C. A. 1st Cir. 1898) 89 Fed. 1, 50 U. S. App. 407, 32 C. C. A. 181, after affirmance of a decree dismissing a bill on demurrer, the complainant's motion that leave be reserved to move the court below to allow an amendment of the bill was denied, because "for the court to grant this motion would be merely to permit a continuance of litigation where there are no apparent equities sufficiently strong to justify it."

In Hawkins v. Cleveland, etc., R. Co., (C. C. A. 7th Cir. 1900) 99 Fed. 322, 39 C. C. A. 538, reversing a decree, it is said: "The mandate was in the customary form. demanding that such further proceedings be had in said cause as are not inconsistent with the opinion of this court, as, according to right and justice and the laws of the United States, ought to be had. . . . The effect was to put the case in the same posture as if no decree had ever been entered, and in that situation the court had the same authority to permit an amendment of the petition or bill of the appellee for the purpose of enlarging the issue and of admitting further proofs as it had before the entry of the reversed decree. The case of In re Ranford Ports, etc., Co., (1895) 100 U. S. 247, 16 S. Ct. 291, 40 U. S. (L. ed.) 414, affords an apt precedent." Hence, a motion to modify the mandate by directing the lower court to permit further pleading was denied because the proposed amendment was unnecessary.

In Watson v. Stevens, (C. C. A. 1st Cir. 1892) 53 Fed. 31, 5 U. S. App. 215, 3 C. C. A. 411, under circumstances there stated, the court, on petition of appellee after a decree of reversal, reserved to appellee liberty to file in the court below an application for leave to file a bill of review, and proceed thereon and on such bill of review as the lower court might determine, and directed that such order should form a part of the mandate to be issued. Followed in Smith v. Weeks, (C. C. A. 1st Cir. 1893) 53 Fed. 708, 5 U. S. App. 240, 3 C. C. A. 644.

Where the Circuit Court of Appeals affirmed a decree, the affirman'c turning on an issue which the appellant defendants did not anticipate, and which was first raised by the appellate court itself, and the appellants suggested that the issue could be met by further proofs, the Circuit Court of Appeals reserved to the appellants liberty to file in the court below an application for leave to file a bill of review, or leave to adopt other appropriate methods, and to proceed thereon as that court might determine with reference to the new issue above mentioned. Woodward v. Boston Lasting Mach. Co., (C. C. A. 1st Cir. 1894) 63 Fed. 609, 21 U. S. App. 463, 11 C. C. A. 353.

Remand with directions.—Where an order of the Circuit (now District) Court refusing to dissolve and continuing an injunction pendente lite against the sale of certain goods by a sheriff, who had seized them on execution, was affirmed by the Circuit Court of Appeals, the latter suggested that a present sale would be for the pecuniary advantage of all parties, and that by consent of the parties the goods should be sold and the proceeds placed in the registry of the court to await the final decision upon the merits; and the court below was instructed that it had the power so to modify its order and was directed "to modify the same upon application of the parties, as it may be advised." Haddan v. Dooley, (C. C. A. 2d Cir. 1896) 74 Fed. 429, 38 U. S. App. 651, 20 C. C. A. 484.

Where an action essentially one at law and without a single equitable feature in it was docketed on the equity side of the federal Circuit Court, and was treated as a cause in equity without objection by either party, and a decree was entered dismissing the suit, from which decree the complainant took an appeal instead of suing out a
write of error, the Circuit Court of Appeals, upon objection being made by appellees that the proper mode of review was by writ of error, the time within which a writ of error could be brought having elapsed before the objection was made, reversed the decree of the court below for want of jurisdiction, with instructions to remand the cause to the law docket, and to reframe the pleadings accordingly. McConnell v. Provident Sav. Life Assur. Soc., (C. C. A. 8th Cir. 1915) 69 Fed. 113, 37 U. S. App. 213, 16 C. C. A. 172. Also germane to such a situation is the Act of Sept. 6, 1916, ch. 448, § 4, 39 Stat. L. 727, set forth in note to Judicial Code, § 274h, supra, this title, vol. 5, p. 1061.

Motion to modify order of affirmance.—In Minnesota Tribune Co. v. Associated Press, (C. C. A. 8th Cir. 1908) 84 Fed. 921, 56 U. S. App. 52, 28 C. C. A. 566, after affirmance of a decree dismissing a bill on the merits, the complainant moved to modify the order of affirmance, so as to direct the dismissal of the bill, without prejudice to its right to sue at law. But the Court of Appeals denied the motion: "First, because the majority of the court are of opinion that the decree of the circuit court dismissing the cause of action on its merits was right; and, second, because the motion to modify the order of affirmance in this court was not filed until long after the term had elapsed at which the order of affirmance was entered."

Construction of mandate.—In U. S. v. St. Louis Terminal R. Ass'n, (1915) 236 U. S. 194, 35 S. Ct. 496, 59 U. S. (L. ed.) 535, it appeared that a mandate from the Supreme Court, which remedied a suit to enforce the provisions of the Sherman Anti-trust Act against a combination of railway terminal facilities, directed the court below to dissolve the combination "upon failure of the parties to come to an agreement" in accord with the opinion of the court. On second appeal the court said that the word "parties" in the mandate as above quoted embraced only the parties to the agreement from which the combination was dissolved, and did not include the United States—it did not mean "parties to the suit."

A motion to revoke a mandate and to issue a new mandate directing the entry of a different decree from the one required to be entered by the original mandate, in beyond the power of the court to grant, where the motion is made after the lapse of the term at which the decree was rendered and the court's control of its decree was in no manner preserved for a succeeding term. Reynolds v. Manhattan Trust Co., (C. C. A. 8th Cir. 1901) 100 Fed. 97, 48 C. C. A. 249. The court said: "In this instance we are not asked to correct a mere clerical mistake made in the entry of a judgment, or to enter a judgment orally announced, which the clerk failed to enter, or to expunge a judgment which, when entered, was absolutely void for want of jurisdiction over the parties, all of which mistakes may doubtless be corrected at any time." See also for a case where a motion to recall a mandate was denied, the motion not having been made until several months after the end of the term at which the judgment was given and the mandate sent down, Miocene Ditch Co. v. Campion Min., etc., Co., (C. C. A. 9th Cir. 1912) 197 Fed. 497, 117 C. C. A. 61.

Recall of mandate unnecessary for further appeal.—In Ritter v. Mutual Life Ins. Co., (C. C. A. 3d Cir. 1898) 72 Fed. 567, 39 U. S. App. 189, 19 C. C. A. 41, after affirmance of a decree, the court denied a petition that the mandate be recalled and the record be directed to be returned to the lower court, so that the petitioner might appeal to the Supreme Court, since the petitioner did not need a recall of the mandate for that purpose, as "the transcript of the record is never remitted to the court below, but remains in this court."

Certiorari by Supreme Court after remand.—The provision that in a case coming from a Circuit Court of Appeals "the cause shall be remanded to the proper District or Circuit Court" is not inconsistent with the power of the Supreme Court to issue a certiorari in a case that was an original proceeding in mandamus in the Circuit Court of Appeals. McClellan v. Carland, (1910) 217 U. S. 268, 30 S. Ct. 501, 54 U. S. (L. ed.) 762.

Proceeding in court below after remand.—The judge of the Circuit (now District) Court cannot open the case when it is remanded. He cannot in any way modify the judgment of the higher court. He has no judicial function to exercise in the matter. He cannot exercise any discretion. All that can be done is to execute the judgment of the appellate court, and this is merely a ministerial act. Moore v. Chattanooga Electric R. Co., (1908) 119 Tenn. 710, 109 S. W. 497, 16 L. R. A. (N. S.) 978.

II. DISPOSITION OF CASE ON CERTIORARI

See cases cited in note to Judicial Code, § 240, supra, this title, vol. 5, at p. 862, under V. Hearing and Examination, Determination and Remand.

Mandate on certiorari.—As a general rule where a case is reviewed and determined on certiorari to the Circuit Court of Appeals, the mandate of the Supreme Court to avoid circuity will go directly to the court of original jurisdiction. But where the only ground for issuing the certiorari was the failure of the Circuit Court of Appeals to consider the case before it, an exception to the general rule is presented, and the case should be remanded to the Circuit Court of Appeals, to the end that the duty to hear and decide it may be performed. Lutcher, etc., Lumber Co. v. Knight, (1910) 217 U. S. 267, 30 S. Ct. 505, 54 U. S. (L. ed.) 767.
XI. MISCELLANEOUS PROVISIONS

Sec. 5. [Action by or against federal railroad company, excluded from federal jurisdiction.] No court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an Act of Congress. [38 Stat. L. 804.]

This section is from the Act of Jan. 23, 1913, ch. 22. 38 Stat. L. 803, entitled "An Act To amend an Act entitled 'An Act to codify, revise and amend the laws relating to the judiciary' approved March third, nineteen hundred and eleven" — the Act thus cited being the Judicial Code.


Section 2 also provided for review by the Circuit Courts of Appeals of final judgments and decrees of the Supreme Court of the Territory of Hawaii and of Porto Rico and is given supra, p. 143.

Section 3 repeated Judicial Code. § 234, supra, this title, vol. 5, p. 593.

Section 4 provided for finality of judgments of Circuit Courts of Appeals in cases and controversies arising under the Bankruptcy Act, and is given in title BANKRUPTCY, vol. 1, p. 583; also supra, this title, p. 146.

Section 6 provided that the Act should not affect pending cases, nor be deemed to affect the provisions of the Criminal Appeals Act of March 2, 1907, which latter Act and said section 6 following it are given supra, pp. 146 et seq.

Prior to the enactment of the text section 3 an action by or against a railroad company incorporated under an Act of Congress was within the jurisdiction of the United States District Court as defined in Judicial Code, § 28, paragraph "First," supra, this title, vol. 4, p. 942; see for more, and said section 24 ch. 4 at pp. 926-927.

Effect of statute. — This section took away from courts of the United States jurisdiction in actions by or against any railroad company on the ground that such company was incorporated under an Act of Congress. Actions at suit were brought at the time of its passage were excepted from the provisions. See Texas, et al. v. Colorado, etc., 239 U. S. 346.

Sec. 84C. [Pen of grand and petit juries.] For actual attendance at any court of records and for the "penalty necessarily suggested in going to and returning from the same," these jurors a fine of 5.}

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JUDICIARY

ch. 52, § 2, 21 Stat. L. 43, relating to the drawing, term of service, and qualifications of jurors, the latter provisions being incorporated in Judicial Code, §§ 275, 276, 278 and 280, supra, this title, vol. 5, pp. 1063–1071 and 1077, and thereby repealed by force of the last paragraph of Judicial Code, § 297, supra, this title, vol. 5, p. 1088. Said R. S. secs. 820 and 821 were also expressly repealed by the Act of May 13, 1884, ch. 46, 23 Stat. L. 22.

The Act of Aug. 8, 1888, ch. 785, 25 Stat. L. 386, entitled “An Act to authorize the juries of the United States circuit and district courts to be used interchangeably, and to provide for drawing talemen,” was nullified by the abolition of the Circuit Courts by Judicial Code, § 298, supra, this title, vol. 5, p. 1082.

Jurors’ fees.—Jurors coming from a distance and who receive no mileage other than at the beginning and end of the term are entitled to a per diem for those days during which the panel stands adjourned, and not merely, as is the case of jurors living within the city and districts, for those days to which from time to time adjournments are taken and on which they appear and answer to their names. Parker v. Kempton, (1849) 1 Wall. Jr. C. C. 344, 18 Fed. Cas. No. 10,741.

Computation of mileage.—Where grand jurors in response to a summons attended court on the first day of the term, and on the same day were discharged until a stated day, and on that day they again attended the court and were finally discharged, it was held that they were entitled to mileage compensation for two round trips to court. In re Grand Jurors’ Mileage, (D. C. Del. 1903) 120 Fed. 307.

The legal fiction that a term of court is but one day has no application to the allowance of mileage compensation under this section. In re Grand Jurors’ Mileage, (D. C. Del. 1903) 120 Fed. 307.


[Jurors’ per diem.] That on and after the passage of this Act the per diem pay of each juror, grand or petit, in any court of the United States, shall be three dollars a day instead of two dollars a day as now provided by law. [32 Stat. L. 396.]

This constituted the Act of June 21, 1902, ch. 1138, 32 Stat. L. 396, entitled “An Act To fix the fees of jurors in the United States courts.”

See the preceding R. S. sec. 532 in the text.

[SEC. 1.] [Jurors and witnesses — fees and mileage in certain states — double fees prohibited.] • • • Jurors and witnesses in the United States courts in the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, and Utah, and in the Territories of New Mexico and Arizona shall be entitled to receive for actual attendance at any court or courts and for the time necessarily occupied in going to and returning from the same, three dollars a day, and fifteen cents for each mile necessarily traveled over any stage line, or by private conveyance, and five cents for each mile by any railway or steamship in going to and returning from said courts: Provided, That no constructive or double mileage fees shall be allowed by reason of any person being summoned as both a witness and juror, or as a witness in two or more cases pending in the same court and triable at the same term thereof. [35 Stat. L. 377.]

This is from the Sundry Civil Appropriation Act of May 27, 1908, ch. 200; and there has been no later provision on the subject. Since the enactment of the text provision the territories of Arizona and New Mexico have been admitted into the Union, as shown supra, this title, vol. 5, pp. 554. 578.

The provision in the text superseded the Act of Aug. 3, 1892, ch. 361, entitled “An Act fixing the fees of jurors and witnesses in the United States courts in certain States and Territories,” which read as follows:
"That jurors and witnesses in the United States courts in the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, and Colorado, and in the Territories of New Mexico, Arizona, and Utah, shall be entitled to and receive fifteen cents for each mile necessarily traveled over any stage line or by private conveyance and five cents for each mile over any railway in going and returning from said courts: Provided, that no constructive or double mileage fees shall be allowed by reason of any person being summoned both as witness and juror, or as witness in two or more cases pending in the same court and triable at the same term thereof." [27 Stat. L. 347.]

The last mentioned Act superseded the Act of June 16, 1880, ch. 247, entitled "An act in relation to the mileage of jurors and witnesses in the State of Colorado," which read as follows:

"That jurors and witnesses in the district and circuit courts of the United States in and for the State of Colorado, shall be entitled to receive fifteen cents for each mile actually traveled in coming to or returning from said courts." [21 Stat. L. 290.]

[Sec. 1.] [Expenditures for Court of Customs Appeals to be submitted to Congress in detailed statement.] * * * A detailed statement of the expenditures of the appropriations for the United States Court of Customs Appeals shall be submitted to Congress at the beginning of each regular session thereof. [36 Stat. L. 1234.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1911, ch. 287. A paragraph in the same section of the same Act reads as follows:

"A detailed statement of the expenditure of the appropriations for the United States Commerce Court shall be submitted to Congress at the beginning of each regular session thereof." The United States Commerce Court was abolished by provisions in the Act of Oct. 22, 1913, ch. 32, given supra, this title, vol. 5, p. 1108.

[Sec. 1.] [Distribution of Supreme Court Reports to Circuit Courts of Appeals libraries.] Provided, That the Secretary of the Interior shall hereafter distribute the Supreme Court Reports to the libraries of the United States circuit courts of appeals. [36 Stat. L. 1419.]

This is from the Sundry Civil Appropriations Act of March 4, 1911, ch. 285, where it followed an appropriation to pay certain publishers for volumes of the Supreme Court Reports.

Judicial Code (enacted March 3, 1911), §§ 225-228, supra, this title, vol. 5, pp. 704-706, provide for delivery to and distribution by the Attorney-General of Supreme Court reports, etc.

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Sec. 346. [Establishment of Department of Justice.] There shall be at the seat of Government an Executive Department to be known as the Department of Justice, and an Attorney-General, who shall be the head thereof. [R. S.]


Sections 346–387 constitute Title VIII of the Revised Statutes.
For R. S. sec. 353, see SEALS.
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For R. S. secs. 386, 387, see PUBLIC DOCUMENTS.

Office and duties of Attorney-General.—In (1854) 6 Op. Atty.-Gen. 326, Attorney-General Caleb Cushing gave to the President an exposition of the constitution of the office of Attorney-General as a branch of the executive administration of the United States, together with some suggestions of possible improvement in the manner of conducting the legal business of the government.

The Attorney-General has authority to commence a suit in the name of the United States to set aside a patent or other solemn instrument issued by proper authority. The statute contains no further specific statement of the general duties of the Attorney-General, but it is seen from the whole chapter that he has the authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States, and to give advice to the President and the heads of the other departments of the government. He is undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government. U. S. v. San Jacinto Tin Co., (1888) 125 U. S. 273, 8 S. Ct. 850, 31 U. S. (L. ed.) 747.

Advising congressional committees.—It is not within the province of the Attorney-General to advise committees of Congress upon questions of law occurring in matters before them. (1872) 14 Op. Atty.-Gen. 17.

Sec. 347. [Solicitor-General.] There shall be in the Department of Justice an officer learned in the law, to assist the Attorney-General in the performance of his duties, called the Solicitor-General, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to a salary of seven thousand five hundred dollars a year. In case of a vacancy in the office of Attorney-General or of his absence or disability, the Solicitor-General shall have power to exercise all the duties of that office. [R. S.]


Beginning with the Legislative, Executive, and Judicial Appropriation Act of June 17, 1910, ch. 297, 36 Stat. L. 468, 522, the annual appropriations for the salary of the Solicitor-General have uniformly been $10,000.

Appointment of special assistants to a district attorney.—The fact that the commission of a special assistant to a district attorney appointed under the authority given by R. S. sec. 363 (JUDICIAL OFFICERS, vol. 4, p. 620) is signed by the solicitor-general in the Department of Justice as "acting attorney-general" does not affect the validity of the appointment; the solicitor-general being empowered by this section 347 to exercise the duties of the office of the Attorney-General in case of his absence, which will be presumed in support of the regularity of the appointment. U. S. v. Twining, (D. C. N. J. 1904) 192 Fed. 120.
Justice Department

Sec. 348. [Assistant Attorneys-General.] There shall be in the Department of Justice three officers, learned in the law, called the Assistant Attorneys-General, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall assist the Attorney-General and Solicitor-General in the performance of their duties. Each of them is entitled to a salary of five thousand dollars a year. [R. S.]


Provisions for the appointment of an additional Attorney-General to facilitate the speedy disposition of cases in the Court of Claims, and in Indian depredation claims, were made by the Act of March 3, 1891, ch. 538, § 12, 26 Stat. L. 551, and an Act of Dec. 21, 1893, ch. 3, 28 Stat. L. 19.

An additional Assistant Attorney-General was authorized by the Act of July 11, 1890, ch. 667, § 1, infra, p. 257, and the salary of the Assistant Attorney-General was fixed at $9,000 by a provision of the Act of Oct. 22, 1913, ch. 32, infra, p. 258.

The Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1053, provided for “six Assistant Attorneys General at $7,500 each.”

Sec. 349. [Solicitor of Treasury, etc., in Department of Justice.] There shall be in the Department of Justice a Solicitor of the Treasury, an Assistant Solicitor of the Treasury, a Solicitor of Internal Revenue, and an Examiner of Claims for the Department of State, who shall be appointed by the President, by and with the advice and consent of the Senate, and shall be entitled to the following salaries: The Solicitor of the Treasury to four thousand dollars a year, the Assistant Solicitor of the Treasury to three thousand dollars a year, the Solicitor of Internal Revenue to five thousand dollars a year, and the Examiner of Claims for the Department of State four thousand dollars a year. [R. S.]


As originally enacted this section provided for a “Naval Solicitor” at a salary of $3,500 per year. This office was abolished by a provision of the Act of June 19, 1878, ch. 329, 20 Stat. L. 205, in the following terms: “And so much of section three hundred and forty-nine of the Revised Statutes as provides for the appointment and payment of a salary to a ‘naval solicitor’ is hereby repealed, and the office is abolished.”

The duties of the naval solicitor were cast upon the judge advocate general of the navy, whose appointment was authorized by the Act of June 8, 1880, ch. 129, 21 Stat. L. 164. See Navy.

By an Act of March 3, 1891, ch. 541, 26 Stat. L. 945, the examiner of claims was to be designated as solicitor for the Department of State. See State Department.

For provisions relating to the solicitors for the departments, see the various departmental titles.

The compensation of these officers has been, from time to time, increased. The Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1053, 1038, provides as follows: In the office of the Attorney-General: solicitor for the Department of the Interior, $5,000; solicitor for the Post Office Department, $5,000; solicitor of Internal Revenue, $5,000; solicitor for the Department of State, $6,000. Office of solicitor of the treasury: solicitor, $5,000; assistant solicitor, $3,000. Office of solicitor of the Department of Commerce: solicitor, $5,000; assistant solicitor, $3,000. Office of the Department of Labor: solicitor, $5,000.

The solicitor of the treasury is an officer of the Department of Justice and not of the Treasury Department. (1894) 20 Op. Atty.-Gen. 714. See also (1884) 18 Op. Atty.-Gen. 59.

Jurisdiction of Attorney-General and solicitor of treasury.—In the matter of rendering opinions there is an exclusive jurisdiction of the Attorney-General, an exclusive jurisdiction of the solicitor of the treasury, and a concurrent jurisdiction in both. Whether questions arising in the concurrent jurisdiction, that is, questions of pure law actually arising in the administration of the department, and relating to matters wholly within the direct or supervisory
control of its head, shall be referred to the Attorney-General, to the solicitor of the treasury, or to both, is entirely within the discretion of the Secretary of the Treasury. (1893) 20 Op. Atty.-Gen. 658.

Sec. 350. [What officers under control of Attorney-General.] The officers named in the preceding section shall exercise their functions under the supervision and control of the head of the Department of Justice. [R.S.]


R. S. sec. 375, infra, p. 354, seems to constitute an exception to the provision of this section directing that the solicitor of the treasury shall be under the supervision and control of the Attorney-General. (1893) 20 Op. Atty.-Gen. 715.

Sec. 351. [Subordinate officers.] There shall be in the Department of Justice,

One chief clerk, at a salary of two thousand two hundred dollars a year.
One law clerk, acting as examiner of titles, at a salary of three thousand dollars a year.
One stenographic clerk, at a salary of two thousand dollars a year.
One clerk, at a salary of two thousand dollars a year.
One disbursing clerk.

In the office of the Solicitor of the Treasury:

One chief clerk, at a salary of two thousand dollars a year, and such temporary clerks as may from time to time be needed, but the allowances for such temporary clerks shall in no one year exceed one thousand dollars. [R. S.]


The number and compensation of the subordinate officers and employees in the Department of Justice depend upon the various Appropriation Acts which have for many years disregarded the limitations set by the text. The current appropriations were contained in the Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1038.


Sec. 352. [Rooms to be provided.] The superintendent of the Treasury building shall from time to time provide such rooms as may be suitable and necessary for the accommodation of the Department of Justice, in some building in the vicinity of the Treasury building. [R. S.]


Recent Appropriation Acts provide for the rent of such buildings and parts of buildings as may be needed. See the notes to the preceding R. S. sec. 351.

R. S. sec. 353. See the notes to R. S. sec. 346, supra, p. 242.

Sec. 354. [Duties of Attorney-General.] The Attorney-General shall give his advice and opinion upon questions of law, whenever required by the President. [R. S.]

The word "of" following the word "questions" was inserted by Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 241.

R. S. sec. 355. See the note to R. S. sec. 346, supra, p. 242.
The right of the President to call upon the Attorney-General for an opinion is not necessarily limited by the provisions of this section. Article II, sec. 2, cl. 1, of the Constitution is entitled to a liberal interpretation. The President may justly call upon him for an opinion or advice in transactions which do not in all respects present a question of law, and unrestrained by the technical rule of the statutes and the strict practice upon the subject. (1901) 23 Op. Atty.-Gen. 364.

When Attorney-General’s opinion binds accounting officers.—In (1904) 25 Op. Atty.-Gen. 301, Attorney-General Moody said, that while “the authority of the comptroller to decide a question involving a payment to be made from the treasury, so as to guide the auditing officers and himself in passing upon accounts, is complete [citing the Act of July 31, 1894, § 8, 28 Stat. L. 162, 208, in TREASURY DEPARTMENT, and all the notes thereto], on the other hand, although a disbursement may be involved, when the question is of general and great importance, and especially when the comptroller, in advance of decision by himself, requests that the matter be referred to the Attorney-General, and states that the opinion of the Attorney-General will be followed by him, then it is the view of this department that the question may properly be answered by the Attorney-General. . . . If a question is presented to the Attorney-General in accordance with law — that is, if it is submitted by the President or the head of a department — if it is a question of law and actually arises in the administration of a department, and the Attorney-General is of opinion that the nature of the question is general and important in other directions than disbursement, and therefore conceives that it is proper for him to deliver his opinion, I think it is final and authoritative under the law, and should be so treated by the accounting officers, even if the question involves a payment to be made.” See also notes to the following R. S. sec. 366.

Sec. 356. [Opinion of Attorney-General upon questions of law.] The head of any Executive Department may require the opinion of the Attorney-General on any questions of law arising in the administration of his Department. [R. S.]


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I. ATTORNEY-GENERAL’S DUTY AND AUTHORITY IN GENERAL

1. Jurisdiction of Attorney-General and Solicitor of Treasury

In the matter of rendering opinions there is an exclusive jurisdiction of the Attorney-General, an exclusive jurisdiction of the solicitor of the treasury, and a concurrent jurisdiction in both. Whether questions arising in the concurrent jurisdiction, that is, questions of pure law actually arising in the administration of the department, and relating to matters within the direct or supervisory control of its head, shall be referred to the Attorney-General, to the solicitor of the treasury, or to both, is entirely within the discretion of the Secretary of the Treasury. (1893) 20 Op. Atty.-Gen. 668.

The Attorney-General will not express an opinion upon a question involving payment of money which has been decided by the comptroller of the treasury, whose decision, under section 8 of the Act of July 31, 1894, ch. 2, 28 Stat. L. 208 (in title TREASURY DEPARTMENT) is conclusive in law. (1904) 25 Op. Atty.-Gen. 185.


Exceptions.—The authority conferred upon the comptroller of the treasury by section 8 of the Act of July 31, 1894, 28 Stat. L. 208 (in title TREASURY DEPARTMENT) to decide questions involving payments to be made from the treasury is
complete; but that Act does not establish a rule which is universal and without exception. Congress did not, by that enactment, intend to shorten the reach of R. S. sec. 354 and the text section, or to repeal them pro tanto. Where a question is presented to the Attorney-General in accordance with law for decision, and he is of opinion that the nature of the question is general and important in other respects than disbursement, and therefore conceives that it is proper for him to deliver his opinion, it is final and authoritative under the law, and should be so treated by the accounting officers of the treasury, even though the question involves a payment to be made from the treasury. When the comptroller of the treasury waives his right to determine a matter involving disbursements within the scope of his authority under the law, and requests or suggests a ruling by the Attorney-General, the Attorney-General's opinion should be controlling upon the accounting officers of the treasury, and should be followed by them unless contrary to some authoritative judicial decision. (1904) 25 Op. Atty.-Gen. 301, followed (1908) 26 Op. Atty.-Gen. 81. See also (1908) 26 Op. Atty.-Gen. 609.

2. For Information of Congress


3. For Information of Private Individuals

The legality of orders issued by the commissioner of internal revenue, prohibiting the reshipment of alcohol from the staves of empty spirit packages, in the absence of affirmative proof that such alcohol had been properly taxed, is not a question upon which the Attorney-General is authorized to give an opinion, where the question has been decided by the Treasury Department and is presented merely because of the request of counsel for parties interested. (1911) 28 Op. Atty.-Gen. 596.

4. Only for Guidance of Head of Department

The opinion sought should be needed for the guidance of the head of a department and should relate to some matter calling for action or decision on his part. For the guidance of the heads of bureaus and other officers of the departments in the discharge of their duties, provision is made by R. S. sec. 361, infra, p. 251, for assistance from the office of the Department of Justice under the direction of the Attorney-General. (1898) 20 Op. Atty.-Gen. 609. See also (1884) 18 Op. Atty.-Gen. 59; (1891) 20 Op. Atty.-Gen. 273; (1891) 20 Op. Atty.-Gen. 251.

5. Matters Belonging to Justice Department

In (1905) 25 Op. Atty.-Gen. 543, the Attorney-General declined to express an opinion upon the question whether proceedings by court-martial would bar proceedings in the civil courts for an assault or other crime involved in the offense of hazing, for the reason that it would be of no assistance to those officers in the proper discharge of their duties, and should such action be taken the matter would peculiarly be one for the consideration of his department. See also (1902) 24 Op. Atty.-Gen. 59; (1908) 26 Op. Atty.-Gen. 651.

6. To Review Proceedings of Courts-Martial

To review the proceedings of courts-martial, in search of questions of law, is not part of the duty of the Attorney-General. (1852) 5 Op. Atty.-Gen. 626.

7. Examination and Approval of Codes or Rules

An examination and approval of codes or rules adopted to meet future cases is not required from the Attorney-General. Nor is he required to examine and approve forms of applications, permits, bonds and affidavits, for future use in other departments. (1894) 20 Op. Atty.-Gen. 759.

II. QUESTIONS AND SUBJECTS FOR OPINION

(1905) 20 Op. Atty.-Gen. 606; (1906) 27
Gen. 49; (1911) 29 Op. Atty.-Gen. 89;

Only on question of law.—The Attor-
ney-General is only authorized to give his
official opinion upon a question of law sub-
mitted to him for that purpose by the
President or the head of one of the execu-
tive departments. He cannot, therefore,
approve or disapprove opinions of assistant
attorneys-general attached to particular
21. See also (1881) 1 Op. Atty.-Gen. 254;
(1890) 19 Op. Atty.-Gen. 506; (1894) 20
Gen. 36.

The question whether or not a citizen
of Porto Rico, legally a resident of New
York, is eligible for appointment in the
United States Hospital service under a de-
partmental regulation which requires the
applicant to be a citizen of the United
States, or, if of foreign birth, to furnish proof
of American citizenship, does not in-
volve any question of law within the mean-
ing of this section, and is not, therefore,
one properly calling for an opinion of the
Attorney-General. The requirement not
being demanded by law, its interpretation
may properly be left to the department or
bureau responsible for its existence and

A finding of facts cannot be made by the
Attorney-General. (1890) 10 Op. Atty.-
Gen. 457. See also 3 Op. Atty.-Gen. 3;
(1849) 5 Op. Atty.-Gen. 165; (1852) 5
Gen. 165; (1881) 18 Op. Atty.-Gen. 487;
(1891) 20 Op. Atty.-Gen. 253; (1892) 20
Gen. 519; (1893) 20 Op. Atty.-Gen. 672;
Atty.-Gen. 49.

Judicial questions.—It is not proper for
the Attorney-General to give an opinion
on questions which are judicial in char-
acter and which must be decided by the

The Attorney-General cannot properly
pass upon the question whether the courts
in this country have authority to execute
letters rogatory issued out of the German
patent office, as that is a matter for judi-
cial and not for executive determination.

In (1896) 25 Op. Atty.-Gen. 97, the
Attorney-General declined to express an
opinion as to the liability of the post-
master at Baltimore, Md., for a sum of
money paid by him to a former clerk in the
Baltimore post office, and for which no
service was performed, for the reason that
the question was essentially a judicial one,
amtating to an inquiry whether in
regular proceedings a court and jury would
hold that officer liable.

In (1896) 25 Op. Atty.-Gen. 360, the
Attorney-General declined to express an
opinion upon the question whether a wil-
ful refusal to give true answers to in-
quiries concerning statistics which, by sec-
tion 6 of the Permanent Census Act of
March 6, 1892 (in Census, vol. 2, p. 31
32 Stat. L. 52), the Department of Com-
merce and Labor was authorized to collect,
would subject a person to the penalties
prescribed by section 22 of the Act of
March 3, 1899, 30 Stat. L. 1020, for the
reason that the question was pre-eminently
one for judicial and not executive deter-
mination.

When the only way to settle the ques-
tion submitted is by judicial proceedings,
it would not be proper for the Attorney-
General to express an opinion on it. (1887)
18 Op. Atty.-Gen. 56. See also (1891) 20

Question not arising in department mak-
ing inquiry.—The Attorney-General is not
authorized to give an official opinion as to
a question of law not arising in the depart-
ment from which the inquiry is sent; (1891)
20 Op. Atty.-Gen. 51. See also (1892) 10
(1892) 20 Op. Atty.-Gen. 420; (1894) 20

In (1896) 25 Op. Atty.-Gen. 584, the
Attorney-General declined to express an
opinion upon the question propounded by
the Secretary of the Interior as to whether
the preliminary draft of title LXVIII,
“Railway and Telegraph Companies,”
submitted to him by the commission to
revise and codify the laws of the United
States, correctly embodies the provisions
of existing law upon the subject, for the
reason that the inquiry did not present a
question of law arising in the administra-
tion of his department.

A question which the head of a depart-
ment is not called upon to answer is not
"a question of law arising in the admin-
istration of his department." (1892) 20

A question propounded to the Secretary
of a Department which he is not called
upon to answer is not a question upon
which the Attorney-General is authorized
to give an opinion. (1910) 28 Op. Atty.-
Gen. 534.

As to construction of statute.—This
section and R. S. sec. 357 do not permit the
Attorney-General to give an opinion as to the
construction or interpretation of a statute except in an actual case which has
arisen and is before one of the executive
departments calling for its action in the
regular course of the administration of
The duty of applying a statute to the
subject matter is one of administration


As to interpretation of regulation of practice.—A request to interpret a regulation of practice made by the commissioner of patents for his own guidance and that of his subordinates, for the convenient, intelligent, and orderly disposal of the business of his office, cannot be granted. Such a regulation when not specially authorized or demanded by law is not law in the sense in which that term is used in the statute. (1887) 18 Op. Atty.-Gen. 521.

As to propriety of prosecuting appeal.—The propriety of prosecuting an appeal in a matter of public interest pending before a department is not always a matter of law, but may well be one merely of judicial discretion, and does not fall within the competency of the judicial department to give advice thereon. (1876) 15 Op. Atty.-Gen. 574.

As to advisability of changing law.—This statute limits the function of the Attorney-General in the matter of opinions requested by the heads of departments on questions arising out of the law as it is, and does not seem to call upon him to give his views and opinions upon the advisability of making changes by treaty. (1890) 19 Op. Atty.-Gen. 598.

Mere moot question.—The inquiry must relate not to a mere moot question, but to one which requires immediate action. The answer must be necessary for the protection of the officer making the inquiry or to infer the lawfulness of the action which he is about to take. (1897) 21 Op. Atty.-Gen. 509. See also (1897) 21 Op. Atty.-Gen. 506; (1897) 21 Op. Atty.-Gen. 478.

III. STATEMENT OF QUESTION SUBMITTED

Question to be specifically formulated.—It has been the invariable rule of the Department of Justice to decline to give an opinion upon any question of law unless it is "specifically formulated." (1902) 24 Op. Atty.-Gen. 59; (1907) 26 Op. Atty.-Gen. 378; (1908) 26 Op. Atty.-Gen. 609.

A statement of facts must be submitted showing that the question has actually arisen in the administration of his department in an existing case calling for action to authorize the Attorney-General to express an opinion upon a question of law propounded by the head of a department. (1898) 22 Op. Atty.-Gen. 85.


An opinion cannot be given upon a general subject, but only on one or more specific questions of law based on the case stated. (1901) 20 Op. Atty.-Gen. 249.

IV. OPINIONS AS BINDING PRECEDENTS

1. On Administrative Officers


2. On Succeeding Attorneys-General


3. On Courts

See cases cited in article STATUTES AND STATUTORY CONSTRUCTION, vol. 1 of this work, p. 83, § 58, note 91.

Sec. 357. [Legal advice to departments of war and navy.] Whenever a question of law arises in the administration of the Department of War or the Department of the Navy, the cognizance of which is not given by statute to some other officer from whom the head of the Department may
require advice, it shall be sent to the Attorney-General, to be by him referred to the proper officer in his Department, or otherwise disposed of as he may deem proper. [R. S.]


Opinions for heads of departments, see in general, notes to the preceding R. S. sec. 356, supra, p. 245.

This section does not contain an exception in favor of the employment by the Secretary of the Navy of counsel in foreign countries to institute suit in behalf of the United States to recover damages for injury to a war vessel of the United States, but the case should be referred to the Department of Justice for attention. (1896) 21 Op. Atty.-Gen. 195.

A question of fact as to whether an obstruction to navigation is "unreasonable" will not be determined by the Attorney-General. (1890) 19 Op. Atty.-Gen. 676.


Hypothetical question.—The Attorney-General declines to express an opinion upon the question whether a paymaster's clerk in the navy retains his status as such clerk while traveling home under orders received prior to the revocation of his appointment, for the reason that the question is hypothetical in its nature. (1909) 28 Op. Atty.-Gen. 129.

The Attorney-General declines to answer the question whether the Navy Department would be justified in continuing to make partial payments under contracts in the event of the repeal of the clause in the Naval Appropriation Act of March 4, 1911 (36 Stat. 1267), which authorizes the Secretary of the Navy to make partial payments on under contracts for public purposes, as no case involving that question is now pending before that department. (1911) 29 Op. Atty.-Gen. 46.

Where no occasion has arisen for the official action of the Secretary of War, the Attorney-General will not give an opinion upon a question proposed by him. (1896) 21 Op. Atty.-Gen. 457.

The Attorney-General is not permitted to give an opinion as to the construction or interpretation of a statute except in an actual case which has arisen before one of the Executive Departments calling for its action in the regular course of its affairs. (1897) 21 Op. Atty.-Gen. 510.

A question of the legality of a provision of long standing in contracts of the War and Navy Departments was determined, as presented, in general terms, though a strict regard to the rule of the Department of Justice which forbids the expression of an official opinion upon any question of law which has not arisen in an existing case and presented upon a definite statement of facts, might warrant a refusal of an opinion thereon. (1895) 21 Op. Atty.-Gen. 207.

Opinion for guidance of private parties. —The Attorney-General is not authorized to express an official opinion as to whether the provisions of the eight-hour law of Aug. 1, 1892 (27 Stat. 340), will apply to the construction of caissons for the United States, where the information is desired for the guidance of certain prospective bidders, as the question is not one which the Secretary of the Navy is called upon to decide in the administration of his department. (1910) 28 Op. Atty.-Gen. 534.

The solution of the question whether an officer on the retired list of the army can accept a diplomatic or consular appointment and still hold his position on the retired list with rank and pay is a matter of his private concern only, and not a subject with which the United States can be concerned until some action has been taken by such officer. (1897) 21 Op. Atty.-Gen. 510.

Advisory nature of opinion.—The opinion of the Attorney-General, addressed to the Secretary of the Navy, is merely advisory, and cannot be regarded as a determination of the case to which it refers, unless it appears from the record that the Secretary has adopted the advice it contained. (1857) 9 Op. Atty.-Gen. 32, where Attorney-General Black said: "The duty of the Attorney-General is to advise, not to decide. A thing is not to be considered as done as far as the head of a department merely because the Attorney-General has advised him to do it. You may disregard his opinion if you are sure it is wrong. He aids you in forming a judgment on questions of law; but still the judgment is yours, not his. You are not bound to see with his eyes, but only to use the light which he furnishes, in order to see the better with your own. But though opinions from this office have technically no binding effect, it is generally safer and better to adopt them. Uniformity of decision in the different departments, on similar subjects, is necessary, and cannot be secured otherwise. For the same reason, one Attorney-General ought to be cautious how he differs from another who has gone before him. For myself, I shall never depart from the precedents when I find it possible to follow them without being unfaithful to my own convictions." See also notes to R. S. sec. 356, supra, at p. 248, IV, Opinions as binding precedents.
Sec. 358. [Reference of questions by Attorney-General to subordinates.] Any question of law submitted to the Attorney-General for his opinion, except questions involving a construction of the Constitution of the United States may be by him referred to such of his subordinates as he may deem appropriate, and he may require the written opinion thereon of the officer to whom the same may be referred. If the opinion given by such officer is approved by the Attorney-General, such approval indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney-General. [R. S.]


This section does not apply in cases where, as in the Departments of the Treasury, Interior, etc., the secretary has a right to ask for an opinion from the subordinate directly, that is, without an intervention by the Attorney-General. (1884) 18 Op. Atty-Gen. 59.

“The Attorney-General must personally pass upon every question so submitted to him; for although he may . . . refer the question to a subordinate for a written opinion, the action of the subordinate must be examined and approved by the Attorney-General to give it effect.” (1895) 21 Op. Atty-Gen. 174, per Attorney-General Olney.

Sec. 359. [Conduct and argument of cases.] Except when the Attorney-General in particular cases otherwise directs, the Attorney-General and Solicitor-General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney-General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor-General or any officer of the Department of Justice to do so. [R. S.]


See the Act of June 30, 1906, ch. 3935, infra, p. 257.

Appearance of district attorney before Circuit Court of Appeals.—In the Act creating the Court of Appeals there is no specific direction to any attorney to represent the government. Whenever the Attorney-General calls upon a district attorney to appear for the government in a case ending in the Court of Appeals, he is not directing him in the discharge of his official duty as district attorney, but is employing him as special counsel. The compensation which he may receive is not a part of his compensation as district attorney or limited by the maximum prescribed therefor. U. S. v. Winston, (1898) 170 U. S. 522, 18 S. Ct. 701, 42 U. S. (L. ed.) 1130. See also Garter v. U. S., (1896) 31 Ct. Cl. 361.

The authority to “conduct suits” in the Court of Claims on behalf of the government may fairly be held to include at least every act in the conduct of such suit which an attorney at law in a suit between individuals may lawfully do; with this reservation, that he cannot, on the trial of a cause, bind the government by admitting facts adverse to it unless they are such as it is his official duty to know, and have become known to him officially in the course of the discharge of such duty. Campbell v. U. S., (1884) 19 Ct. Cl. 429.

A special assistant to the Attorney-General is not an “officer” within the meaning of this section or R. S. sec. 367. U. S. v. Rosenthal, (S. D. N. Y. 1906) 121 Fed. 962.

Bringing suit in the name of the Attorney-General.—The power conferred by this section on the Attorney-General does not authorize him to bring a suit in which the United States is interested in his own name, or authorize the solicitor-general or any officer of the Department of Justice to do so. Atty-Gen. v. Rumford Chemical Works, (C. C. R. I. 1876) 32 Fed. 623.

Proceedings before grand jury.—The power given the Attorney-General and his officers to “conduct and argue any case in any court” cannot be exercised in derogation of the exclusive power of the district attorney to initiate proceedings before the grand jury. U. S. v. Rosenthal, (S. D. N. Y 1903) 121 Fed. 962.
Sec. 360. [Performance of duty by officers of Department of Justice.] The Attorney-General may require any solicitor or officer of the Department of Justice to perform any duty required of the Department or any officer thereof. [R. S.]


Extra compensation.—The Attorney-General directed the United States district attorney for the district of Kansas to attend to the taking of a deposition at Wichita, in the state of Kansas, in a suit which was pending in the state of New York; it was held that even if this was one of the duties of some other officer of the same or any other department of the government, he was prohibited from recovering any extra compensation for it by R. S. sec. 1764 (In title Public Officers and Employees). U. S. v. Ady, (C. C. A. 8th Cir. 1896) 76 Fed. 359, 40 U. S. App. 312, 22 C. C. A. 223.

Sec. 361. [Officers of the department to perform all legal services required for other departments.] The officers of the Department of Justice, under the direction of the Attorney-General, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of Departments and the heads of Bureaus and other officers in the Departments, to discharge their respective duties; and shall, on behalf of the United States, procure the proper evidence for, and conduct, prosecute, or defend all suits and proceedings in the Supreme Court and in the Court of Claims, in which the United States, or any officer thereof, as such officer, is a party or may be interested; and no fees shall be allowed or paid to any other attorney or counselor at law for any service herein required of the officers of the Department of Justice, except in the cases provided by section three hundred and sixty-three. [R. S.]


For the guidance of the heads of bureaus and other officers of the departments in the discharge of their duties, provision is made by this section for assistance from the officers of the Department of Justice under the direction of the Attorney-General. (1893) 20 Op. Atty.-Gen. 609.

Reviewing opinion of solicitor of treasury.—The solicitor of the treasury is an officer of the Department of Justice, and therefore, by virtue of this section, is entitled to the direction of the Attorney-General. Whatever this direction may include, it does not extend to opinions asked and given in the course of a formal correspondence in writing. (1884) 18 Op. Atty.-Gen. 60.

Sec. 362. [Superintendence of district attorneys and marshals.] The Attorney-General shall exercise general superintendence and direction over the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct. [R. S.]


Supervision of district attorneys.—There is no express authority vested in him [the Attorney-General] to authorize suits to be brought against the debtors of the government, or upon bonds, or to begin criminal prosecutions, or to institute
proceedings in any of the numerous cases in which the United States is plaintiff; and yet he is invested with the general superintendence of all such suits, and all the district attorneys who do bring them in the various courts in the country are placed under his immediate direction and control." U. S. v. San Jacinto Tim Co., (1888); 125 U. S. 273, 8 S. Ct. 850, 31 U. S. (L. ed.) 747.

General regulations.—The Attorney-General is authorized to exercise general superintendence and direction over attorneys and marshals of all districts and territories as to the manner of discharge of their respective duties; and the section confers upon the Attorney-General power to superintend any criminal prosecution instituted by the district attorney, and to direct the district attorney in regard to the method of discharging his duties in any particular prosecution instituted by him. But it does not authorize the Attorney-General to control the action of the district attorney in criminal cases by general regulation. Fish v. U. S., (E. D. N. Y. 1888) 36 Fed. 680.

Appearances before Circuit Courts of Appeals.—The Attorney-General has authority under this section to direct district attorneys to follow cases on appeal from their own districts into the Circuit Court of Appeals, and he has authority to employ special counsel to assist district attorneys in the discharge of their duties; and he may employ as special counsel one who is district attorney within the district in which the Court of Appeals is sitting in a case coming from another district. Garter v. U. S., (1898) 31 Ct. Cl. 344, affirmed (1898) 170 U. S. 557, 18 S. Ct. 763, 42 U. S. (L. ed.) 1133.

The authority to exercise general superintendence and direction over the manner of discharging special duties as deputy marshal could not include or imply authority to compel him to do, in a limited time, what could not by any diligence on his part be done in that time, or to deprive him of the compensation which Congress has explicitly provided should be paid to him. Stockdale v. U. S., (D. C. Md. 1889) 39 Fed. 62.

It was within the authority of the Attorney-General to require the district attorney of the northern district of Illinois to consult with and advise the secretary of the board of management of the United States government exhibit at the World's Columbian Exposition, and special compensation fixed by the Attorney-General was allowed. Milichrist v. U. S., (1896) 31 Ct. Cl. 418.

The Attorney-General has power to authorize a district attorney to employ a stenographer to take from dictation, and to copy, certain complaints and indictments and a certain opinion of the district judge in some criminal cases which the United States was prosecuting in that district, and for such services the stenographer is entitled to recover from the government. U. S. v. Denison, (C. C. A. 8th Cir. 1897) 80 Fed. 370, 49 U. S. App. 352, 25 C. C. A. 496.

The transfer of the settlement of the accounts of district attorneys and marshals to the Attorney-General's office was not affected by this statute. (1861) 10 Op. Atty.-Gen. 95.

Sec. 367. [Interest of United States in pending suits, who may attend to.] The Solicitor-General, or any officer of the Department of Justice, may be sent by the Attorney-General to any State or District in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States. [R. S.]


Sec. 368. [Accounts of district attorneys, marshals, etc.] The Attorney-General shall exercise general supervisory powers over the accounts of district attorneys, marshals, clerks, and other officers of the courts of the United States. [R. S.]

The decision of the Attorney-General is conclusive and not subject to collateral attack by the courts. Schloss v. Hewlett, (1866) 51 Ala. 266, 4 So. 263. See (1872) 14 Op. Atty.-Gen. 104.

Effect of judicial order allowing fees.—The supervisory powers given in this section are precisely those which were exercised by the Secretary of the Interior before the Department of Justice was established. They do not give the Attorney-General any authority to make an allowance of fees under R. S. sec. 824, or to review and reverse a judicial order allowing such fees. U. S. v. Waters, (1890) 183 U. S. 208, 10 S. Ct. 249, 33 U. S. (L. ed.) 594.

Blanks furnished to district attorney.—The sums paid by the marshal upon the requisition of the district attorney, approved by the Attorney-General, for blank indictments and informations for the necessary use of the district attorney, having been paid by the marshal, with the approval of the Attorney-General, the marshal is entitled to be repaid those sums. Harmon v. U. S., (C. C. Mm. 1890) 43 Fed. 580, affirmed 147 U. S. 268, 13 S. Ct. 327, 37 U. S. (L. ed.) 164.

Sec. 369. [Requisitions.] The Attorney-General shall sign all requisitions for the advance or payment of moneys appropriated for the Department of Justice, out of the Treasury, subject to the same control as is exercised on like estimates or accounts by the First Auditor or First Comptroller of the Treasury. [R. S.]


The First Auditor was designated as Auditor for the Treasury Department, and the First Comptroller of the Treasury as Comptroller of the Treasury by the Act of July 31, 1894, ch. 174, §§ 3, 4, 28 Stat. L. 206, 206. See Treasury Department.

Sec. 370. [Traveling expenses of officers of the department.] Whenever the Solicitor-General, or any officer of the Department of Justice, is sent by the Attorney-General to any State, District, or Territory, to attend to any interest of the United States, the person so sent shall receive, in addition to his salary, his actual and necessary expenses while absent from the seat of Government; the account thereof to be verified by affidavit. [R. S.]


Expenses of district attorney outside of his district.—The provisions of this section and R. S. secs. 346, 362, 363, 367, and 368, confer ample authority on the Attorney-General to incur the expense of sending some attorney to any court of the nation to attend any interest of the United States. If he sends an officer of the Department of Justice from Washington, that officer can recover the amount of his expenses, in addition to his salary, under this section. If he employs and retains an attorney, the Acts of Congress prohibit the payment to him of any special compensation for the services he renders without his district (R. S. sec. 367, supra, p. 232, and R. S. secs. 1764 and 1765, in title Public Officers); but they contain no prohibition of the repayment to him of the actual and necessary expenses which he incurs on such a mission. U. S. v. Fleming, (C. C. A. 8th Cir. 1897) 80 Fed. 373, 49 U. S. App. 354, 25 C. C. A. 498.

Sec. 371. [Disbursement of moneys.] All moneys drawn out of the Treasury upon the requisition of the Attorney-General shall be disbursed by such one of the clerks in the Department of Justice as the Attorney-General may designate. [R. S.]


Recent Appropriation Acts provide for a disbursing clerk. Provision for such clerk at a salary of $2,750 was made by the Act of March 4, 1916, ch. 141, 38 Stat. L. 1039. See Judicial Officers, vol. 4, p. 610.
Sec. 372. [Records formerly appertaining to office of agent of the Treasury.] The Solicitor of the Treasury shall have charge, within the Department of Justice, of the books, papers, and records formerly appertaining to the office of agent of the Treasury, or to the superintendence of the collection of outstanding direct taxes and internal duties which have been transferred to him by the act of May twenty-nine, eighteen hundred and thirty, and remain in his charge; and of the seal adopted for the office of the Solicitor of the Treasury. [R. S.]

R. S. secs. 373, 374. See the note to R. S. sec. 346, supra, p. 242.

Sec. 375. [False reports of bonds delivered for suit.] Whenever it appears that any collector has made return of any bond as in suit, or delivered for suit, which is not, at the time, in suit, or delivered for suit, or has returned any bond as in suit for the whole amount thereof when part thereof has been paid to him or as in suit for more than is actually due thereon, the Solicitor of the Treasury shall, immediately upon discovery thereof, communicate the facts to the President of the United States. [R. S.]


Sec. 376. [Measures taken for the discovery of frauds.] The Solicitor of the Treasury, under direction of the Secretary of the Treasury, shall take cognizance of all frauds or attempted frauds upon the revenue, and shall exercise a general supervision over the measures for their prevention and detection, and for the prosecution of persons charged with the commission thereof. [R. S.]


Actions to recover moneys due the United States, not involving an issue of fraud, do not come in any way under the direction of the Secretary of the Treasury. (1894) 20 Op. Atty.-Gen. 714.

Sec. 377. [Rules established by solicitor of treasury respecting suits.] The Solicitor of the Treasury shall establish such regulations, not inconsistent with law, with the approbation of the Secretary of the Treasury, for the observance of collectors of the customs, and, with the approbation of the Attorney-General, for the observance of district attorneys and marshals respecting suits in which the United States are parties, as may be deemed necessary for the just responsibility of those officers, and the prompt collection of all revenues and debts due and accruing to the United States. But this section does not apply to suits for taxes, forfeitures, or penalties arising under the internal revenue laws. [R. S.]


The power to compromise a suit in which the United States is a party does not exist with the district attorney. No statute of the United States gives the district attorney any such power, and a regulation established by the solicitor of the treasury and approved by the Attorney-General provides that no district attorney shall agree to take a judgment or decree for a less amount than is claimed by the United States without express instructions from the solicitor of the treasury. U. S. v. Beebe. (1901) 180 U. S. 343, 21 S. Ct. 371, 45 U. S. (L. ed.) 563.
Sec. 378. [Report by solicitor of treasury of moneys recovered.] The Solicitor of the Treasury shall report all moneys recovered or collected under his direction to the officer from whom the bond or other evidence of debt was received, who shall give proper credit therefor; and he shall report in like manner all credits allowed by due course of law on any suits under his direction. [R. S.]


Sec. 379. [Instructions by solicitor of treasury to district attorneys and other officers.] The Solicitor of the Treasury shall have power to instruct the district attorneys, marshals and clerks of the circuit and district courts in all matters and proceedings appertaining to suits in which the United States is a party or interested, except suits for taxes, penalties, or forfeitures under the internal-revenue laws, and to cause them, or either of them, to report to him from time to time any information he may require in relation to the same. [R. S.]

R. S. sec. 380. See the notes to R. S. sec. 346, supra, p. 242.

Extent of solicitor's authority.—In (1855) 7 Op. Atty.-Gen. 475, the Attorney-General said that it was not intended by the Act of May 29, 1830, from which this section was taken, to confer on the solicitor a mandatory power independent of the authority of the President or of the heads of departments. "On the contrary, by the tenor of the statute itself, and by a subsisting general order of the President, the solicitor in giving his instructions is to act upon advice of the Attorney-General, or special direction of the secretary within whose department any suit in law may arise; and he is subject, of course, to the direction, both general and special, of the President."

The Secretary of the Treasury has not any direct control over suits instituted for the collection of unpaid duties. This section places these matters in charge of the solicitor of the treasury. As a matter of prudent administration, this discretion of the solicitor of the treasury should be exercised under the supervision and with the approbation of the secretary or that of the head of the department to which the solicitor is attached as subordinate. (1881) 17 Op. Atty.-Gen. 142.

A direction to stay proceedings in a suit commenced on a duty bond is clearly within the statute; and a direction to stay the commencement of a suit on a duty bond handed over to him by the collector, on such terms as shall be deemed advantageous to the United States, is also an instruction in a matter appertaining to a suit in which the United States is interested, and therefore it may be given by the solicitor. (1837) 3 Op. Atty.-Gen. 251.

An action to recover duties on goods previously smuggled is a suit "in which the United States is a party or interested" within the meaning of this section. (1894) 20 Op. Atty.-Gen. 714.

Sec. 381. [Duties of United States attorneys.] In the prosecution of any suit for money due the Post-Office Department, the United States attorney conducting the same shall obey the directions which may be given him by the Department of Justice. [R. S.]


Sec. 382. [Proceedings in equity in cases of post-office department.] When proceedings at law for money due the Post-Office Department are fruitless the Department of Justice may direct the institution of a suit in chancery, in any United States district or circuit court, to set aside fraudulent conveyances or trusts, or attach debts due the defendant, or obtain any other proper exercise of the powers of equity to have satisfaction of any judgment against such defendant. [R. S.]

Sec. 383. [Publication of opinions of attorney-general.] The Attorney-General shall from time to time cause to be edited, and printed at the Government Printing-Office, an edition of one thousand copies of such of the opinions of the law-officers herein authorized to be given as he may deem valuable for preservation in volumes, which shall be, as to size, quality of paper, printing, and binding, of uniform style and appearance, as nearly as practicable, with volume eight of such opinions, published, by Robert Farnham, in the year eighteen hundred and sixty-eight. Each volume shall contain proper head-notes, a complete and full index, and such foot-notes as the Attorney-General may approve. Such volumes shall be distributed in such manner as the Attorney-General may from time to time prescribe. [R. S.]

Sec. 384. [Attorney-General to report business and statistics.] It shall be the duty of the Attorney-General to make to Congress at the commencement of each regular session, a report of the business of the Department of Justice for the last preceding fiscal year, and of any other matters appertaining thereto that he may deem proper, including a statement of the several appropriations now or which may hereafter be placed under its control, the amount appropriated, and a detailed statement of the amounts used for defraying the expenses of the United States courts in each judicial district; also the statistics of crime under the laws of the United States, and a statement of the number of causes, civil and criminal, pending during the preceding year in each of the several courts of the United States. [R. S.]

Sec. 385. [Attorney-General to report additional attorneys and counsel employed.] The Attorney-General shall make an annual report to Congress of the names of all persons employed or retained as attorneys or counselors at law to assist any district attorneys in the performance of their duties, stating when and upon what business each was employed, and the compensation paid to each. [R. S.]

[Sec. 1.] [Attorney-General to report expenditures of contingent fund.] * * * And the Attorney-General shall hereafter annually report to Congress in detail, the items, amounts, and causes of expenditure of the contingent expenses of this department. [18 Stat. L. 109.]

This provision follows an appropriation for contingent expenses of the Department of Justice in the Legislative, Executive, and Judicial Appropriation Act of June 20, 1874, ch. 328.
See the two preceding paragraphs of the text and the notes thereto.
SEC. 3. [Attorney-General to report statement of payments.] That the Attorney-General shall include in his annual report a statement of all payments or expenditures during any fiscal year out of any appropriation fund subject to requisitions by him. [21 Stat. L. 44.]

This section is from the Act of June 30, 1879, ch. 52, "making appropriation for certain judicial expenses," etc.

See the three preceding paragraphs of the text and the notes thereto.

[Sec. 1.] [Additional assistant attorney-general.] * * * For an additional assistant Attorney-General to be appointed by the President, by and with the advice and consent of the Senate, who shall receive a compensation at the rate of five thousand dollars per annum. [26 Stat. L. 265.]

This is from the Legislative, Executive, and Judicial Appropriation Act of July 11, 1890, ch. 667.

See R. S. secs. 347 and 348, supra, pp. 242, 243, and the notes thereto.

SEC. 23. [Attorney-General to report attorneys' and marshals' expenses, etc.] * * * The Attorney-General shall, in his annual report to Congress each year, include a statement in detail showing for the preceding fiscal year the number of assistant district attorneys employed, the salaries of each; the number of clerical assistants employed for each district attorney, the salaries of each; the amount expended for necessary subsistence and actual and necessary traveling expenses of each district attorney and his assistants; the number of office deputys and clerical assistants employed for each marshal, the salaries paid to each; the amount expended for necessary subsistence and actual and necessary traveling expenses of each marshal and his office deputys, and the number of field deputy marshals employed by each marshal and the amount of fees earned by and the compensation paid to each of them out of such fees. [29 Stat. L. 185.]

This section is from the Legislative, Executive, and Judicial Appropriation Act of May 28, 1896, ch. 252.

See R. S. secs. 384, 385, supra, p. 256, and the notes thereto.

An Act To authorize the commencement and conduct of legal proceedings under the direction of the Attorney-General.


[Conduct of proceedings which are authorized to be conducted by District Attorneys.] That the Attorney-General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney-General under any provision of law, may, when thereunto specifically directed by the Attorney-General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or
hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought. [34 Stat. L. 816.]

This Act is also set forth in Judicial Officers, vol. 4, pp. 774-775, and is there annotated.
Provision for conduct and argument of cases is made in R. S. sec. 359, supra, p. 250.

[Sec. 1.] [Administrative audit of accounts.] * * * The administrative audit of all expenditures under the control of the Department of Justice shall hereafter be made in the Division of Accounts of that Department. [37 Stat. L. 404.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

[Sec. 1.] [Assistant Attorney-General—Salary.] * * * For salary of the Assistant to the Attorney General, which is hereby fixed at the rate of $9,000 per annum; in addition to the $7,000 heretofore appropriated, for the balance of the fiscal year nineteen hundred and fourteen, $1,500, or so much thereof as may be necessary. [38 Stat. L. 218.]

This was a provision of the Deficiencies Appropriation Act of Oct. 22, 1913, ch. 32. See the notes to R. S. secs. 348, 349, supra, p. 243.

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I. ARBITRATION

An Act Providing for mediation, conciliation, and arbitration in controversies between certain employers and their employees.

[Act of July 15, 1913, ch. 6, 38 Stat. L. 103.]

[Sec. 1.] [Arbitration of controversies with railway employees.] That the provisions of this Act shall apply to any common carrier or carriers and their officers, agents, and employees, except masters of vessels and seamen, as defined in section forty-six hundred and twelve, Revised Statutes of the United States, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a con-
tinuous carriage or shipment from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States.

The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

The term "employees" as used in this Act shall include all persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract: Provided, however, That this Act shall not be held to apply to employees of street railroads and shall apply only to employees engaged in railroad train service. In every such case the carrier shall be responsible for the acts and defaults of such employees in the same manner and to the same extent as if said cars were owned by it and said employees directly employed by it, and any provisions to the contrary of any such lease or other contract shall be binding only as between the parties thereto and shall not affect the obligations of said carrier either to the public or to the private parties concerned.

A common carrier subject to the provisions of this Act is hereinafter referred to as an "employer," and the employees of one or more of such carriers are hereinafter referred to as "employees." [38 Stat. L. 103.]

This is the first section of the Arbitration Act of 1913 and repeals the prior Act on the subject. See the note to section 11 of this Act, infra, p. 287.

For R. S. sec. 4612 mentioned in the text, see SLAVERY.

Discharge of employee.—In the Act of June 1, 1898, ch. 370, 30 Stat. L. 428, it was provided in section 10 as follows: "That any employer subject to the provisions of this Act and any officer, agent, or receiver of such employer who shall require any employee, or any person seeking employment, as a condition of such employment, to enter into an agreement, either written or oral, not to become or remain a member of any labor corporation, association, or organization; or shall threaten any employee with loss of employment, or shall unjustly discriminate against any employee because of his membership in such a labor corporation, association, or organization; or who shall require any employees or any person seeking employment, as a condition of such employment, to enter into a contract whereby such employee or applicant for employment shall agree to contribute to any fund for charitable, social, or beneficial purposes; or to release such employer from legal liability for any personal injury by reason of any benefit received from such fund beyond the proportion of the benefit arising from the employer's contribution to such fund; or who shall, after having discharged an employee, attempt or conspire to prevent such employee from obtaining employment, or who shall, after the quitting of an employee, attempt or conspire to prevent such employee from obtaining employment, is hereby declared to be guilty of a misdemeanor, and, upon conviction thereof in any court of the United States of competent jurisdiction in the district in which such offense was committed, shall be punished for each offense by a fine of not less than one hundred dollars and not more than one thousand dollars."

In construing this provision the United States Supreme Court declared that personal liberty as well as the right of property were invaded without due process of law, in violation of U. S. Const., Fifth Amendment, and it was said that there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent or officer of an interstate carrier, having full authority in the premises from his principal, to discharge an employee from service to such carrier because of such membership on his part. Adair v. U. S., (1908) 208 U. S. 161, 23 S. Ct. 277, 62 U. S. (L. ed.) 430, 13 Ann. Cas. 764, reversing (E. D. Ky. 1907) 152 Fed. 737.

And in Coppage v. Kansas, (1915) 236 U. S. 1, 35 S. Ct. 240, 59 U. S. (L. ed.) 441, L. R. A. 1916 C 980, reversing (1912) 87 Kan. 752, 125 Pac. S, a similar statute enacted by the Kansas legislature was declared to be unconstitutional, the decision being based on the reasoning of the court in Adair v. U. S., supra. The Kansas statute read as follows: "It shall be unlawful for any individual or member of any firm, or any agent, officer, or employee of any company or corporation, to coerce, require, demand, or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such individual, firm, or corporation. Any individual or member of any firm, or any agent, officer, or employee of any company or imprisoned in the county jail not less than this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than $50, or imprisoned in the county jail not less than thirty days." The statute was held unconstitutional as being in conflict with that provision of the Fourteenth Amendment of the Constitution of the United States which declared that no state shall deprive any person of liberty or property without due process of law.

SEC. 2. [Board of Mediation and Conciliation — duties.] That whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between an employer or employers and employees subject to this Act interrupting or threatening to interrupt the business of said employer or employers to the serious detriment of the public interest, either party to such controversy may apply to the Board of Mediation and Conciliation created by this Act and invoke its services for the purpose of bringing about an amicable adjustment of the controversy; and upon the request of either party the said board shall with all practicable expedition put itself in communication with the parties to such controversy and shall use its best efforts, by mediation and conciliation, to bring them to an agreement; and if such efforts to bring about an amicable adjustment through mediation and conciliation shall be unsuccessful, the said board shall at once endeavor to induce the parties to submit their controversy to arbitration in accordance with the provisions of this Act.

In any case in which an interruption of traffic is imminent and fraught with serious detriment to the public interest, the Board of Mediation and Conciliation may, if in its judgment such action seem desirable, proffer its services to the respective parties to the controversy.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act either party to the said agreement may apply to the Board of Mediation and Conciliation for an expression of opinion from such board as to the meaning or application of such agreement and the said board shall upon receipt of such request give its opinion as soon as may be practicable. [38 Stat. L. 104.]

SEC. 3. [Boards of arbitration authorized — members.] That whenever a controversy shall arise between an employer or employers and employees subject to this Act, which can not be settled through mediation and conciliation in the manner provided in the preceding section, such controversy may be submitted to the arbitration of a board of six, or, if the parties to the controversy prefer so to stipulate, to a board of three persons, which board shall be chosen in the following manner: In the case of a board of three, the employer or employers and the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; and the two
arbitrators thus chosen shall select the third arbitrator; but in the event of their failure to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Board of Mediation and Conciliation. In the case of a board of six, the employer or employers and the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators, and the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators; but in the event of their failure to name the two arbitrators within fifteen days after their first meeting the said two arbitrators, or as many of them as have not been named, shall be named by the Board of Mediation and Conciliation.

In the event that the employees engaged in any given controversy are not members of a labor organization, such employees may select a committee which shall have the right to name the arbitrator, or the arbitrators, who are to be named by the employees as provided above in this section. [38 Stat. L. 104.]

Construction of statute.—An arbitration of differences between an interstate carrier and its employees, under this Act, is essentially a common-law arbitration, and rests solely on the written agreement of arbitration entered into by the parties, which limits and determines not only the rights of the parties thereto but also the extent of the powers of the arbitrators, and it is to be construed in accordance with the rules governing the construction of contracts, rather than those applicable to pleadings. In re Southern Pac. Co., (N. D. Cal. 1907) 153 Fed. 1001.

SEC. 4. [Requirements of agreement to arbitrate.] That the agreement to arbitrate—

First. Shall be in writing;

Second. Shall stipulate that the arbitration is had under the provisions of this Act;

Third. Shall state whether the board of arbitration is to consist of three or six members;

Fourth. Shall be signed by duly accredited representatives of the employer or employers and of the employees;

Fifth. Shall state specifically the questions to be submitted to the said board for decision;

Sixth. Shall stipulate that a majority of said board shall be competent to make a valid and binding award;

Seventh. Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board, as provided for in the agreement, within which the said board shall commence its hearings;

Eighth. Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: Provided, That this period shall be thirty days unless a different period be agreed to;

Ninth. Shall provide for the date from which the award shall become effective and shall fix the period during which the said award shall continue in force;

Tenth. Shall provide that the respective parties to the award will each faithfully execute the same;

Eleventh. Shall provide that the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the district court of the United
States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon the parties to the agreement unless set aside for error of law apparent on the record;

Twelfth. May also provide that any difference arising as to the meaning or the application of the provisions of an award made by a board of arbitration shall be referred back to the same board or to a subcommittee of such board for a ruling, which ruling shall have the same force and effect as the original award; and if any member of the original board is unable or unwilling to serve another arbitrator shall be named in the same manner as such original member was named. [38 Stat. L. 105.]

Construction of agreement.—A written contract inter parties, as an agreement for arbitration stating the questions to be submitted and determined, must primarily be interpreted by its language taken in its ordinary and accepted meaning, and if that language is plain and unambiguous in itself, there is no room for construction, but it will be held to mean precisely what its terms imply. It is only when the language is susceptible of more than one construction that the intent or understanding of the parties may be inquired into, or that evidence of the surrounding circumstances may be resorted to. In re Southern Pac. Co., (N. D. Cal. 1907) 155 Fed. 1001.

Scope of question submitted.—An agreement for arbitration between a railroad company and the Order of Railway Telegraphers provided for the submission, among others, of the question “whether members of the Order of Railroad Telegraphers in the employ of the employer shall legislate for train dispatchers respecting rates of pay and hours of service or otherwise.” It was held that such question was not limited to an inquiry as to whether the train dispatchers in the service of the employer had authorized the order or its committee to represent them in the arbitration proceedings, which was merely a matter of agency, but that it covered the broader question as to whether they should be represented generally in their negotiations and dealings with the employer in respect to rates of pay and hours of service by the body of its employees who were members of the order, or should be separately represented, and that the board of arbitration properly admitted evidence offered by the employer to show the nature of their duties, and that their relation to the employer and to its service to the public was different from that of ordinary telegraphers. In re Southern Pac. Co., (N. D. Cal. 1907) 155 Fed. 1001.

An agreement for arbitration between a railroad company and the Order of Railroad Telegraphers, whose members employed by the company were working under a schedule agreed to between the parties fixing rates of pay and hours of service, which submitted as one of the questions to be arbitrated “the question of eliminating from the operation of the schedule certain important agencies where the duties of soliciting traffic are paramount,” was not ambiguous in respect to such question, which was clearly limited by terms to “agencies where the duties of soliciting traffic are paramount,” and could not be broadened by construction to authorize the board of arbitrators to consider and determine whether the schedule shall apply generally to “station agents whose regular duties do not include telegraphic work and whose annual earnings . . . . equal or exceed a certain sum. In re Southern Pac. Co., (N. D. Cal. 1907) 155 Fed. 1001.

Sec. 5. [Authority of arbitrators to secure testimony, etc.] That for the purposes of this Act the arbitrators herein provided for, or either of them, shall have power to administer oaths and affirmations, sign subpœnas, require the attendance and testimony of witnesses, and the production of such books, papers, contracts, agreements, and documents material to a just determination of the matters under investigation as may be ordered by the court; and may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as is provided for in the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and the amendments thereto. [38 Stat. L. 106.]

For the Act of Feb. 4, 1887, ch. 104, as amended, mentioned in this section, together with other Acts of similar character, see the title Interstate Commerce, vol. 4, p. 331.
SEC. 6. [Acknowledgment and filing of agreement — notification to arbitrators — selection to complete board — notice to board — reconvening of board.] That every agreement of arbitration under this Act shall be acknowledged by the parties thereto before a notary public or a clerk of the district or the circuit court of appeals of the United States, or before a member of the Board of Mediation and Conciliation, the members of which are hereby authorized to take such acknowledgments; and when so acknowledged shall be delivered to a member of said board or transmitted to said board to be filed in its office.

When such agreement of arbitration has been filed with the said board, or one of its members, and when the said board, or a member thereof, has been furnished the names of the arbitrators chosen by the respective parties to the controversy, the board, or a member thereof, shall cause a notice in writing to be served upon the said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the board, and advising them of the period within which, as provided in the agreement of arbitration, they are empowered to name such arbitrator or arbitrators.

When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Board of Mediation and Conciliation; and in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act they shall, at the expiration of such period, notify the Board of Mediation and Conciliation of the arbitrators selected, if any, or of their failure to make or to complete such selection.

If the parties to an arbitration desire the reconvening of a board to pass upon any controversy arising over the meaning or application of an award, they shall jointly so notify the Board of Mediation and Conciliation, and shall state in such written notice the question or questions to be submitted to such reconvened board. The Board of Mediation and Conciliation shall thereupon promptly communicate with the members of the board of arbitration or a subcommittee of such board appointed for such purpose pursuant to the provisions of the agreement of arbitration, and arrange for the reconvening of said board or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the board will meet for hearings upon the matters in controversy to be submitted to it. [38 Stat. L. 106.]

SEC. 7. [Organisation of board — proceedings, etc.] That the board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings; but in its award or awards the said board shall confine itself to findings or recommendations as to the questions specifically submitted to it or matters directly bearing thereon. All testimony before said board shall be given under oath or affirmation, and any member of the board of arbitration shall have the power to administer oaths or affirmations. It may employ such assistants as may be necessary in carrying on its work. It shall, whenever practicable, be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may adjourn for its deliberations. The board of arbitration shall furnish a certified copy of its awards to the respective parties to the controversy, and shall transmit the original,
together with the papers and proceedings and a transcript of the testimony taken at the hearings, certified under the hands of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk’s office as provided in paragraph eleven of section four of this Act. And said board shall also furnish a certified copy of its award, and the papers and proceedings, including the testimony relating thereto, to the Board of Mediation and Conciliation, to be filed in its office.

The United States Commerce Court, the Interstate Commerce Commission, and the Bureau of Labor Statistics are hereby authorized to turn over to the Board of Mediation and Conciliation upon its request any papers and documents heretofore filed with them and bearing upon mediation or arbitration proceedings held under the provisions of the Act approved June first, eighteen hundred and ninety-eight, providing for mediation and arbitration. [38 Stat. L. 106.]

The Act of June 1, 1898, ch. 370, above mentioned was repealed by section 11 of this Act, infra, p. 287.

**Sec. 8. [When award becomes effective — action in district court — disposition of exceptions on questions of law — appeals — restricted to questions of law — finality of judgment — judgment by agreement — no compulsory labor.]** That the award, being filed in the clerk’s office of a district court of the United States as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent upon the record, in which case said award shall go into practical operation, and judgment be entered accordingly, when such exceptions shall have been finally disposed of either by said district court or on appeal therefrom.

At the expiration of ten days from the decision of the district court upon exceptions taken to said award as aforesaid judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided.

The determination of said circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

If exceptions to an award are finally sustained, judgment shall be entered setting aside the award in whole or in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Nothing in this Act contained shall be construed to require an employee to render personal service without his consent, and no injunction or other legal process shall be issued which shall compel the performance by any employee against his will of a contract for personal labor or service. [38 Stat. L. 107.]
Exceptions and review.—Under this section an award is subject to exception only on pure questions of law directly and necessarily affecting the award made and which go to the jurisdiction of the board, the legality of its formation under the statute, and the scope of its inquiry with respect to the questions specifically submitted to it. The judgment of a District Court on the exceptions to an award made in arbitration proceedings pursuant to this section, is reviewable by appeal in the Circuit Court of Appeals. Georgia, etc., R. Co. v. Brotherhood of Locomotive Engineers, (C. C. A. 5th Cir. 1914) 217 Fed. 765, 132 C. C. A. 559.

Entry of judgment.—In an arbitration proceeding to settle differences between an interstate carrier and its employees, judgment on the award cannot be entered by the court until after the appeal has been determined, or until after the time for taking an appeal has expired. In re Southern Pac. Co., (N. D. Cal. 1907) 156 Fed. 1001.

Sec. 9. [Rights of employees under federal court receivers—restriction on reducing wages.] That whenever receivers appointed by a Federal court are in possession and control of the business of employers covered by this Act the employees of such employers shall have the right to be heard through their representatives in such court upon all questions affecting the terms and conditions of their employment; and no reduction of wages shall be made by such receivers without the authority of the court therefor, after notice to such employees, said notice to be given not less than twenty days before the hearing upon the receivers’ petition or application, and to be posted upon all customary bulletin boards along or upon the railway or in the customary places on the premises of other employers covered by this Act. [38 Stat. L. 107.]

Sec. 10. [Compensation of arbitrators.] That each member of the board of arbitration created under the provisions of this Act shall receive such compensation as may be fixed by the Board of Mediation and Conciliation, together with his traveling and other necessary expenses. The sum of $25,000, or so much thereof as may be necessary, is hereby appropriated, to be immediately available and to continue available until the close of the fiscal year ending June thirtieth, nineteen hundred and fourteen, for the necessary and proper expenses incurred in connection with any arbitration or with the carrying on of the work of mediation and conciliation, including per diem, traveling, and other necessary expenses of members or employees of boards of arbitration and rent in the District of Columbia, furniture, office fixtures and supplies, books, salaries, traveling expenses, and other necessary expenses of members or employees of the Board of Mediation and Conciliation, to be approved by the chairman of said board and audited by the proper accounting officers of the Treasury. [38 Stat. L. 108.]

That part of the above section providing for an appropriation may be regarded as temporary, since appropriations are made yearly for the purpose of carrying out the provisions of this Act. That for the fiscal year 1915 is contained in the Deficiencies Appropriation Act of March 4, 1915, ch. 147, 38 Stat. L. 1140.

Sec. 11. [Commissioner and assistant commissioner of mediation and conciliation—other members to constitute board of mediation and conciliation—assistant commissioner—former act repealed—pending agreements, etc., continued.] There shall be a Commissioner of Mediation and Conciliation, who shall be appointed by the President, by and with the advice and consent of the Senate, and whose salary shall be $7,500 per annum, who shall hold his office for a term of seven years and until a successor qualifies, and who shall be removable by the President only for misconduct in office. The President shall also designate not more than two other officials of the Government who have been appointed by and with
the advice and consent of the Senate, and the officials thus designated, together with the Commissioner of Mediation and Conciliation, shall constitute a board to be known as the United States Board of Mediation and Conciliation.

There shall also be an Assistant Commissioner of Mediation and Conciliation, who shall be appointed by the President, by and with the advice and consent of the Senate, and whose salary shall be $5,000 per annum. In the absence of the Commissioner of Mediation and Conciliation, or when that office shall become vacant, the assistant commissioner shall exercise the functions and perform the duties of that office. Under the direction of the Commissioner of Mediation and Conciliation, the assistant commissioner shall assist in the work of mediation and conciliation and when acting alone in any case he shall have the right to take acknowledgments, receive agreements of arbitration, and cause the notices in writing to be served upon the arbitrators chosen by the respective parties to the controversy, as provided for in section five of this Act.

The Act of June first, eighteen hundred and ninety-eight, relating to the mediation and arbitration of controversies between railway companies and certain classes of their employees is hereby repealed: Provided, That any agreement of arbitration which, at the time of the passage of this Act, shall have been executed in accordance with the provisions of said Act of June first, eighteen hundred and ninety-eight, shall be governed by the provisions of said Act of June first, eighteen hundred and ninety-eight, and the proceedings thereunder shall be conducted in accordance with the provisions of said Act. [38 Stat. L. 108.]

The Act repealed by the latter part of the above section is the Erdman Act of June 1, 1898, ch. 370, 30 Stat. L. 424.

II. COMMISSION ON INDUSTRIAL RELATIONS

An Act To create a Commission on Industrial Relations.


[Sec. 1.] [Commission established — composition.] That a commission is hereby created to be called the Commission on Industrial Relations. Said commission shall be composed of nine persons, to be appointed by the President of the United States, by and with the advice and consent of the Senate, not less than three of whom shall be employers of labor and not less than three of whom shall be representatives of organized labor. The Department of Commerce and Labor is authorized to cooperate with said commission in any manner and to whatever extent the Secretary of Commerce and Labor may approve. [37 Stat. L. 415.]

This is known as the "Industrial Relations Commission Act."

The Department of Commerce and Labor was to be called the Department of Commerce, and the secretary thereof the Secretary of Commerce by the Act of March 4, 1913, ch. 141, sec. 1, 37 Stat. L. 736, creating the Department of Labor as a new executive department. See Labor Department. See the note to sec. 3 of this Act, infra, p. 269.

Sec. 2. [Compensation of members — general authority.] That the members of this commission shall be paid actual traveling and other neces-
sary expenses and in addition a compensation of ten dollars per diem while actually engaged on the work of the commission and while going to or returning from such work. The commission is authorized as a whole, or by subcommittees of the commission, duly appointed, to hold sittings and public hearings anywhere in the United States, to send for persons and papers, to administer oaths, to summon and compel the attendance of witnesses and to compel testimony, and to employ such secretaries, experts, stenographers, and other assistants as shall be necessary to carry out the purposes for which such commission is created, and to rent such offices, to purchase such books, stationery, and other supplies, and to have such printing and binding done, as may be necessary to carry out the purposes for which such commission is created, and to authorize its members or its employees to travel in or outside the United States on the business of the commission. [37 Stat. L. 415.]

SEC. 3. [Reports and recommendations to Congress.] That said commission may report to the Congress its findings and recommendations and submit the testimony taken from time to time, and shall make a final report accompanied by the testimony not previously submitted not later than three years after the date of the approval of this Act, at which time the term of this commission shall expire, unless it shall previously have made final report, and in the latter case the term of the commission shall expire with the making of its final report; and the commission shall make at least one report to the Congress within the first year of its appointment and a second report within the second year of its appointment. [37 Stat. L. 415.]

By the Sundry Civil Appropriation Act of March 4, 1915, ch. 75, § 1, 38 Stat. L. 840, an appropriation was made:

"For completing the inquiries and investigations authorized by the Act of August twenty-third, nineteen hundred and twelve, entitled 'An Act to create a Commission on Industrial Relations,' and to provide the expenses of such inquiries and investigations as are enumerated in section two of said Act, and for all necessary printing, including the final report of the commission, $100,000, to be immediately available."

SEC. 4. [Inquiries into labor conditions.] That the commission shall inquire into the general condition of labor in the principal industries of the United States including agriculture, and especially in those which are carried on in corporate forms; into existing relations between employers and employees; into the effect of industrial conditions on public welfare and into the rights and powers of the community to deal therewith; into the conditions of sanitation and safety of employees and the provisions for protecting the life, limb, and health of the employees; into the growth of associations of employers and of wage earners and the effect of such associations upon the relations between employers and employees; into the extent and results of methods of collective bargaining; into any methods which have been tried in any State or in foreign countries for maintaining mutually satisfactory relations between employees and employers; into methods for avoiding or adjusting labor disputes through peaceful and conciliatory mediation and negotiations; into the scope, methods, and resources of existing bureaus of labor and into possible ways of increasing their usefulness; into the question of smuggling or other illegal entry of Asians into the United States or its insular possessions, and of the methods by which such Asians have gained and are gaining such admission, and
shall report to Congress as speedily as possible with such recommendation as said commission may think proper to prevent such smuggling and illegal entry. The commission shall seek to discover the underlying causes of dissatisfaction in the industrial situation and report its conclusions thereon. [37 Stat. L. 416.]

SEC. 5. [Employment of experts — salaries.] That the sum of one hundred thousand dollars is hereby appropriated out of any money in the Treasury of the United States not otherwise appropriated for the use of the commission for the fiscal year ending June thirtieth, nineteen hundred and thirteen: Provided, That no portion of this money shall be paid except upon the order of said commission, signed by the chairman thereof: Provided, That the commission may expend not to exceed five thousand dollars per annum for the employment of experts at such rate of compensation as may be fixed by the commission but no other person employed hereunder by the commission, except stenographers temporarily employed for the purpose of taking testimony, shall be paid compensation at a rate in excess of three thousand dollars per annum. [37 Stat. L. 416.]

See the note to sec. 3 of this Act, supra, p. 269, respecting appropriations.

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III. HOURS OF LABOR

An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia.


SECTION 1. [Hours of labor for laborers and mechanics on government work — dredging, etc., in rivers and harbors — permitting longer hours — exceptions.] That the service and employment of all laborers and mechanics who are now, or may hereafter, be employed by the Government of the United States or the District of Columbia, or by any contractor or subcontractor, upon a public work of the United States or of the District of Columbia, and of all persons who are now, or may hereafter be, employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor, to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics or of such persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to require or permit any such laborer or mechanic or any such person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight
hours in any calendar day, except in case of extraordinary emergency: Provided, That nothing in this Act shall apply or be construed to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock excavating machinery or tools, nor to persons engaged in construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable rivers of the United States. [27 Stat. L. 340, as amended by 37 Stat. L. 726.]

This is the first section of the "Hours of Service Act" or the "Eight Hour Law of 1892" and was amended to read as above given by section 1 of an Act of March 3, 1913, ch. 106, entitled, "An Act relating to the limitation of the hours of daily service of laborers and mechanics employed upon a public work of the United States and of the District of Columbia, and of all persons employed in constructing, maintaining, or improving a river or harbor of the United States and of the District of Columbia."

The section as originally enacted was as follows:

"That the service and employment of all laborers and mechanics who are now or may hereafter be employed by the Government of the United States, by the District of Columbia, or by any contractor or subcontractor upon any of the public works of the United States or of the said District of Columbia, is hereby limited and restricted to eight hours in any one calendar day, and it shall be unlawful for any officer of the United States Government or of the District of Columbia or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency."

By its enactment it superseded the following provision of the Revised Statutes:

"Sec. 3738. Eight hours shall constitute a day's work for all laborers, workmen, and mechanics who may be employed by or on behalf of the Government of the United States."


Section 4 of the Amending Act of March 3, 1913, ch. 106, provided as follows:

"Sec. 4. That this Act shall become effective and be in force on and after March first, nineteen hundred and thirteen."

I. Power to legislate respecting hours of labor, 271
II. Construction and application generally, 271
III. Term "public works" construed and applied, 273
IV. Term "laborers and mechanics" construed and applied, 274
  1. In general, 274
  2. Particular employees, 274
V. Decisions construing R. S. sec. 3738, 275
I. POWER TO LEGISLATE RESPECTING HOURS OF LABOR

Authority of Congress.—Congress has power to prescribe the terms and conditions under which labor shall be performed in the construction of public works of the United States, and without reference to the fact whether such public works are or are not upon land over which the national government exercises political jurisdiction. U. S. v. San Francisco Bridge Co., (N. D. Cal. 1898) 86 Fed. 891.

Constitutionality.—The prohibition, under penalty of fine or imprisonment, except in case of extraordinary emergency, against requiring or permitting laborers or mechanics employed upon any of the public works of the United States or of the District of Columbia to work more than eight hours each day, is not repugnant to the Federal Constitution. Ellis v. U. S., (1907) 206 U. S. 246, 27 S. Ct. 600, 51 U. S. (L. ed.) 1047, 11 Ann. Cas. 588. See also (1905) 25 Op. Atty.-Gen. 441.

II. CONSTRUCTION AND APPLICATION GENERALLY

Purpose of eight-hour law.—The underlying purpose of all this legislation is to confer upon workmen the benefits, physical and moral, supposed to flow from a reduction of their labor to eight hours a day; not to increase their wages by enabling them to secure additional pay, if practicable, for working more than eight hours a day. Such statutes are paternalistic in character, and it is not intended that their benefits should be nullified through contracts made by the beneficiaries. (1912) 29 Op. Atty.-Gen. 488.

The effect of this Act was to make the government in all respects an eight-hour a-day employer as regards laborers and mechanics. (1912) 29 Op. Atty.-Gen. 506.

This Act was passed merely to extend the Act of June 25, 1898, R. S. sec. 3738, to contractors and subcontractors and to provide a penalty for violations of its restrictions, but not to change its general meaning. (1912) 29 Op. Atty.-Gen. 371.

Effect of Act of March 15, 1896.—Whether this Act was repealed to any extent whatever by the Act of March 16,
1898 (amending the Act of March 3, 1893, ch. 211, sec. 5, given in Civil Service, vol. 2, p. 164), providing for the hours of labor for governmental department employees, is a question upon which there may be some doubt, although the congressional history of the later Act indicates that Congress recognized its inconsistency with the eight-hour law in so far as it covers the same field and intended to that extent to repeal this Act. (1912) 29 Op. Atty.-Gen. 491.

Eight hours' effective labor.—This law means eight hours of effective labor. (1906) 26 Op. Atty.-Gen. 64.

Extraordinary emergency.—The exception in this section of cases of extraordinary emergency was designed to excuse overtime work which must be rendered to avert some sudden unusual emergency, unexpectedly arising and calling for prompt action. (1907) 26 Op. Atty.-Gen. 278.

But "no mere requirement of business convenience or pecuniary advantage is an extraordinary emergency within the meaning of this Act. The extraordinary emergency which relieves from the act is not one that is contemplated and inheres necessarily in the work. It is a special occurrence, and the phrase used emphasizes this. It is not an emergency simply which is expressed by it, something merely sudden and unexpected, but an extraordinary one, one exceeding the common degree." U. S. v. Garbish, (1911) 222 U. S. 257, 32 S. Ct. 77, 56 U. S. (L. ed.) 190.

And a contractor for a public work of the United States, who intentionally permits laborers employed thereon to work more than eight hours a day, under the mistaken assumption that an extraordinary emergency exists, intentionally violates the provisions of this Act. Ellis v. U. S., (1907) 206 U. S. 248, 27 S. Ct. 600, 51 U. S. (L. ed.) 1047, 11 Ann. Cas. 589.

In this connection it has been decided that the building of levees on the banks of the Mississippi river in the Eastern District of Louisiana presents at all times an extraordinary emergency, exempted from operation of the eight-hour law. U. S. v. Garbish, (E. D. La. 1910) 180 Fed. 502.

A delay, however, not entirely unexpected, in obtaining the timber required for the construction of a pier at the Boston navy yard, was held not to create an extraordinary emergency within the meaning of the exception in this Act. Ellis v. U. S. (1907) 206 U. S. 246, 27 S. Ct. 600, 51 U. S. (L. ed.) 1047, 11 Ann. Cas. 589.

And in U. S. v. Sheridan-Kirk Contract Co., (S. D. Ohio 1906) 149 Fed. 809, it was held that an "extraordinary emergency" in connection with the building of a dam across the Ohio river could not be construed as a continuing emergency, which would suspend the eight-hour law during the entire lifetime of the contract, nor an emergency growing out of the scarcity of labor, nor could it be made to include, not only the time of the happening of a flood, but also the time required to repair the injuries resulting therefrom; but that it is such an unforeseen, sudden, or unexpected emergency as requires immediate action or remedy, and when the emergency passes the privilege ceases.

Laborers at customs ports.—This Act includes in its scope such of the laborers employed at the various customs ports as are actually engaged in manual labor. (1912) 29 Op. Atty.-Gen. 491.

Government vessel as public work.—The employment of laborers and mechanics in making repairs to government vessels is employment upon a public work of the United States and is therefore subject to the restrictions of the eight-hour law. (1912) 29 Op. Atty.-Gen. 369.

Torpedo boats and torpedo boat destroyers.—This Act does not apply to the construction of torpedo boats and torpedo boat destroyers. (1910) 28 Op. Atty.-Gen. 404.

Construction of naval vessels.—This Act does not apply to the manufacture elsewhere than at the place where the vessel is built of machinery or other material which is to enter into the construction of the vessel. (1910) 28 Op. Atty.-Gen. 368.

Disease contracted in course of employment.—The word injury as used in this statute is in no sense suggestive of disease. Thus an artisan or laborer employed by the United States in the construction of river and harbor work, who contracted a severe cold in the course of his employment resulting in pneumonia and which incapacitated him from duty for a period lasting more than fifteen days, is not entitled to compensation under this Act. (1911) 29 Op. Atty.-Gen. 254.

Skilled workmen.—The eight-hour law includes skilled as well as unskilled workmen; and the employment of persons for a longer period than eight hours in any one day "when a dam is being raised or lowered" and the service is one "requiring skill and training" which "cannot safely be intrusted to inexperienced men," is not an employment in case of an "extraordinary emergency," and is a violation of that statute. (1908) 26 Op. Atty.-Gen. 605.

Statute does not affect wages.—If a workman is required by the officer in charge of the work to perform more labor each day during a part of his term of employment than the law allows, then the officer is an offender, unless there is an emergency; but that fact does not fix the wages of the workman or establish an agreement, either express or implied, when one did not exist before, and he is not entitled to recover compensation for the labor performed by him in excess of eight hours on each calendar day. U. S. v. Moses, (C. C. A. 9th Cir. 1903) 126 Fed. 58, 60 C. C. A. 600.
Indian service employees.—Persons employed by the Indian service on the Menominee Indian Reservation, Wis., under the Act of October 3, 1906 (34 Stat. 501), for the cutting of timber thereon and its conversion into logs and other lumber, are not employees of the United States Government and are not subject to the restrictions imposed by the Act of August 1, 1892, (27 Stat. 340) as regards hours of labor. (1909) 27 Op. Atty.-Gen. 139.


There is no conflict between the declarations in section 4 of the Reclamation Act of June 17, 1902, 32 Stat. L. 388 (see WATERS), that eight hours shall constitute a day's work upon the public works therein specified and the declarations in section 1 of this Act which allows more than eight hours' work in one calendar day "in case of extraordinary emergency." (1906) 26 Op. Atty.-Gen. 64.

Jetty work.—In (1907) 26 Op. Atty.-Gen. 273, it was held that this Act applied to the jetty work at the mouth of the Columbia river, which was being conducted directly by the government, and that those employed upon that work who came fairly within the meaning of the words "laborers and mechanics" should be restricted to eight hours of effective labor in any one calendar day, irrespective of enforced idleness on other days, except in case of a sudden emergency requiring prompt action.

Locks and dams.—A lock and dam permanent in its nature, constructed across a navigable stream pursuant to a contract with the United States, the title to which was to vest in the United States, although the medium of payment is not a money consideration but a grant of right to use the water power produced by said dam, is a "public work within the meaning of the Act. Chattanooga, etc., Power Co. v. U. S., (C. C. A. 6th Cir. 1913) 209 Fed. 28, 126 C. C. A. 170.

Obstructions to navigation.—The removal of such obstructions in the rivers and harbors of the country is a part of the public work of the government. U. S. v. Jefferson, (D. C. Wash. 1894) 60 Fed. 736.

Panama canal.—This Act applies to the employment of laborers and mechanics in the construction of the Panama canal.

It does not apply to the office force of the Isthmian Canal Commission stationed on the Isthmus of Panama, or to any of the employees of the government who are not within the ordinary meaning of the words "laborers and mechanics." (1906) 26 Op. Atty.-Gen. 441.

Employees of Panama railroad.—This Act does not apply to laborers and mechanics in the employ of the Panama Rail-
road and Steamship Line, such persons being employed by the corporation and not by the United States. (1906) 26 Op. Atty.-Gen. 465.

IV. TERM "LABORERS AND MECHANICS" CONSTRUED AND APPLIED

1. In General

The words "laborers and mechanics" must be presumed to have been used by Congress in their ordinary sense. (1892) 20 Op. Atty.-Gen. 487.

As to laborers and mechanics in the direct employment of the government and in the District of Columbia, the statute is general, and the limitation to public works applies only to such persons as are not in the employ of contractors and subcontractors. (1902) 20 Op. Atty.-Gen. 459.

Method of payment not material. The words "laborers and mechanics," as used in the eight-hour law, apply to all persons who may fairly come within the description of laborers and mechanics, whether they are paid by the year, by the month, or by the day. (1906) 26 Op. Atty.-Gen. 465.

Labor outside regular hours. Persons employed as lock tenders, lock helpers, lockmen, and in similar employments at the locks of the various canals owned and operated by the government may be called upon to perform service at any hour of the day, and such requirement is legal and proper under the eight-hour law so long as the total service rendered does not exceed eight hours per day. (1908) 26 Op. Atty.-Gen. 605.

2. Particular Employees

Blacksmiths and their helpers, firemen, and pumpmen employed in the Reclamation Service are either mechanics or laborers within the meaning of the eight-hour law. (1906) 26 Op. Atty.-Gen. 64.

Carpenters. A carpenter "whose duty is to perform manual labor in the removal of furniture and office fixtures, cutting grass, washing floors and windows, and general office cleaning," is not a laborer within the meaning of the eight-hour law; such services being more those of a domestic servant than those of a laborer in the usual meaning of the term. (1908) 26 Op. Atty.-Gen. 623.

Foremen of mechanics at the Port Leavenworth military prison are not laborers or mechanics within the statute. (1894) 21 Op. Atty.-Gen. 32.

Hostler. A hostler "whose duty is to feed, drive and care for horses, and to clean carriages, harness, and stables," is rather a domestic servant than a laborer. (1908) 26 Op. Atty.-Gen. 623.

Messengers. A messenger "whose duty is to sweep floors and do general office cleaning, attend to fires, and carry messages," is not a laborer or mechanic within the meaning of the eight-hour law. (1908) 26 Op. Atty.-Gen. 623. See also (1908) 26 Op. Atty.-Gen. 604.

Seamen. To the question whether the statute includes teamsters, watchmen, engineers, and firemen employed in the public service in the War Department, and all engineers, firemen, deckhands, mates, and seamen on government vessels, in the service thereof, the Attorney-General replied that the answer depended upon matters of fact not stated and not within his cognizance. "If the employees named are ordinary laborers or mechanics, working for the government for wages under ordinary conditions, the statute would seem to apply. At the same time, it is quite apparent that, as to some of them, it might frequently happen that they would be within the emergency exception named in the statute; and as to others, as, for instance, sailors or others on shipboard, or teamsters or their employment being peculiar, they might well be held to be, as a matter of fact, neither laborers nor mechanics within the meaning of this law." (1892) 20 Op. Atty.-Gen. 459.

Masters, mates, engineers, firemen, crane men, deck hands, and scow men employed on tugs, dredges, and scows used in dredging a harbor channel are not laborers or mechanics within the meaning of this Act. Ellis v. U. S., (1907) 206 U. S. 246. 27 S. Ct. 600, 51 U. S. (L. ed.) 1047, 11 Ann. Cas. 589.

In Breakwater Co. v. U. S., (C. C. A. 3d Cir. 1910) 182 Fed. 112, 105 C. C. A. 404, it appeared that the defendant was a contractor engaged in constructing for the United States jetties near Cape May harbor, extending from the shore into the open sea. The jetties were built up with stone, thrown overboard from barges, which were towed across Delaware bay, anchored, and as needed towed to the jetties and warped along while being discharged. As crews of such barges defendant employed engineers, boatmen, and hoistmen, selected for their seafaring experience, who operated the barges and also discharged their cargoes. The work done and the time required to do it depended on tide, wind, and weather, which ordinarily required variable hours of service on the part of the men. The court followed Ellis v. U. S., supra, and held that such men were seamen, with the rights of such, including the right to a lien on the vessel for their wages, and could not be classed as laborers or mechanics, within the meaning of this Act. Watchmen. In (1908) 26 Op. Atty.-Gen. 623, it was held that a watchman "whose duty is to watch the entrance of one of the public buildings occupied by the War Department, executing instructions with regard to admitting persons into the building and permitting public property to be taken out of the building, reporting to his chief any violation of law, disturbance of the peace, etc., that may be brought to his attention, or to guard the building
and property therein during the night," was not a laborer or mechanic within the meaning of the eight-hour law.

In (1908) 26 Op. Atty.-Gen. 622, it was held that a watchman employed at Corregidor Island, Philippine Islands, whose duties were "to supervise all arrivals and to see that no one lands on the island without authority, to investigate such matters as the absence from work of native employees, and to make reports of those matters," was not a laborer or mechanic within the meaning of the eight-hour law. See also (1908) 26 Op. Atty.-Gen. 804.

The crew of a vessel belonging to the War Department, used in the removal of obstructions to navigation in rivers and harbors, are laborers of a different kind from those who are ordinarily employed upon public works of the United States. If part of the crew of such vessel is also sent to perform service in the making or clearing of obstructions from the rivers and harbors in order to convict the officer of the vessel under section 2 of this statute, it would have to be found that the defendant required them upon the public work, aside from their duties as seamen or deck hands on the vessel, to perform more than eight hours work in a day. U. S. v. Jefferson, (D. C. Wash. 1894) 60 Fed. 736.

V. DECISIONS CONSTRUING R. S. SEC. 3738
This statute was the original eight-hour law and contains no reference to "public works," but applies in terms to "all laborers, workmen, and mechanics now employed or who may hereafter be employed by or on behalf of the government of the United States." This statute proved ineffective because it was held to be not mandatory but merely directory (U. S. v. Martin, (1876) 94 U. S. 400, 24 U. S. (L. ed.) 128), and also not to apply to laborers employed by independent contractors even though engaged in government work (Crandall, (1877) 96 U. S. 421, 24 U. S. (L. ed.) 847). The present Act (Act of August 1, 1892, ch. 352, 27 Stat., p. 270) was passed avowedly to meet these two decisions. (1912) 29 Op. Atty.-Gen. 481; (1912) 29 Op. Atty.-Gen. 482.

Directory.—The statute is in the nature of a direction by the government to its agent, and the government is not precluded from making contracts fixing a different length of time as a day's work. If an employee in the public service, independently of the Act, works more than eight hours per day, and is paid by the day and accepts payment, he cannot be heard to say that every eight hours constituted a day's work. U. S. v. Martin, (1876) 94 U. S. 400, 24 U. S. (L. ed.) 128. See also Laurev v. U. S., (1897) 32 Ct. Cl. 259; Driscoll's Case, (1877) 13 Ct. Cl. 33; (1890) 19 Op. Atty.-Gen. 685.

This statute is general, applying to all "laborers and workmen and mechanics" in the direct employment of the United States. In practical administration, however, this section has been held to be merely directory, and has not been enforced. (1892) 20 Op. Atty.-Gen. 462.

The statute is not a contract between the government and its laborer that eight hours shall constitute a day's work. It does not prevent the government from making agreements, either express or implied, by which a day's labor could be more or less than eight hours a day, nor does it prescribe the amount of compensation for that time or any other number of hours' labor. Coleman v. U. S., (D. C. Ky. 1897) 81 Fed. 824.

Employed by contractor.—The provisions of this statute are not applicable to mechanics, workmen, and laborers who are in the employment of a contractor with the United States. (1872) 14 Op. Atty.-Gen. 87; See also U. S. v. Driscoll, (1877) 96 U. S. 421, 24 U. S. (L. ed.) 847; (1872) 14 Op. Atty.-Gen. 45.

"Where a contract was entered into between the Secretary of State and an individual whereby the latter was to furnish all the labor necessary for dressing and boxing certain granite, and to be paid the cost thereof with fifteen per cent. added, it cannot be deemed an evasion of the statute known as the eight-hour law. The legal execution of a right in such form as not to come within the prohibition of a statute is not necessarily an evasion of the statute." Driscoll's Case, (1877) 13 Ct. Cl. 15.

But where a contract with a contractor provided that the United States were to pay the contractor "the full expense and cost of working, dressing, insuring, and boxing the stone," and it appears that the granite cutters, dressers, and boxers of the stone were paid by the United States, they were held to be the employees of the government, though their labor was engaged and directed by the contractor, and such they were subject to and entitled to the benefit of this statute. Dix Island Granite Case, (1876) 12 Ct. Cl. 624.

The provisions of this section were extended to contractors and subcontractors, and a penalty provided for violations of its restrictions by the Act of Aug. 1, 1892. (1912) 29 Op. Atty.-Gen. 371.

Statute does not affect wages.—This statute does not establish an inflexible rule for the payment of wages to employees and give them the right to the same rate of compensation for each eight hours' labor that they would otherwise be entitled to for a calendar day's work or more hours', actual service. Averill's Case, (1878) 14 Ct. Cl. 200. See also Collins v. U. S. (1889) 24 Ct. Cl. 571.

It does not absolutely require that employees of the government must receive as high wages for their eight hours' labor as similar industry in private employment receives for a day's labor of ten or twelve
hours; but it simply requires that the same worth of labor shall be compensated in the public employment at the same rate of wages that it receives in private employment. (1868) 12 Op. Atty.-Gen. 530. See also (1869) 13 Op. Atty.-Gen. 29.

This statute left the subject of compensation to be regulated upon principles in force at the time of its passage. The President, by proclamation dated May 19, 1869, directed that thereafter no reduction should be made in the wages of government employees on account of the reduction in the hours of labor; it was held that persons serving the government as laborers, workmen, and mechanics are not entitled to receive, for the period intervening between the date of the Act and the date of the proclamation, the wages of a day of ten hours for working eight hours — the government being under no obligation to pay more for the past because it has agreed to pay more for the future. (1871) 13 Op. Atty.-Gen. 494.

The following propositions may be deduced from former opinions of the Attorneys-General and the decisions of the Court of Claims and the Supreme Court of the United States: 1. That the Act of 1868 (R. S. sec. 3738) prescribed the length of time which shall constitute a day's work; but it does not establish any rule by which the compensation for a day's work shall be determined — this being left to be fixed in the ordinary or customary manner where the law does not otherwise provide. 2. That it does not contemplate a reduction of wages simply because of the reduction thereby made in the length of the day's work; but on the other hand it does not require that the same wages shall be paid therefor as are received by those who in similar private employments work a greater length of time per day. This matter of wages is to be dealt with as pointed out in the preceding paragraph, having due regard to the public interest. 3. That it does not forbid the making of contracts which shall have a different length of time for the day's work than that prescribed in the law. 4. The provisions of the Act are not applicable to mechanics, workmen, and laborers who are in the employment of a contractor of the United States. It was not intended that the Act should extend to any others than the immediate employees of the government. 5. All persons who are employed and paid by the day are included within the Act, even though they do not fall within the strict language of "laborers, workmen, and mechanics." (1868) 18 Op. Atty.-Gen. 359. See also (1882) 17 Op. Atty.-Gen. 341; (1878) 16 Op. Atty.-Gen. 69.

When the salary of an office is limited by statute to a certain sum per annum, it precludes the officers of the United States and the person appointed to the office from the exercise of the power of contractors to increase the compensation beyond the limited appropriation. Gordon v. U.S., (1896) 31 Ct. Cl. 254.

When an employee continues in a service which requires twelve hours of time each day at a stated compensation per month, he is not entitled to recover as upon an implied contract for the service in excess of eight hours a day. U. S. v. Martin, (1876) 94 U. S. 400, 24 U. S. (L. ed.) 128; Timmonds v. U. S., (C. C. A. 7th Cir. 1898) 84 Fed. 933, 56 U. S. App. 269, 26 C. C. A. 470.

Where an employee in the public service works twelve hours a day, is paid by the day, and accepts the payment, he is excluded from maintaining that every eight hours constituted a day's work under the provisions of the eight-hour law. Averill's Case, (1875) 14 Ct. Cl. 200.

A circular of the Navy Department announcing that "the department will contract for the labor of mechanics, foremen, leading men, and laborers on the basis of eight hours a day," but that workmen "serving to labor ten hours a day will receive a proportionate increase of their wages," is in accordance with this section. (1878) 16 Op. Atty.-Gen. 58.

Watchmen are not included within the designation of persons entitled to the benefits in the preceding section, to wit, "laborers, workmen, and mechanics." Gordon v. U. S., (1898) 31 Ct. Cl. 254.

VIOLATION OF ACT BY OFFICER OR CONTRACTOR PUNISHABLE.

Sec. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, who shall intentionally violate any provision of this Act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed one thousand dollars, or by
imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

This section was amended to read as above given by the Act of March 3, 1915, ch. 106. See the note to section 1 of this Act supra, p. 271. Originally it was as follows:

"Sec. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any of the public works of the United States or of the District of Columbia who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof."

Jurisdiction.—In a prosecution of govern- ment contractors for "unlawfully, intentionally, and knowingly requiring or permitting a laborer or mechanic, employed on public work," to wit, a dam across the Ohio river, to work more than eight hours in a single calendar day, contrary to the provisions of this Act, the offense was not the working overtime by the laborer or mechanic, but was on the part of the contractor in requiring and permitting such overtime work to be done; and hence, where the work was directed, required, or permitted from the Ohio side of the river, the federal court for the Southern District of Ohio had jurisdiction over the offense, notwithstanding some or all of the work may have been performed south of the line which divides the states of Ohio and Kentucky. U. S. v. Sheridan-Kirk Contract Co., (S. D. Ohio 1900) 149 Fed. 809.

To render a person amenable to this statute he must have been an officer or agent of the government of the United States, or a contractor or subcontractor, whose duty it was to employ, direct, or control laborers or mechanics employed upon some of the public works of the United States. He must have intentionally violated the provision of this act by requiring or permitting such laborers or mechanics to work more than eight hours in any calendar day. U. S. v. Ollinger, (S. D. Ala. 1893) 59 Fed. 699.

Indictment.—The time of the commission of an offense under this Act as laid in the indictment does not confine the proof within the limits of that period, but proof that the offense was committed on or about the dates fixed in the indictment, if con- fined to dates prior to the finding of the grand jury, is competent to establish the charge. U. S. v. Sheridan-Kirk Contract Co., (S. D. Ohio 1900) 149 Fed. 809.

Information.—This Act makes it a separate offense in the case of each laborer or mechanic so required to work more than eight hours, and a criminal information against a contractor for violation of such provision must set out the names of, or otherwise identify, the persons so alleged to have been unlawfully employed, that the accused may meet the charge intelligently, and be able to plead a conviction or acquit-
the eight-hour law given by that department during the years immediately following the passage of the law, he is not entitled to introduce such construction as a defense. U. S. c. Sheridan-Kirk Contract Co., (S. D. Ohio 1906) 149 Fed. 810.

EXISTING CONTRACTS NOT AFFECTED BY ACT.

SEC. 3. That the provisions of this Act shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or to limit the hours of daily service of laborers or mechanics engaged upon a public work of the United States or of the District of Columbia, or persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, for which contracts have been entered into prior to the passing of this Act or may be entered into under the provisions of appropriation Acts approved prior to the passage of this Act. [27 Stat. L. 540, as amended by 37 Stat. L. 727.]

This section was amended to read as above given by the Act of March 3, 1913, ch. 106. See the note to section 1 of this Act, supra, p. 271. The original provision was as follows:

"SEC. 3. The provisions of this act shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or to limit the hours of daily service of laborers or mechanics engaged upon the public works of the United States or of the District of Columbia for which contracts have been entered into prior to the passage of this act."

Where on July 28, 1892, the formal acceptance of a bid was given, but leaving a minor detail to be agreed upon, and a formal contract and bond were afterwards to be prepared and executed, no contract was entered into prior to the passage of the Act within the meaning of the statute. (1892) 20 Op. Atty.-Gen. 445.

An Act Limiting the hours of daily service of laborers and mechanics employed upon work done for the United States, or for any Territory, or for the District of Columbia, and for other purposes.


[SEC. 1.] [Eight-hour work day — all public contracts to provide for, by laborers or mechanics — penalty to be stipulated — inspectors to report violations — deduction from contract — appeals to head of department, etc.—right of action in Court of Claims.] That every contract hereafter made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of five dollars for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work; and any officer or person designated as inspector of the work to be performed under any such contract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any
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Territory, or of the District of Columbia, all violations of the provisions of this Act directed to be made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation and the day of such violation, and the amount of the penalties imposed according to the stipulation in any such contract shall be directed to be withheld for the use and benefit of the United States, the District of Columbia, or the Territory contracting by the officer or person whose duty it shall be to approve the payment of the moneys due under such contract, whether the violation of the provisions of such contract is by the contractor or any subcontractor. Any contractor or subcontractor aggrieved by the withholding of any penalty as hereinbefore provided shall have the right within six months thereafter to appeal to the head of the department making the contract on behalf of the United States or the Territory, and in the case of a contract made by the District of Columbia to the Commissioners thereof, who shall have power to review the action imposing the penalty, and in all such appeals from such final order whereby a contractor or subcontractor may be aggrieved by the imposition of the penalty hereinbefore provided such contractor or subcontractor may within six months after decision by such head of a department or the Commissioners of the District of Columbia file a claim in the Court of Claims, which shall have jurisdiction to hear and decide the matter in like manner as in other cases before said court. [37 Stat. L. 137.]

This is the first section of the "Hours of Service Act" or "Eight Hour Law" of 1912. For provisions relating to the Court of Claims, see JUDICIAL, vol. 5, p. 646.

"Work contemplated by the contract." — The eight-hour work day restriction applies only to work contemplated by the contract. The words "work contemplated by the contract" include the work directly and proximately in view in the contract as specifically appropriated to and destined for the government use. (1912) 29 Op. Atty.-Gen. 534.

Employees on dredging vessel.— Floating dredges are vessels, within the admiralty jurisdiction of the United States, and persons employed on them are seamen and not "laborers and mechanics" within the operation of the eight-hour law. It is therefore not necessary to report the cases of any persons working more than eight hours a day upon any vessel engaged in dredging under a government contract, irrespective of whether such persons are connected with the vessel as a part of its crew in its operation and management or are only employed thereon in the particular work of dredging and handling material. (1912) 29 Op. Atty.-Gen. 583.

Sec. 2. [Contracts excepted — all classes of contract work included — waiver in time of war — emergencies, etc.— eight-hour law not affected.]

That nothing in this Act shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: Provided, That all classes of work which have been, are now, or may hereafter be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section one of this Act. The President, by Executive order, may waive the provisions and stipulations in this Act as to any specific contract
or contracts during time of war or a time when war is imminent, and until January first, nineteen hundred and fifteen, as to any contract or contracts entered into in connection with the construction of the Isthmian Canal. No penalties shall be imposed for any violation of such provision in such contract due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or condition on account of which the President shall subsequently declare the violation to have been excusable. Nothing in this Act shall be construed to repeal or modify the Act entitled "An Act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia" being chapter three hundred and fifty-two of the laws of the Fifty-second Congress, approved August first, eighteen hundred and ninety-two, as modified by the Acts of Congress approved February twenty-seventh, nineteen hundred and six, and June thirtieth, nineteen hundred and six, or apply to contracts which have been or may be entered into under the provisions of appropriation Acts approved prior to the passage of this Act. [37 Stat. L. 138.]

The Act of Aug. 1, 1892, ch. 352, above mentioned, is given supra, p. 270.
The Acts of June 30, 1906, ch. 3912, 34 Stat. L. 689, and Feb. 27, 1908, ch. 510, 34 Stat. L. 33, above mentioned, were temporary only and provided that the Act of Aug. 1, 1892, ch. 352, supra, p. 270, should not apply to unskilled alien laborers employed in the construction of the Isthmian Canal within the Canal Zone.

The word "supplies" and the phrase "such materials or articles as may usually be bought in open market" are practically synonymous and cover things which are had in store or stock. Whether a particular article or material falls within this exception to the eight-hour provision is generally a matter of administration. (1912) 29 Op. Atty.-Gen. 534.

Contracts for purchase of government supplies.—The eight-hour work day restriction known as the eight-hour law, applies to contracts for the purchase of supplies by the government where the work incident to the manufacture thereof has ordinarily been performed by the government up to the time of the making of the contract therefor, and not merely occasionally or to a limited extent, and it is immaterial whether the contractor furnishes both materials and labor or labor only. (1912) 29 Op. Atty.-Gen. 505.

Projectiles.—Contracts for the purchase of projectiles are not excepted from the operation of the eight-hour restriction, but only the work done in assembling the parts, treating the forging or casting and machining the projectiles would be "work contemplated by the contract," unless the casting and other parts were manufactured solely and exclusively for the purpose of making projectiles. (1912) 29 Op. Atty.-Gen. 534.

Smokeless powder is manufactured ordinarily by the government and hence contracts for the purchase thereof are not excepted from the operation of this Act. (1912) 29 Op. Atty.-Gen. 534.

Sec. 3. [Effect.] That this Act shall become effective and be in force on and after January first, nineteen hundred and thirteen. [37 Stat. L. 138.]

IV. COMPENSATION FOR INJURIES TO EMPLOYEES

An Act Granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment.


[Sec. 1.] [Compensation to certain government employees for injuries sustained during employment.] That when, on or after August first, nine-
teen hundred and eight, any person employed by the United States as an artisan or laborer in any of its manufacturing establishments, arsenals, or navy-yards, or in the construction of river and harbor or fortification work or in hazardous employment on construction work in the reclamation of arid lands or the management and control of the same, or in hazardous employment under the Isthmian Canal Commission, is injured in the course of such employment, such employee shall be entitled to receive for one year thereafter, unless such employee, in the opinion of the Secretary of Commerce and Labor, be sooner able to resume work, the same pay as if he continued to be employed, such payment to be made under such regulations as the Secretary of Commerce and Labor may prescribe: Provided, That no compensation shall be paid under this Act where the injury is due to the negligence or misconduct of the employee injured, nor unless said injury shall continue for more than fifteen days. All questions of negligence or misconduct shall be determined by the Secretary of Commerce and Labor. [35 Stat. L. 556.]

This is known as the "Government Employers' Liability Act," and was extended by the Act of March 11, 1912, ch. 57, infra, p. 283, and the Act of July 27, 1912, ch. 255, sec. 2, infra, p. 284.


For Acts relating to injuries to employees on the Isthmian Canal see the title RIVERS, HARBOURS AND CANALS.

The Department of Commerce and Labor was to be called the Department of Commerce, and the secretary thereof the Secretary of Commerce by the Act of March 4, 1913, ch. 141, sec. 1, 37 Stat. L. 736, creating the new executive Department of Labor. See LABOR DEPARTMENT.

Negligence or misconduct as bar.—Although this statute is remedial and should be generously construed, the provision that no compensation shall be paid where the injury is due to negligence or misconduct forbids a construction of the statute which will involve the government in liability for injuries resulting from voluntary and unnecessary acts of persons in its employ. So where a laborer employed by the United States in the construction of river and harbor works, while off duty, went upon a hill to talk with the man emptying gravel about going home the following Sunday, and in the act of leaving, voluntarily and with no emergency for immediate action, attempted to empty a box of gravel and in so doing fell overboard and was drowned, the accident is deemed not to have arisen within the course of his employment, and compensation therefor is unauthorized under this Act. (1912) 29 Op. Atty.-Gen. 415.

And an employee in a government building who knows of an insecure plank in a passageway, and has passed over it frequently, is guilty of contributory negligence if he allows himself to trip upon it when with ordinary care he could pass over it in safety. Hayes v. U. S., (1911) 46 Ct. Cl. 382.

But where a plate printer in the Bureau of Engraving and Printing sprained his right wrist in the course of his employment, without misconduct or negligence on his part, which injury was complicated by a rupture of the synovial sac surrounding the ligaments leading from the back part of the forearm to the fingers, the injury continuing for more than fifteen days, it was ruled that he had suffered "an injury" within the meaning of this Act, on account of which compensation might be paid. 27 Op. Atty.-Gen. (1909) 346.

Sec. 2. [Compensation to widow, children, or dependents.] That if any artisan or laborer so employed shall die during the said year by reason of such injury received in the course of such employment, leaving a widow, or a child or children under sixteen years of age, or a dependent parent, such widow and child or children and dependent parent shall be entitled to receive, in such portions and under such regulations as the Secretary of Commerce and Labor may prescribe, the same amount, for the remainder of the said year, that said artisan or laborer would be entitled to receive
as pay if such employee were alive and continued to be employed: Provided, That if the widow shall die at any time during the said year her portion of said amount shall be added to the amount to be paid to the remaining beneficiaries under the provision of this section, if there be any. [35 Stat. L. 556.]

See the note to the preceding sec. 1 of this Act regarding the Secretary of Commerce and Labor.

Sec. 3. [Reports of injuries — character of reports.] That whenever an accident occurs to any employee embraced within the terms of the first section of this Act, and which results in death or a probable incapacity for work, it shall be the duty of the official superior of such employee to at once report such accident and the injury resulting therefrom to the head of his Bureau or independent office, and his report shall be immediately communicated through regular official channels to the Secretary of Commerce and Labor. Such report shall state, first, the time, cause, and nature of the accident and injury and the probable duration of the injury resulting therefrom; second, whether the accident arose out of or in the course of the injured person’s employment; third, whether the accident was due to negligence or misconduct on the part of the employee injured; fourth, any other matters required by such rules and regulations as the Secretary of Commerce and Labor may prescribe. The head of each Department or independent office shall have power, however, to charge a special official with the duty of making such reports. [35 Stat. L. 557.]

With respect to the Secretary of Commerce and Labor see the note to sec. 1 of this Act, supra, p. 281.

The word "accident" is employed in this section to denote the happening of some unusual event producing death or injury, which injury results in incapacity for work, lasting more than fifteen days. 27 Op. Atty-Gen. (1909) 346.

An employee may, within the language of this section, be injured in the course of his employment without having suffered a definite accident. 27 Op. Atty-Gen. (1909) 346.

Sec. 4. [Affidavit in case of death — physician’s certificate — affidavit in case of injury — determining compensation.] That in the case of any accident which shall result in death, the persons entitled to compensation under this Act or their legal representatives shall, within ninety days after such death, file with the Secretary of Commerce and Labor an affidavit setting forth their relationship to the deceased and the ground of their claim for compensation under the provisions of this Act. This shall be accompanied by the certificate of the attending physician setting forth the fact and cause of death, or the nonproduction of the certificate shall be satisfactorily accounted for. In the case of incapacity for work lasting more than fifteen days, the injured party desiring to take the benefit of this Act shall, within a reasonable period after the expiration of such time, file with his official superior, to be forwarded through regular official channels to the Secretary of Commerce and Labor, an affidavit setting forth the grounds of his claim for compensation, to be accompanied by a certificate of the attending physician as to the cause and nature of the injury and probable duration of the incapacity, or the nonproduction of the certificate shall be satisfactorily accounted for. If the Secretary of Commerce and Labor shall find from the report and affidavit or other evidence pro
duced by the claimant or his or her legal representatives, or from such additional investigation as the Secretary of Commerce and Labor may direct, that a claim for compensation is established under this Act, the compensation to be paid shall be determined as provided under this Act and approved for payment by the Secretary of Commerce and Labor. [35 Stat. L. 557.]

See the note to sec. 1 of this Act, supra, p. 281, respecting the Secretary of Commerce and Labor.

The word "injury" in this section is employed comprehensively, to embrace all the cases of incapacity to continue work or employment, unless the injury is due to the negligence or misconduct of the employee injured, and includes all cases where, as a result of the employee's occupation, and without any negligence or misconduct, he becomes unable to carry on his work, and the condition continues for more than fifteen days. 27 Op. Atty.-Gen. (1909) 346.

But it has been ruled that the word "injury," as used in above statute, is in no sense suggestive of disease, nor has it ordinarily any such significance. 28 Op. Atty.-Gen. (1910) 254.

So an artisan or laborer employed by the United States in the construction of river and harbor work, who contracted a severe cold in the course of his employment, resulting in pneumonia, which incapacitated him for duty for a period lasting more than fifteen days, is not entitled to compensation under this act. 28 Op. Atty.-Gen. (1910) 254.

SEC. 5. [Medical examination.] That the employee shall, whenever and as often as required by the Secretary of Commerce and Labor, at least once in six months, submit to medical examination, to be provided and paid for under the direction of the Secretary, and if such employee refuses to submit to or obstructs such examination his or her right to compensation shall be lost for the period covered by the continuance of such refusal or obstruction. [35 Stat. L. 557.]

As to the Secretary of Commerce and Labor see the note to sec. 1 of this Act, supra, p. 281.

SEC. 6. [Payments to beneficiaries, etc.] That payments under this Act are only to be made to the beneficiaries or their legal representatives other than assignees, and shall not be subject to the claims of creditors. [35 Stat. L. 557.]

SEC. 7. [Contracts exempting from liability void.] That the United States shall not exempt itself from liability under this Act by any contract, agreement, rule, or regulation, and any such contract, agreement, rule, or regulation shall be pro tanto void. [35 Stat. L. 558.]

SEC. 8. [Repeal.] That all Acts or parts of Acts in conflict herewith or providing a different scale of compensation or otherwise regulating its payment are hereby repealed. [35 Stat. L. 558.]

An Act To amend an Act entitled "An Act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment," approved May thirtieth, nineteen hundred and eight.

[Act of March 11, 1912, ch. 37, 37 Stat. L. 74.]

[Provisions extended to Bureau of Mines and Forest Service.] That the provisions of the Act approved May thirtieth, nineteen hundred and
eight, entitled "An Act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment," shall, in addition to the classes of persons therein designated, be held to apply to any artisan, laborer, or other employee engaged in any hazardous work under the Bureau of Mines or the Forestry Service of the United States: Provided, That this Act shall not be held to embrace any case arising prior to its passage. [37 Stat. L. 74.]

For the Act of May 30, 1908, ch. 236, above mentioned, see supra, p. 280.

Sec. 2. [Provisions extended to certain employees in the Lighthouse Service.] * * * And hereafter the benefits of the Act of May thirtieth, nineteen hundred and eight (Thirty-fifth Statutes, page five hundred and fifty-six), entitled "An Act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment," shall be extended to persons employed by the United States in any hazardous employment in the Lighthouse Service. [37 Stat. L. 239.]

This is from an Act of July 27, 1912, ch. 255, entitled "An Act to authorize additional aids to navigation in the lighthouse service, and for other purposes."

For the Act of May 30, 1908, ch. 236, above mentioned, see supra, p. 280.

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I. LABOR DEPARTMENT GENERALLY
An Act To create a Department of Labor.

[Sec. 1.] [Department of Labor created — Secretary — Department of
Commerce and Labor affected — purpose — seal.] That there is hereby
created an executive department in the Government to be called the
Department of Labor, with a Secretary of Labor, who shall be the head thereof,
to be appointed by the President, by and with the advice and consent of
the Senate; and who shall receive a salary of twelve thousand dollars per
annum, and whose tenure of office shall be like that of the heads of the
other executive departments; and section one hundred and fifty-eight of
the Revised Statutes is hereby amended to include such department, and
the provisions of title four of the Revised Statutes, including all amend-
ments thereto, are hereby made applicable to said department; and the
Department of Commerce and Labor shall hereafter be called the Depart-
ment of Commerce, and the Secretary thereof shall be called the Secretary
of Commerce, and the Act creating the said Department of Commerce and
Labor is hereby amended accordingly. The purpose of the Department of
Labor shall be to foster, promote, and develop the welfare of the wage
earners of the United States, to improve their working conditions, and to
advance their opportunities for profitable employment. The said Secretary
shall cause a seal of office to be made for the said department of such
device as the President shall approve and judicial notice shall be taken
of the said seal. [37 Stat. L. 736.]

This is known as the "Department of Labor Act." R. S. sec. 158, amended by the
text, enumerated the various executive departments and is given under the title
EXECUTIVE DEPARTMENTS.
The various Acts relating to the Department of Commerce and Labor which are
affected by the provisions of the text are given under COMMERCE DEPARTMENT.
SEC. 2. [Assistant Secretary — other employees — audit of accounts.] That there shall be in said department an Assistant Secretary of Labor, to be appointed by the President, who shall receive a salary of five thousand dollars a year. He shall perform such duties as shall be prescribed by the Secretary or required by law. There shall also be one chief clerk and a disbursing clerk, and such other clerical assistants, inspectors, and special agents as may from time to time be provided for by Congress. The Auditor for the State and Other Departments shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of Labor and of all bureaus and offices under his direction, and all accounts relating to all other business within the jurisdiction of the Department of Labor, and certify the balances arising thereon to the division of bookkeeping and warrants and send forthwith a copy of each certificate to the Secretary of Labor. [37 Stat. L. 736.]

SEC. 3. [Bureaus, etc., transferred.] That the following-named officers, bureaus, divisions, and branches of the public service now and heretofore under the jurisdiction of the Department of Commerce and Labor, and all that pertains to the same, known as the Commissioner General of Immigration, the Commissioners of Immigration, the Bureau of Immigration and Naturalization, the Division of Information, the Division of Naturalization, and the Immigration Service at Large, the Bureau of Labor, the Children's Bureau, and the Commissioner of Labor, be, and the same hereby are, transferred from the Department of Commerce and Labor to the Department of Labor, and the same shall hereafter remain under the jurisdiction and supervision of the last-named department. The Bureau of Immigration and Naturalization is hereby divided into two bureaus, to be known hereafter as the Bureau of Immigration and the Bureau of Naturalization, and the titles Chief Division of Naturalization and Assistant Chief shall be Commissioner of Naturalization and Deputy Commissioner of Naturalization. The Commissioner of Naturalization or, in his absence, the Deputy Commissioner of Naturalization, shall be the administrative officer in charge of the Bureau of Naturalization and of the administration of the naturalization laws under the immediate direction of the Secretary of Labor, to whom he shall report directly upon all naturalization matters annually and as otherwise required, and the appointments of these two officers shall be made in the same manner as appointments to competitive classified civil-service positions. The Bureau of Labor shall hereafter be known as the Bureau of Labor Statistics, and the Commissioner of the Bureau of Labor shall hereafter be known as the Commissioner of Labor Statistics; and all the powers and duties heretofore possessed by the Commissioner of Labor shall be retained and exercised by the Commissioner of Labor Statistics; and the administration of the Act of May thirtieth, nineteen hundred and eight, granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment. [37 Stat. L. 737.]

Acts relating to immigration and naturalization are treated under the titles IMMIGRATION and NATURALIZATION respectively.
The Children's Bureau is treated infra, subdivision III, p. 295.
The Act of May 30, 1908, ch. 238, referred to in the text, is given under LABOR, ante, p. 280.
Sec. 4 of this Act, relating to reports by the Bureau of Labor Statistics of conditions of labor and products, is given infra, p. 291.
Sec. 5. [Records, furniture, etc., to be transferred with bureaus.] That the official records and papers now on file in and pertaining exclusively to the business of any bureau, office, department, or branch of the public service in this Act transferred to the Department of Labor, together with the furniture now in use in such bureau, office, department, or branch of the public service, shall be, and hereby are, transferred to the Department of Labor. [37 Stat. L. 737.]

Sec. 6. [Custody of buildings, property, etc.—officers, employees, clerks, etc., transferred—duties, etc., transferred.] That the Secretary of Labor shall have charge in the buildings or premises occupied by or appropriated to the Department of Labor, of the library, furniture, fixtures, records, and other property pertaining to it or hereafter acquired for use in its business; he shall be allowed to expend for periodicals and the purposes of the library and for rental of appropriate quarters for the accommodation of the Department of Labor within the District of Columbia, and for all other incidental expenses, such sums as Congress may provide from time to time: Provided, however, That where any office, bureau, or branch of the public service transferred to the Department of Labor by this Act is occupying rented buildings or premises, it may still continue to do so until other suitable quarters are provided for its use: And provided further, That all officers, clerks, and employees now employed in any of the bureaus, offices, departments, or branches of the public service in this Act transferred to the Department of Labor are each and all hereby transferred to said department at their present grades and salaries, except where otherwise provided in this Act: And provided further, That all laws prescribing the work and defining the duties of the several bureaus, offices, departments, or branches of the public service by this Act transferred to and made a part of the Department of Labor shall, so far as the same are not in conflict with the provisions of this Act, remain in full force and effect, to be executed under the direction of the Secretary of Labor. [37 Stat. L. 738.]

Sec. 7. [Solicitor for department.] That there shall be a solicitor of the Department of Justice for the Department of Labor, whose salary shall be five thousand dollars per annum. [37 Stat. L. 738.]

Sec. 8. [Conciliation of labor disputes.] That the Secretary of Labor shall have power to act as mediator and to appoint commissioners of conciliation in labor disputes whenever in his judgment the interests of industrial peace may require it to be done; and all duties performed and all power and authority now possessed or exercised by the head of any executive department in and over any bureau, office, officer, board, branch, or division of the public service by this Act transferred to the Department of Labor, or any business arising therefrom or pertaining thereto, or in relation to the duties performed by and authority conferred by law upon such bureau, officer, office, board, branch, or division of the public service, whether of an appellate or revisory character or otherwise, shall hereafter be vested in and exercised by the head of the said Department of Labor. [37 Stat. L. 738.]

Sec. 9. [Annual report—reports of special investigations.] That the Secretary of Labor shall annually, at the close of each fiscal year, make a
report in writing to Congress, giving an account of all moneys received and disbursed by him and his department and describing the work done by the department. He shall also, from time to time, make such special investigations and reports as he may be required to do by the President, or by Congress, or which he himself may deem necessary. [37 Stat. L. 738.]

By a provision of the Legislative, Executive and Judicial Appropriation Act of May 1, 1913, ch. 1, § 1, infra, this page, the Secretary of Labor was required to submit to Congress annually estimates in detail for all personal services and for all general and miscellaneous expenses for the Department of Labor.

Sec. 10. [Report on coordination of duties, etc., with present bureaus, etc.] That the Secretary of Labor shall investigate and report to Congress a plan of coordination of the activities, duties, and powers of the office of the Secretary of Labor with the activities, duties, and powers of the present bureaus, commissions, and departments, so far as they relate to labor and its conditions, in order to harmonize and unify such activities, duties, and powers, with a view to further legislation to further define the duties and powers of such Department of Labor. [37 Stat. L. 738.]

Sec. 11. [In effect.] That this Act shall take effect March fourth, nineteen hundred and thirteen, and all Acts or parts of Acts inconsistent with this Act are hereby repealed. [37 Stat. L. 738.]

[Sec. 1.] [Annual estimates.] • • • The Secretary of Labor shall submit to Congress, for the fiscal year nineteen hundred and fifteen, and annually thereafter, estimates in detail for all personal services and for all general and miscellaneous expenses for the Department of Labor. [38 Stat. L. 2.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 1, 1913, ch. 1.

[Sec. 1.] [Detail of special immigrant inspectors for duty at Washington.] • • • Bureau of Immigration. • • • Hereafter special immigrant inspectors, not to exceed three, may be detailed for duty in the Bureau at Washington. [28 Stat. L. 786.]

This is a provision of the Legislative, Executive, and Judicial Appropriation Act of March 2, 1895, ch. 177.

[Sec. 1.] [Detail of officer employed in enforcement of Chinese Exclusion Acts.] • • • and nothing in section four of the Act of August fifth, eighteen hundred and eighty-two (Twenty-second Statutes at Large, page two hundred and twenty-five) shall be construed to prevent the Secretary of the Treasury from hereafter detailing one officer employed in the enforcement of the Chinese exclusion Acts for duty at the Treasury Department at Washington. [31 Stat. L. 611.]

This is from the Sundry Civil Appropriation Act of June 6, 1900, ch. 791. By the Act of Feb. 14, 1903, ch. 562, § 7, given in Commerce Department, vol. 2, p. 476, the authority then possessed by the Secretary with respect of the Chinese
exclusion laws was transferred to the Secretary of Commerce and Labor, and by the Act of March 4, 1913, ch. 141, § 6, supra, p. 288, it was provided that all laws prescribing the work, etc., of the various bureaus, etc., transferred to the Department of Labor, should be executed by the Secretary of Labor. This paragraph, therefore, may be regarded as applicable to the Secretary of Labor.


[Sec. 1.] [Detail of officer and clerk employed for enforcing alien contract labor provisions.] * * * Section four of the Act of August fifth, eighteen hundred and eighty-two (Twenty-second Statutes, page two hundred and twenty-five), shall not be construed to prevent the Secretary of Labor from hereafter detailing one officer and one clerk employed for the special duty of enforcing the alien contract labor provisions of the immigration Act approved February twentieth, nineteen hundred and seven (Thirty-fourth Statutes, page eight hundred and ninety-eight), in pursuance of section twenty-four of said immigration Act, for duty at the Department of Labor at Washington. [38 Stat. L. 1151.]

This is from the Deficiencies Appropriation Act of March 4, 1915, ch. 147. See the notes to the preceding paragraph of the text.


The Act of Feb. 20, 1907, ch. 1134, mentioned in the text, is given in Immigration, vol. 3, p. 637 et seq.

These provisions superseded the similar provisions of the Act of March 3, 1901, ch. 863, § 1, 31 Stat. L. 1155.

II. BUREAU OF LABOR STATISTICS

Sec. 3. [Designation of Bureau and of Commissioner of Labor Statistics.] * * * The Bureau of Labor shall hereafter be known as the Bureau of Labor Statistics, and the Commissioner of the Bureau of Labor shall hereafter be known as the Commissioner of Labor Statistics; and all the powers and duties heretofore possessed by the Commissioner of Labor shall be retained and exercised by the Commissioner of Labor Statistics; and the administration of the Act of May thirtieth, nineteen hundred and eight, granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment. [37 Stat. L. 737.]

This is the latter part of the Act of March 4, 1913, ch. 141, sec. 3, being an “Act to Create a Department of Labor,” the duties and powers of the Bureau of Labor Statistics created by the provisions of the text being defined by the following sec. 4 of the same Act. The other sections of this Act are given in subdivision I, supra, p. 286.

The Act of May 30, 1908, ch. 296, mentioned in the text is given under the title Labor, ante, p. 290.

The Act of June 13, 1888, ch. 389, creating the former Department of Labor, is given, infra, p. 291.

The Department of Labor, established by the Act of June 13, 1888, infra, p. 291, was placed under the jurisdiction of the Department of Commerce and Labor as created by the Act of Feb. 14, 1903, ch. 552, by sec. 4 of said Act. See Commerce Department, vol. 2, p. 474. Thence it was again transferred, to be known as the Bureau of Labor Statistics, and the Commissioner of the Bureau of Labor was designated the Commissioner of Labor Statistics by the provisions of the Act of March 4, 1913, ch. 141, § 3, given in the text.
SEC. 4. [Collation and report of labor conditions, products, etc.] That the Bureau of Labor Statistics, under the direction of the Secretary of Labor, shall collect, collate, and report at least once each year, or oftener if necessary, full and complete statistics of the conditions of labor and the products and distribution of the products of the same, and to this end said Secretary shall have power to employ any or either of the bureaus provided for his department and to rearrange such statistical work and to distribute or consolidate the same as may be deemed desirable in the public interests; and said Secretary shall also have authority to call upon other departments of the Government for statistical data and results obtained by them; and said Secretary of Labor may collate, arrange, and publish such statistical information so obtained in such manner as to him may seem wise. [37 Stat. L. 737.]

See the note to the preceding sec. 3 of this Act.

An act to establish a Department of Labor.

[SEC. 1.] [Former department of labor — design and duties.] That there shall be at the seat of Government a Department of Labor, the general design and duties of which shall be to acquire and diffuse among the people of the United States useful information on subjects connected with labor, in the most general and comprehensive sense of that word, and especially upon its relation to capital, the hours of labor, the earnings of laboring men and women, and the means of promoting their material, social, intellectual, and moral prosperity. [25 Stat. L. 182.]

See the two preceding paragraphs of the text and the notes thereto.

SEC. 2. [Commissioner, compensation.] That the Department of Labor shall be under the charge of a Commissioner of Labor, who shall be appointed by the President, by and with the advice and consent of the Senate; he shall hold his office for four years, unless sooner removed, and shall receive a salary of five thousand dollars per annum. [25 Stat. L. 182.]

See the note to the Act of March 4, 1913, ch. 141, § 3, supra, p. 290.

SEC. 3. [Clerical force.] That there shall be in the Department of Labor, to be appointed by the Commissioner of Labor: One chief clerk, at a salary of two thousand five hundred dollars per annum; four clerks of class four, all to be statistical experts; five clerks of class three, one of whom may be a stenographer; six clerks of class two, one of whom may be a translator and one of whom may be a stenographer; eight clerks of class one; five clerks, at one thousand dollars per annum; one disbursing clerk, who shall also have charge of accounts, at a salary of one thousand eight hundred dollars per annum; two copyists, at nine hundred dollars each per annum; two copyists, at seven hundred and twenty dollars each per annum; one messenger; one assistant messenger; one watchman; two assistant watchmen; two skilled laborers, at six hundred dollars each per annum; two char-
women, at two hundred and forty dollars each per annum; six special
agents, at one thousand six hundred dollars each per annum; ten special
agents, at one thousand four hundred dollars each per annum; four special
agents, at one thousand two hundred dollars each per annum, and an allow-
ance to special agents for traveling expenses not to exceed three dollars per
day while actually employed in the field and outside of the District of
Columbia, exclusive of actual transportation including sleeping-car fares;
and such temporary experts, assistants, and other employees as Congress
may from time to time provide, with compensation corresponding to that
of similar officers and employees in other departments of the Government.
[25 Stat. L. 182.]

This section was in effect superseded by the Act of March 4, 1913, ch. 141, which
created this department and provided in sec. 2 thereof, supra, p. 287, for the necessary
clerical force. Appropriations for the Bureau of Labor Statistics for the fiscal year
ending June 30, 1916, were made by the Legislative, Executive, and Judicial Appropria-
See the notes to the Act of March 4, 1913, ch. 141, § 3, supra, p. 290.

SEC. 4. [Chief clerk as commissioner.] That during the necessary
absence of the Commissioner, or when the office shall become vacant, the
chief clerk shall perform the duties of Commissioner. [25 Stat. L. 182.]

The Legislative, Executive and Judicial Appropriation Act of March 4, 1915, ch. 141,
38 Stat. L. 1046, provides for a “chief statistician who shall also perform the duties of
chief clerk.”

SEC. 5. [Disbursing clerk.] That the disbursing clerk shall, before enter-
ing upon his duties, give bond to the Treasurer of the United States in the
sum of twenty thousand dollars, which bond shall be conditioned that the
said officer shall render a true and faithful account to the Treasurer,
quarter-yearly, of all moneys and properties which shall be by him received
by virtue of his office, with sureties to be approved by the Solicitor of the
Treasury. Such bond shall be filed in the office of the First Comptroller of
the Treasury, to be by him put in suit upon any breach of the conditions
thereof. [25 Stat. L. 182.]

This section was in effect superseded by sec. 2 of the Act of March 4, 1913, ch. 141,
supra, p. 287, which provided for a disbursing clerk.
See the notes to the Act of March 4, 1913, ch. 141, § 3, supra, p. 290.

SEC. 6. [Custody of building and property.] That the Commissioner of
Labor shall have charge in the building or premises occupied by or appro-
priated to the Department of Labor, of the library, furniture, fixtures,
records, and other property pertaining to it, or hereafter acquired for use
in its business, and he shall be allowed to expend for periodicals and the
purposes of the library, and for the rental of appropriate quarters for the
accommodation of the Department of Labor within the District of Colum-
bia, and for all other incidental expenses, such sums as Congress may pro-
vide from time to time. [25 Stat. L. 182.]

This section was superseded by the Act of Feb. 14, 1903, ch. 552, sec. 9, 32 Stat. L.
829, which was in turn superseded by the Act of March 4, 1913, ch. 141, § 6, supra,
p. 288.

SEC. 7. [Duties of commissioner of labor.] That the Commissioner of
Labor, in accordance with the general design and duties referred to in sec-
tion one of this act, is specially charged to ascertain, at as early a date as possible, and whenever industrial changes shall make it essential, the cost of producing articles at the time dutiable in the United States, in leading countries where such articles are produced, by fully-Specified units of production, and under a classification showing the different elements of cost, or approximate cost, of such articles of production, including the wages paid in such industries per day, week, month, or year, or by the piece; and hours employed per day; and the profits of the manufacturers and producers of such articles; and the comparative cost of living, and the kind of living.

"It shall be the duty of the Commissioner also to ascertain and report as to the effect of the customs laws, and the effect thereon of the state of the currency, in the United States, on the agricultural industry, especially as to its effect on mortgage indebtedness of farmers;" and what articles are controlled by Trusts, or other combinations of capital, business operations, or labor, and what effect said trusts, or other combinations of capital, business operations, or labor have on production and prices. He shall also establish a system of reports by which, at intervals of not less than two years, he can report the general condition, so far as production is concerned, of the leading industries of the country. The Commissioner of Labor is also specially charged to investigate the causes of, and facts relating to, all controversies and disputes between employers and employees as they may occur, and which may tend to interfere with the welfare of the people of the different States, and report thereon to Congress. The Commissioner of Labor shall also obtain such information upon the various subjects committed to him as he may deem desirable from different foreign nations, and what, if any, convict made goods are imported into this country, and if so from whence. [25 Stat. L. 183.]

That part of the above section requiring the Commissioner of Labor to ascertain the cost of production of certain articles, and imposing on him certain duties relating to information concerning trusts, was superseded by the transfer of these duties to the Bureau of Foreign and Domestic Commerce by the Act of August 23, 1912, ch. 380, sec. 1, 37 Stat. L. 497, given under the title COMMERCE DEPARTMENT. See the Act of March 4, 1913, ch. 141, § 4, supra, p. 291.

Sec. 8. [Annual and special reports.] That the Commissioner of Labor shall annually make a report in writing to the President and Congress, of the information collected and collated by him, and containing such recommendations as he may deem calculated to promote the efficiency of the Department. He is also authorized to make special reports on particular subjects whenever required to do so by the President or either House of Congress, or when he shall think the subject in his charge requires it. He shall, on or before the fifteenth day of December in each year, make a report in detail to Congress of all moneys expended under his direction during the preceding fiscal year. [25 Stat. L. 183.]

Sec. 9. [Existing labor bureau merged.] That all laws and parts of laws relating to the Bureau of Labor created under the act of Congress approved June twenty-seventh, eighteen hundred and eighty-four, so far as the same are applicable and not in conflict with this act, and only so far, are continued in full force and effect, and the Commissioner of Labor appointed under said act, approved June twenty-seventh, eighteen hundred and eighty-four, and all clerks and employees in the Bureau of Labor authorized to
be appointed by said act or subsequent acts, shall continue in office and employment as if appointed under the provisions of this act, and until a Commissioner of Labor, other officers, clerks, and employees are appointed and qualified as herein required and provided; and the Bureau of Labor, as now organized and existing, shall continue its work as the Department of Labor until the Department of Labor shall be organized in accordance with this act; and the library, records, and all property now in use by the said Bureau of Labor are hereby transferred to the custody of the Department of Labor hereby created, and on the organization of the Department of Labor on the basis of this act the functions of the Bureau of Labor shall cease. [25 Stat. L. 183.]

The Act of June 27, 1884, ch. 127, 23 Stat. L. 60, "An act to establish a Bureau of Labor," mentioned in the text, was as follows:

"That there shall be established in the Department of the Interior a Bureau of Labor, which shall be under the charge of a Commissioner of Labor, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioner of Labor shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed, and shall receive a salary of three thousand dollars a year. The Commissioner shall collect information upon the subject of labor, its relation to capital, the hours of labor, and the earnings of laboring men and women, and the means of promoting their material, social, intellectual, and moral prosperity. The Secretary of the Interior upon the recommendation of said Commissioner, shall appoint a chief clerk, who shall receive a salary of two thousand dollars per annum, and such other employees as may be necessary for the said Bureau: Provided, That the total expense shall not exceed twenty-five thousand dollars per annum. During the necessary absence of the Commissioner, or when the office shall become vacant, the chief clerk shall perform the duties of Commissioner. The Commissioner shall annually make a report in writing to the Secretary of the Interior of the information collected and collated by him, and containing such recommendations as he may deem calculated to promote the efficiency of the Bureau."

See the note to the Act of March 4, 1913, ch. 141, § 3, supra, p. 290.

Sec. 10. [Estimates.] That on the passage of this act the Commissioner of Labor shall at once submit estimates for the expenses of the Department of Labor for the next fiscal year, giving in detail the number and salaries of officers and employees therein. [25 Stat. L. 184.]

[Sec. 1.] [Official statistics of cities.] * * * The Commissioner of Labor is authorized to compile and publish annually, as a part of the Bulletin of the Department of Labor, an abstract of the main features of the official statistics of the cities of the United States having over thirty thousand population. [30 Stat. L. 648.]

This is from the Sundry Civil Appropriation Act of July 1, 1898, ch. 548. See generally the title PUBLIC DOCUMENTS. See the notes to the Act of March 4, 1913, ch. 141, § 3, supra, p. 290.

[Sec. 1.] [Bulletin as to condition of labor, etc.] * * * The Commissioner of Labor is hereby authorized to prepare and publish a bulletin of the Department of Labor, as to the condition of labor in this and other countries, condensations of State and foreign labor reports, facts as to conditions of employment, and such other facts as may be deemed of value to the
industrial interests of the country, and there shall be printed one edition of not exceeding ten thousand copies of each issue of said bulletin for distribution by the Department of Labor. [38 Stat. L. 805.]

This was a provision of the Legislative, Executive and Judicial Appropriation Act of March 2, 1895, ch. 177.


See the preceding paragraph of the text.

III. CHILDREN’S BUREAU

An Act To establish in the Department of Commerce and Labor a bureau to be known as the Children’s Bureau.

[Act of April 9, 1912, ch. 73, 37 Stat. L. 79.]

[Sec. 1.] [Children’s Bureau established.] That there shall be established in the Department of Commerce and Labor a bureau to be known as the Children’s Bureau. [37 Stat. L. 79.]

This is known as the “Children’s Bureau Act,” and the Bureau by it established was transferred to the Department of Labor by the Act of March 4, 1913, ch. 141, sec. 3, supra, p. 287.

Sec. 2. [Chief — appointment and salary — investigations — restrictions — publications.] That the said bureau shall be under the direction of a chief, to be appointed by the President, by and with the advice and consent of the Senate, and who shall receive an annual compensation of five thousand dollars. The said bureau shall investigate and report to said department upon all matters pertaining to the welfare of children and child life among all classes of our people, and shall especially investigate the questions of infant mortality, the birth rate, orphanage, juvenile courts, desertion, dangerous occupations, accidents and diseases of children, employment, legislation affecting children in the several States and Territories. But no official, or agent, or representative of said bureau shall, over the objection of the head of the family, enter any house used exclusively as a family residence. The chief of said bureau may from time to time publish the results of these investigations in such manner and to such extent as may be prescribed by the Secretary of Commerce and Labor. [37 Stat. L. 79.]

Sec. 3. [Office force.] That there shall be in said bureau, until otherwise provided for by law, an assistant chief, to be appointed by the Secretary of Commerce and Labor, who shall receive an annual compensation of two thousand four hundred dollars; one private secretary to the chief of the bureau, who shall receive an annual compensation of one thousand five hundred dollars; one statistical expert, at two thousand dollars; two clerks of class four; two clerks of class three; one clerk of class two; one clerk of class one; one clerk, at one thousand dollars; one copyist, at nine hundred dollars; one special agent, at one thousand four hundred dollars; one special agent, at one thousand two hundred dollars, and one messenger at eight hundred and forty dollars. [37 Stat. L. 80.]

The appropriations for the fiscal year ending June 30, 1916, provided for additional employees at different salaries and were contained in the Legislative, Executive and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1046.
Sec. 4. [Quarters for bureau.] That the Secretary of Commerce and Labor is hereby directed to furnish sufficient quarters for the work of this bureau at an annual rental not to exceed two thousand dollars. [37 Stat. L. 80.]

Sec. 5. [Effect.] That this Act shall take effect and be in force from and after its passage. [37 Stat. L. 80.]

LABOR UNIONS
See Trade Combinations and Trusts

LACEY ACT
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See Railroads; Seamen

LAND DISTRICTS AND OFFICES
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CROSS-REFERENCES

Gold and Silver Certificates, Silver Dollars, and Treasury Notes, see COINAGE, MINTS AND ASSAY OFFICES.

Legal Tender of Hawaiian and Philippine Coins, see HAWAIIAN ISLANDS; PHILIPPINE ISLANDS.

National Bank Notes, see NATIONAL BANKS.
See also CURRENCY.

Sec. 3584. [Foreign coins.] No foreign gold or silver coin shall be a legal tender in payment of debts. [R. S.]


Foreign equivalent in legal tender.—A promissory note to pay one thousand pounds sterling, lawful money of Great Britain, agreed by the parties to be worth a stipulated sum in the gold coin of the United States, is solvable only in gold coin. The Edith, (1871) 5 Ben. 144, 8 Fed. Cas. No. 4,281.

And as a decree by a court of the United States for the payment of money can be made only for the payment of so many dollars of some species of money that is made lawful money by a statute of the United States, it follows that a recovery upon such a promissory note or contract must be for so many dollars in gold and silver coin, lawful money of the United States, as are equivalent to the foreign denomination, expressed in the instrument, upon which the recovery is decreed. The Edith, (1871) 5 Ben. 144, 8 Fed. Cas. No. 4,281; Forbes v. Murray, (1869) 3 Ben. 497, 9 Fed. Cas. No. 4,928.

Where a bill of lading stipulated that freight, payable in New York, should be paid at the current rate of exchange for bankers' sight bills on London, at the date of the steamer's report at the custom house, and the freight reserved by the bill of lading was expressed in English money, the amount to be paid in the current money of the country was such sum as would be sufficient to buy the bills on London designated. Hus v. Kempf, (1879) 10 Ben. 364, 12 Fed. Cas. No. 6,944.

Where the amount of freight to be paid on the discharge of a cargo in England is expressed in dollars, it should, if not paid in current specie dollars, be liquidated with as many sovereigns or a bill for as many pounds sterling as the stipulated amount will buy at the place agreed for payment. Jelison v. Lee, (1847) 3 Woodb. & M. 368, 13 Fed. Cas. No. 7,256.

Sec. 3585. [Gold coins of the United States.] The gold coins of the United States shall be a legal tender in all payments at their nominal value
when not below the standard weight and limit of tolerance provided by law for the single piece, and when reduced in weight below such standard and tolerance, shall be a legal tender at valuation in proportion to their actual weight.  [R. S.]


Not repealed.—The Act of June 20, 1874, ch. 343, known as “the National Bank Act” (title National Bank) was not intended to repeal or affect the general provisions of law embodied in this and following sections, making the coins of the United States a legal tender in all payments.  (1881) 17 Op. Atty.-Gen. 144.

Contract payable in gold.—An express contract to pay in gold will be respected by the courts, and be enforced, or its breach be redressed, according to its tenor, although made after the passage of the legal tender acts.  The Emily B. Souder, (1871) 8 Blatchf. 337, 8 Fed. Cas. No. 4,486; The Edith, (1871) 5 Ben. 144, 8 Fed. Cas. No. 4,281.


R. S. sec. 3586. This section was as follows:

“Sec. 3586. The silver coins of the United States shall be a legal tender at their nominal value for any amount not exceeding five dollars in any one payment.”


While not repealed, this section was undoubtedly superseded by the following provisions:


The coining of twenty-cent pieces was authorized and they were made legal tender at their nominal value for any amount not exceeding five dollars in any one payment by an Act of March 3, 1875, ch. 143, 18 Stat. L. 478. This Act was repealed by an Act of May 2, 1878, ch. 79, 20 Stat. L. 47.

Construction.—R. S. sec. 3586 made the subsidiary silver coins of the United States legal tender at their nominal value only where the amount of the debt, in payment of which they were offered, did not exceed five dollars. The provision applied alike to cases wherein the officers of the government received payment of its dues and to cases wherein they disbursed the public funds in discharge of its obligations. 16 Op. Atty.-Gen. (1878) 128.


Sec. 3587. [Minor coins.] The minor coins of the United States shall be a legal tender, at their nominal value for any amount not exceeding twenty-five cents in any one payment.  [R. S.]


Five-cent pieces.—Under this section and R. S. sec. 3587, COINAGE, MINTS AND ASSAY OFFICES, vol. 2, p. 350, providing that no coin shall consist of five-cent pieces, three-cent pieces, and one-cent pieces, five-cent pieces are legal tender, so that proof that a defendant stole eighty-three cents in United States five-cent pieces was sufficient to sustain an indictment for theft of property of eighty-three cents, and the United States of America, v. Frank F. State, 144 4th C. C. 78 S. W. 511, normal to accept payment of street car fare.—The refusal of a collector, under the rules of the company, to accept five one-cent pieces for fare except in exchange for a five-cent piece to be inserted in the automatic collector by the passenger, is not a violation of this section, providing that the minor coins of the United States shall be a legal tender at their nominal value for any amount not exceeding twenty-five cents in one payment, under which five separate pieces are legal tender for a debt of five cents, so as to render the rule unreasonable; such refusal not amounting to a refusal to accept the five coins in payment of the fare within the meaning of the statute. Martin v. Rhode Island Co., (1911) 32 R. L. 192, 78 Atl. 548, Ann. Cas. 1912C 1255, 32 R. L. A. (N. S.) 688.
Sec. 3588. [United States notes.] United States notes shall be lawful money, and a legal tender in payment of all debts, public and private, within the United States, except for duties on imports and interest on the public debt. [R.S.]


Constitutionality.—In Legal Tender Cases, (1870) 12 Wall. 457, 20 U. S. (L. ed.) 287, it was held that the Acts of Congress known as the Legal Tender Acts were constitutional as applied to contracts made either before or after their passage, occurring so much of Hepburn v. Griswold, (1869) 8 Wall. 603, 19 U. S. (L. ed.) 513, as ruled the Acts unwarranted by the Constitution so far as they applied to contracts made before their enactment. See also Railroad Co. v. Thompson, (1875) 15 Wall. 195, 21 U. S. (L. ed.) 178; Legal Tender Cases, (1884) 110 U. S. 421, 4 S. Ct. 122, 28 U. S. (L. ed.) 204; Latham's Case, (1864) 1 Ct. Cl. 149; (1866) 12 Op. Atty-Gen. 54.

The question whether at any particular time, in war or in peace, the exigency is such, by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for the uses of the government and of the people, that it is, as matter of fact, wise and expedient to resort to this means, is a political question to be determined by Congress when the question of exigency arises, and not a judicial question, to be afterwards passed upon by the courts. Legal Tender Cases, (1884) 110 U. S. 421, 4 S. Ct. 122, 28 U. S. (L. ed.) 204.

In Essex Co. v. Pacific Mills, (1867) 14 Allen 389, the court, in reply to a contention that Congress had no constitutional power to make treasury notes a legal tender, or to give them the qualities of lawful money, said: "We do not regard it as consistent with the duties of this court to undertake at this time to consider or pass upon this question, as an original question of constitutional right. These notes practically constitute, and for nearly five years have constituted the money of the country. The pecuniary transactions of the whole people have been adapted to the state of things, and interests of an incalculable amount are affected by it. The validity of the Acts of Congress under which they were issued has been affirmed, so far as we are aware, by every judicial tribunal in which the question has been presented; and has been recognized in various ways by the action of the state governments."

Effect of statute.—The Acts of Congress making United States notes lawful money and a legal tender in the payment of debts are not laws operating retrospectively, but in present and prospectively. No new obligations are created, nor new duties imposed by them; neither do they attach new disabilities in respect to transactions or considerations which had transpired before their passage. They simply provide that the notes issued by their authority shall be lawful money, and that such money shall be a legal tender in the payment of debts. Higgins v. Bear River, etc., Water, etc., Co., (1865) 27 Cal. 153.

Scope of statute.—"Debts" within the meaning of the statute include all debts, public and private, within the United States, except duties on imports and interest on the bonds and notes of the United States. The Acts of Congress, so far as they declare that treasury notes shall be a legal tender in the payment of debts, make no reference to the time when the obligation had its inception. They operate directly upon subsisting debts, recognizing the existing relations of debtors and creditors, and declare that a certain kind of money, which is made lawful money by sovereign authority, shall be a legal tender as well as other kinds of money, in the payment of debts then due, or to become due thereafter, while such money may be a lawful cur; rency and legal tender in the payment of debts. Higgins v. Bear River, etc., Water, etc., Co., (1866) 27 Cal. 159.

Taxes imposed by state authority are not within this statute, which relates to debts in the ordinary sense of the word arising out of simple contracts or contracts by specialty, which include judgments and recognizances. Lane County v. Oregon, (1868) 7 Wall. 71, 19 U. S. (L. ed.) 101; Perry v. Washburn, (1869) 20 Cal. 318.

A tax levied by the territorial legislature of Idaho was a debt within the meaning of the statute. Haas v. Misner, (1867) 1 Idaho 170.

Assessments for local improvements.—The Acts of Congress making the notes of the United States a legal tender do not apply to involuntary contributions exacted by a state, but only to debts, in the strict sense of that term, that is, to obligations for the payment of money founded on contracts, express or implied. Hagar v. Reclamation Dist. No. 108, (1884) 111 U. S. 701, 4 S. Ct. 663, 28 U. S. (L. ed.) 569.
Debts payable in money generally.— The provision that United States notes are legal tender for all debts means for all debts which are payable in money generally, and not obligations payable in commodities or obligations of any other kind. Trebilcock v. Wilson, (1871) 12 Wall. 687, 20 U. S. (L. ed.) 460.

On a shipment of specie the agreement in the bill of lading is not a promise to pay money, but to transport certain articles on freight. In an action to recover damages for a breach of such bill of lading the legal tender statute is not applicable. The Ship Patrick Henry, (1887) 1 Ben. 529, 18 Fed. Cas. No. 10,806.


National bank notes are properly "money" though not legal tender.


Effect as to measure of damages.— In assessing damages a jury may take into account the fact that the judgment could be paid in legal tender notes. The Vaughan, (1871) 14 Wall. 258, 20 U. S. (L. ed.) 807. See also Texas v. White, (1868) 7 Wall. 769, 19 U. S. (L. ed.) 227; Legal Tender Cases, (1870) 12 Wall. 459, 20 U. S. (L. ed.) 287.

Judgment for money payable in gold.— The direction in a judgment as to the payment "in United States gold coin" is mere surplusage where the record shows that the notes sued on were notes for the payment of so many dollars generally. It is only where the contract calls for the payment of the debt in gold coin that the judgment should be rendered for coined dollars. Belford v. Woodward, (1866) 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593.

Sec. 3589. [Demand treasury notes.] Demand Treasury notes authorized by the act of July seventeen, eighteen hundred and sixty-one, chapter five, and the act of February twelve, eighteen hundred and sixty-two, chapter twenty, shall be lawful money and a legal tender in like manner as United States notes. [R. S.]


Treasury notes issued prior to February 25, 1862.— In (1882) 10 Op. Atty.-Gen. 195, the attorney-general said that treasury notes issued under the various Acts of Congress prior to February 25, 1862, are not legal tender.


Judgments on contracts payable in gold may be entered for coined dollars and parts of dollars. Bronson v. Rodes, (1868) 7 Wall. 229, 19 U. S. (L. ed.) 141.

Debts of United States payable abroad. — "Undoubtedly all claims against the United States, not specially excepted, which are payable at the treasury, are payable in these notes. It is not so clear that debts of the United States incurred and to be paid abroad, where our treasury notes have no currency, come within the purview of this Act. On the contrary, the reasonable construction leads to the conclusion that in this class of debts and expenditures the rate of exchange must be taken into the account, so as to provide the full amount necessary to pay the debt or expenditure at the place of payment." (1866) 12 Op. Atty.-Gen. 9. But see (1864) 11 Op. Atty.-Gen. 52, where the sum awarded to the claimant "is payable in current money of the United States."

Obligations of foreign countries.— In (1869) 13 Op. Atty.-Gen. 85, the attorney-general said that the annual instalments of interest due to the United States under the convention with Spain of February 17, 1834, might, by virtue of the Legal Tender Act of February 25, 1862, be paid in treasury notes if the Spanish government chose to offer them in payment, there being no express provision in the convention that the money should be paid in coin.

Sec. 3590. [Interest-bearing notes.] Treasury notes issued under the authority of the acts of March three, eighteen hundred and sixty-three, chapter seventy-three, and June thirty, eighteen hundred and sixty-four, chapter one hundred and seventy-two, shall be legal tender to the same extent as United States notes, for their face value, excluding interest:
Provided, That Treasury notes issued under the act last named shall not be a legal tender in payment or redemption of any notes issued by any bank, banking association, or banker, calculated and intended to circulate as money. [R. S.]


The term “treasury notes” has been generally employed by Congress from an early period to designate interest bearing notes of the United States, something intermediate between the currency and the funded debt of the United States. (1892) 20 Op. Atty.-Gen. 317.

Sec. 2. [Trade dollar not to be legal tender.] That the trade dollar shall not hereafter be a legal tender, and the Secretary of the Treasury is hereby authorized to limit from time to time, the coinage thereof to such an amount as he may deem sufficient to meet the export demand for the same. [19 Stat. L. 215.]

This is from the Res. of July 22, 1876, No. 17. The other provisions of the resolution are given in COINAGE, MINTS AND ASSAY OFFICES, vol. 2, p. 339.


Sec. 3. [Silver coins legal tender for ten dollars.] That the present silver coins of the United States of smaller denominations than one dollar shall hereafter be a legal tender in all sums not exceeding ten dollars in full payment of all dues public and private. [21 Stat. L. 8.]

This and sec. 4 following are from the Act of June 9, 1879, ch. 12. The other provisions of the Act are given in COINAGE, MINTS AND ASSAY OFFICES, vol. 2, p. 341.

Sec. 4. [Repeal.] That all laws or parts of laws in conflict with this act be, and the same are hereby, repealed. [21 Stat. L. 8.]

LEGISLATURE
See ALASKA; CONGRESS; HAWAIIAN ISLANDS; PHILIPPINE ISLANDS; PORTO RICO

LEPROSY ACT
See HOSPITALS AND ASYLUMS

LETTER CARRIERS
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See SHIPPING AND NAVIGATION
LIBRARY OF CONGRESS

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CROSS-REFERENCES

See COPYRIGHT; EDUCATION; PATENTS; PUBLIC DOCUMENTS; PUBLIC PRINTING; SMITHSONIAN INSTITUTION.

Sec. 30. [Collections composing.] The Library of Congress, composed of the books, maps, and other publications which now remain in existence, from the collections heretofore united under the act of January twenty-six, eighteen hundred and two, chapter two; the resolution of October twenty-one, eighteen hundred and fourteen; the act of January thirty, eighteen hundred and fifteen, chapter twenty-seven; the act of June twenty-five, eighteen hundred and sixty-four, chapter one hundred and forty-seven, section one; the resolution of July twenty-five, eighteen hundred and sixty-six; the act of March two, eighteen hundred and sixty-seven, chapter one hundred and sixty-seven, section one; and those added from time to time by purchase, exchange, donation, reservation from publications ordered by Congress, deposit to secure copyright, and otherwise shall be preserved in the Capitol in the rooms which were on the fourth day of July, eighteen hundred and seventy-two, appropriated to its use, and in such others as may hereafter be assigned thereto. [R.S.]


Provisions for the transfer of the library to the Library Building were made by the Act of Feb. 19, 1897, ch. 265, 29 Stat. L. 544, parts of which are given, infra, p. 509.

The Library of Congress.—The name “The Library of Congress” is used in the laws principally to signify something “composed of books, maps, etc.,” and partly the place in which these are kept. (1907) 26 Op. Atty.-Gen. 447.

It is largely under the control of a joint committee of Congress and there is no indication in the statutes concerning it that it is a corporation or artificial person. (1907) 26 Op. Atty.-Gen. 447.

Form of bequests for the Library of Congress.— “The Library of Congress” is not a proper legatee to be named in a bequest. The question as to what is the best form of such a bequest depends upon the law of the testator’s domicile, and it is therefore impossible to formulate any particular style of bequest that will be everywhere valid and in proper form. However, a bequest “to the United States of America, to be deposited in the Library of Congress,” which latter part may be varied in case of pecuniary bequests “to be applied to the increase or improvement of the Library of Congress,” will, it is believed, be a satisfactory form to be used generally in the states of the Union and in other English-speaking countries. (1907) 26 Op. Atty.-Gen. 447.
Sec. 81. [Library to be in two departments.] The Library of Congress shall be arranged in two departments, a general library and a law library. [R. S.]

Act of July 14, 1832, ch. 221, 4 Stat. L. 579.

Sec. 82. [Joint committee on Library.] The unexpended balance of any sums appropriated by Congress for the increase of the general library, together with such sums as may hereafter be appropriated to the same purpose, shall be laid out under the direction of a joint committee of Congress upon the Library, to consist of three members of the Senate and three members of the House of Representatives. [R. S.]

Act of April 24, 1800, ch. 37, 2 Stat. L. 56; Act of Jan. 26, 1802, ch. 2, 2 Stat. L. 129. Further provisions relating to the joint committee upon the library were made by the Act of March 3, 1883, ch. 141, sec. 2, infra, p. 308, and the number of the joint committee was increased by a Res. of Feb. 7, 1902, No. 5, infra, p. 311.

Sec. 83. [Incidental expenses of law library.] The incidental expenses of the law library shall be paid out of the appropriations for the Library of Congress. [R. S.]

Act of July 14, 1832, ch. 221, 4 Stat. L. 579.

Sec. 84. [Purchase of books for law library.] The Librarian shall make the purchases of books for the law library, under the direction of and pursuant to the catalogue furnished him by the Chief Justice of the Supreme Court. [R. S.]

Act of July 14, 1832, ch. 221, 4 Stat. L. 579.

Sec. 85. [Regulations for the Library.] The Joint Committee upon the Library is authorized to establish regulations, not inconsistent with law, in relation to the Library of Congress or either department thereof; and from time to time to alter, amend, or repeal the same; but such regulations as to the law library shall be subject to those imposed by the justices of the Supreme Court under section ninety-five. And until they impose new regulations or restrictions, the care and business of the Library shall continue to be regulated by such rules as may have been heretofore imposed by any lawful authority. [R. S.]


The Librarian was authorized to make rules and regulations for the government of the library by the Act of Feb. 19, 1897, ch. 265, sec. 1, infra, p. 309. R. S. sec. 95, mentioned in the text, is given, infra, p. 307.

Sec. 86. [Duplicate, injured, or wasted books.] The Joint Committee upon the Library may, at any time, exchange, or otherwise dispose of duplicate, injured, or wasted books of the Library, or documents, or any other matter in the Library not deemed proper to it, as they deem best. [R. S.]

Act of June 26, 1848, ch. 73, 9 Stat. L. 240. Further provisions relating to the subject were made by the Act of March 4, 1909, ch. 297, sec. 1, infra, p. 312.

Sec. 87. [Agents for exchange, etc., of documents.] The Joint Committee upon the Library may from time to time appoint such agents as they deem requisite, to carry into effect the donation and exchange of
documents and other publications placed at their disposal for the purpose.

[R. S.]

Act of June 26, 1848, ch. 73, 9 Stat. L. 240.

Sec 88. [Appointment of Librarian.] The President, solely, shall appoint from time to time a Librarian to take charge of the Library of Congress. [R. S.]


The provisions of this section were in part superseded by those of the Act of Feb. 19, 1897, ch. 265, sec. 1, infra, p. 309.

Sole power of appointment.—Under this section it was ruled that when Congress sees fit to give the sole power of appointment it does so by language appropriate to that end, as in this section. (1900) 23 Op. Atty.-Gen. 186. See also (1901) 23 Op. Atty.-Gen. 574.

Sec. 89. [Librarian's bond.] The Librarian of Congress shall, before entering upon the duties of his office, give a bond, payable to the United States * * * Such bond shall be deposited in the office of the Secretary of the Senate. [R. S.]


The part of the section omitted in the text was as follows: "In such a sum and with such security as the Joint Committee upon the Library may deem sufficient, for the safekeeping of the books, maps, and furniture confided to his care, and for the faithful discharge of his trust according to the regulations established for the government of the Library."

R. S. sec. 4950 relating to the same subject was as follows:

"Sec. 4950. The Librarian of Congress shall give a bond, with sureties, to the Treasurer of the United States, in the sum of five thousand dollars, with the condition that he will render to the proper officers of the Treasury a true account of all moneys received by virtue of his office."


Both provisions were superseded by the first paragraph of the Act of Feb. 19, 1897, ch. 265, sec. 1, infra, p. 309.

Form of bond.—The form of the bond the bond was to be approved. (1885) 18 was impliedly left by Congress to be regulated or fixed by the officer by whom Op. Atty.-Gen. 274.

Sec. 90. [Librarian's salary.] The Librarian of Congress is entitled to a salary of four thousand dollars a year. [R. S.]


The salary of the Librarian has been from time to time increased; the current appropriations are for "Librarian, $6,500, Chief Assistant Librarian, $4,000," made by the Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1004.

Sec. 4949. [Seal of office.] The seal provided for the office of the Librarian of Congress shall be the seal thereof, and by it all records and papers issued from the office and to be used in evidence shall be authenticated. [R. S.]


This section was a part of the Revised Statutes title relating to copyrights. The seal for the copyright office was prescribed by the Act of March 4, 1909, ch. 320, sec. 92. 35 Stat. L. 1086. See Copyright, vol. 2, p. 612.

R. S. sec. 91. This section was as follows:

"Sec. 91. The Librarian of Congress is authorized to employ from time to time the following assistants in the business of the Library:

Three assistant librarians, at a salary of two thousand eight hundred and seventy-five dollars a year each.

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Two assistants, at a salary of two thousand and seventy dollars a year each.
One assistant, at a salary of one thousand eight hundred and forty dollars a year.
Two assistants, at a salary of one thousand six hundred and fifty-six dollars a year each.
Three assistants, at a salary of one thousand three hundred and eighty dollars a year each.
Two assistants, at a salary of one thousand one hundred and fifty dollars a year each.
One assistant, at a salary of eleven hundred and four dollars a year."


More comprehensive provisions relating to the same subject were made by the Act of Feb. 19, 1897, ch. 265, 29 Stat. L. 544. The number of officers and employees, and their compensation, varies from year to year. The current appropriations were made by the Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1004.

Further provisions relating to the Register of Copyrights, his duties, bond, etc., made by said Act of Feb. 19, 1897, ch. 265, 29 Stat. L. 545, were superseded by the more comprehensive provisions of the Copyright Act of March 4, 1909, ch. 320, 35 Stat. L. 1075. See Copyright.

Sec. 92. [No maps to be taken out.] No map shall be taken out of the Library by any person. [R. S.]


Sec. 93. [Who may take out books.] No book shall be taken from the Library except by the President, the Vice-President, Senators, Representatives, and Delegates in Congress, and the persons enumerated in section ninety-four, or otherwise authorized by law. [R. S.]


Sec. 94. [Persons specially privileged to use Library.] The Joint Committee on the Library is authorized to grant the privilege of using and drawing books from the Library, in the same manner and subject to the same regulations as members of Congress, to any of the following persons:
First. Heads of Departments.
Second. The Chief Justice and associate justices, the reporter, and clerk of the Supreme Court.
Third. Members of the diplomatic corps.
Fourth. The judges and clerk of the Court of Claims.
Fifth. The Solicitor-General, and Assistant Attorneys-General.
Sixth. The Secretary of the Senate.
Seventh. The Clerk of the House of Representatives.
Eighth. The Chaplains of the two Houses of Congress.
Ninth. The Solicitor of the Treasury.
Tenth. The financial agent of the Joint Committee on the Library.
Eleventh. The Smithsonian Institution, through its Secretary.
Twelfth. Any person, when in the District of Columbia, who has been President. [R. S.]


The privileges of the Library were further extended by the Act of March 3, 1875, ch. 179, infra, p. 308; Res. of Aug. 26, 1890, No. 41, infra, p. 309, and the Res. of Jan. 27, 1894, No. 9, infra, p. 309.
Sec. 95. [Use and regulation of law library.] The justices of the Supreme Court shall have free access to the law library; and they are authorized to make regulations, not inconsistent with law, for the use of the same during the sittings of the court. But such regulations shall not restrict any person authorized to take books from the Library from having access to the law library, or using the books therein in the same manner as he may be entitled to use the books of the general Library. [R. S.]

Act of July 14, 1832, ch. 221, 4 Stat. L. 579. See the Res. of Jan. 27, 1894, No. 9, infra, p. 309.

Sec. 96. [Copies of Statutes at Large.] Ten of the copies of the Statutes at Large, published by Little, Brown & Co., which were deposited in the Library prior to February fifth, eighteen hundred and fifty-nine, shall be retained by the Librarian for the use of the justices of the Supreme Court, during the terms of court. [R. S.]


Sec. 97. [Copies of journals and documents.] Two copies of the journals and documents, and of each book printed by either House of Congress, well bound in calf, shall be deposited in the Library, and must not be taken therefrom. [R. S.]


Sec. 98. [Deposit in Library of journals of Senate and House.] Twenty-five copies of the public journals of the Senate, and of the House of Representatives, shall be deposited in the Library of the United States, at the seat of Government, to be delivered to members of Congress during any session, and to all other persons authorized by law to use the books in the Library, upon their application to the Librarian, and giving their responsible receipts for the same, in like manner as for other books. [R. S.]


Sec. 99. [Smithsonian Library.] The library collected by the Smithsonian Institution under the provisions of the act of August ten, eighteen hundred and forty-six, chapter twenty-five, and removed from the building of that Institution, with the consent of the Regents thereof, to the Library of Congress, shall, while there deposited, be subject to the same regulations as the Library of Congress, except as hereinafter provided. [R. S.]


Sec. 100. [How to be kept and used.] The Smithsonian Institution shall have the use thereof in like manner as before its removal, and the public shall have access thereto for purposes of consultation on every ordinary week-day, except during one month of each year, in the recess of
Congress, when it may be closed for renovation. All the books, maps, and charts of the Smithsonian library shall be properly cared for and preserved in like manner as are those of the Congressional Library; from which the Smithsonian library shall not be removed except on re-imbursement by the Smithsonian Institution to the Treasury of the United States of expenses incurred in binding and in taking care of the same, or upon such terms and conditions as shall be mutually agreed upon by Congress and the Regents of the Institution. [R. S.]


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An act extending the privilege of the Library of Congress to the Regents of the Smithsonian Institution.

[Act of March 3, 1875, ch. 179, 18 Stat. L. 512.]

[Privilege extended to regents of Smithsonian Institution.] That the Joint Committee of both Houses of Congress on the Library be authorized to extend the use of the books in the Library of Congress to the Regents of the Smithsonian Institution resident in Washington on the same conditions and restrictions as members of Congress are allowed to use the Library. [18 Stat. L. 512.]

See R. S. sec. 94 and the notes thereeto, supra, p. 306.

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An act to protect public libraries in the District of Columbia, and for other purposes.


[Theft, injury, or destruction of books, etc., punished.] That any person who shall steal, wrongfully deface, injure, mutilate, tear, or destroy any book, pamphlet, or manuscript, or any portion thereof, belonging to the Library of Congress, or to any public library in the District of Columbia, whether the property of the United States or of any individual or corporation in said District, or who shall steal, wrongfully deface, injure, mutilate, tear, or destroy any book, pamphlet, document, manuscript, print, engraving, medal, newspaper, or work of art, the property of the United States, shall be guilty of a misdemeanor, and, on conviction thereof, shall, when the offense is not otherwise punishable by some statute of the United States, be punished by a fine of not less than ten dollars nor more than one thousand dollars, and by imprisonment for not less than one nor more than twelve months, or both, for every such offense. [20 Stat. L. 171.]

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Sec. 2. [Committee on library during recess.] * * * That the portion of the Joint Committee of Congress upon the Library on the part of the Senate remaining in office as Senators shall during the recess of Congress exercise the powers and discharge the duties conferred by law upon the Joint Committee of Congress upon the Library. [22 Stat. L. 592.]

This is from the Deficiency Appropriation Act of March 3, 1883, ch. 141. See R. S. sec. 82, supra, p. 304.
Joint resolution extending the privileges of the Library of Congress to
the members and secretary of the Interstate Commerce Commission,
and the Chief of Engineers of the Corps of Engineers United States
Army.

[Res. of Aug. 28, 1890, No. 41, 26 Stat. L. 678.]

[Privilege extended to Interstate Commerce Commission and Chief of
Engineers.] That the Joint Committee of Congress on the Library be
authorized to extend the use of the books in the Library of Congress to the
members and secretary of the Interstate Commerce Commission, and the
Chief of Engineers of the Corps of Engineers United States Army, resident
in Washington, on the same conditions and restrictions as members of Con-
gress are allowed to use the Library. [26 Stat. L. 678.]

See R. S. sec. 94 and the notes thereto, supra, p. 306.

Joint resolution authorizing the chief justice and associate justices of the
court of appeals and of the supreme court of the District of Columbia
to use and take books from the Library of Congress.

[Res. of Jan. 27, 1894, No. 9, 28 Stat. L. 577.]

[Privilege extended to judges of courts of District of Columbia.] That
the chief justice and associate justices of the court of appeals of the Dis-
trict of Columbia and the chief justice and associate justices of the supreme
court of said District be authorized to use and take books from the Library of
Congress in the same manner and subject to the same regulations as Justi-
tices of the Supreme Court of the United States. [28 Stat. L. 577.]

See R. S. sec. 94 and the notes thereto, supra, p. 306.

SEC. 1.] [Appointment and salary of Librarian — rules and regula-
tions.] • • • For Librarian of Congress, to be appointed by the
President, by and with the advice and consent of the Senate, five thousand
dollars; and the Librarian shall make rules and regulations for the govern-

The provisions of this and the following four paragraphs of the text were from the
Legislative, Executive, and Judicial Appropriation Act of Feb. 19, 1897, ch. 265.
The provisions of this paragraph relating to the appointment of the Librarian super-
seded in part those of R. S. sec. 88, supra, p. 305, and the provisions relating to the
salary of the Librarian have been superseded by subsequent Appropriation Acts. See
the notes to R. S. sec. 90, supra, p. 305.
[Superintendent of Library building and grounds — duties — bond — subordinate employees.] * * * For superintendent of the Library building and grounds, to be appointed by the President, by and with the advice and consent of the Senate, five thousand dollars; and said superintendent shall disburse all appropriations made for and on account of the Library and Library building and grounds, and shall on and after July first, eighteen hundred and ninety-seven, give bond, payable to the United States in the sum of thirty thousand dollars, with sureties approved by the Secretary of the Treasury, for the faithful discharge of his duties; and for the employment by said superintendent of all necessary clerks, messengers, watchmen, engineers, firemen, electrician, elevator conductors, mechanics, laborers, charwomen, and others for the proper custody, care, and maintenance of said building and grounds. [29 Stat. L. 545.]

See the notes to the preceding paragraph of the text.

The salary of the superintendent was reduced to $3,000 by a provision of the Act of March 4, 1915, ch. 141, sec. 1, infra, p. 312.

Further duties were imposed on the superintendent by the provisions from the Act of July 19, 1897, ch. 3, sec. 1, given infra, p. 311.

Power of superintendent.—The superintendent of the library building and grounds has no authority to transfer certain disused portions of the lighting and heating plant of the Library of Congress to the Bureau of Mines of the Department of the Interior. On the contrary, the duties of the superintendent as custodian, implies prohibits him from transferring the possession of property committed to his care to some one else. (1912) 29 Op. Atty.-Gen. 524.

[Library appointments to be solely for fitness.] * * * That all persons employed in and about said Library of Congress, under the Librarian or the superintendent of the Library building and grounds shall be appointed solely with reference to their fitness for their particular duties. [29 Stat. L. 545.]

See the note to the first paragraph of this section, supra, p. 309.

[Bond of Librarian.] * * * The Librarian of Congress shall on and after July first, eighteen hundred and ninety-seven, give bond, payable to the United States, in the sum of twenty thousand dollars, with sureties approved by the Secretary of the Treasury, for the faithful discharge of his duties according to law. [29 Stat. L. 546.]

See the note to the first paragraph of this section, supra, p. 309.

The provisions of this section superseded in part those of R. S. sec. 89, supra, p. 305. See the notes to said section.

Form of bond.—In most cases where Congress to be regulated or fixed by the official bonds are required the form officers by whom the bonds are to be thereof is tacitly or impliedly left by approved. (1885) 18 Op. Atty.-Gen. 274.

[Librarian to report as to affairs of library, etc.] * * * The Librarian of Congress shall make to Congress at the beginning of each regular session, a report for the preceding fiscal year, as to the affairs of the Library of Congress, including the copyright business, and said report shall also include a detailed statement of all receipts and expenditures on account of the Library and said copyright business. [29 Stat. L. 546.]

See the note to the first paragraph of this section, supra, p. 309.
[Sec. 1.] [Superintendent of building to disburse appropriations] • • • The superintendent of the Library building and grounds shall hereafter disburse all appropriations made for and on account of the Botanic Garden, and shall also disburse all appropriations authorized to be expended by the Joint Committee on the Library. [30 Stat. L. 136.]

This is from the Deficiency Appropriation Act of July 19, 1897, ch. 9.

[Sec. 1.] [House of Representatives files transferred to Library.] • • • The Clerk of the House of Representatives is hereby authorized and directed to deliver to the Librarian of Congress all bound volumes of original papers, general petitions, printed matter, books, and manuscripts now in, or that may hereafter come into, the files of the House, which in his judgment are not required to be retained in the immediate custody of the file clerk; and it shall be the duty of the Librarian of Congress to cause all such matter so delivered to him to be properly classified by Congress and arranged for preservation and ready reference. All of such matter to be held as a part of the files of the House of Representatives, subject to its orders and rules. [31 Stat. L. 642.]

This is from the Sundry Civil Appropriation Act of June 6, 1900, ch. 791.

[Sec. 1.] [Library of House of Representatives under Librarian of Congress — appointments and removals.] • • • The library of the House of Representatives shall hereafter be under the control and direction of the Librarian of Congress, who shall provide all needful books of reference therefor. The librarian, two assistant librarians, and assistant in the library, above provided for, shall be appointed by the Clerk of the House, with the approval of the Speaker of the House of Representatives of the Fifty-sixth Congress, and thereafter no removals shall be made from the said positions except for cause reported to and approved by the Committee on Rules. [31 Stat. L. 960.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 3, 1901, ch. 830.

Joint Resolution Increasing the membership of the Joint Committee of Congress upon the Library.

[Res. of Feb. 7, 1902, No. 5, 32 Stat. L. 735.]

[Joint committee increased.] That the Joint Committee of Congress upon the Library, authorized by section eighty-two of the Revised Statutes, shall hereafter consist of five members of the Senate and five members of the House of Representatives. [32 Stat. L. 735.]

R. S. sec. 82 mentioned in the text and affected thereby is given supra, p. 304.
Joint Resolution Authorizing the transfer to the Library of Congress of the library of State reports, and so forth.

[Res. of Feb. 21, 1902, No. 6, 32 Stat. L. 736.]

[Industrial Commission records transferred to Library.] That all volumes and pamphlets published by the several States and Territories and collected by the Industrial Commission, also official minutes of the Commission and files of correspondence, are hereby directed to be turned over by the Industrial Commission to the Librarian of Congress, subject to the further orders of Congress. [32 Stat. L. 736.]

[Sec. 1.] [Sale of card indexes and other publications.] * * * The Librarian of Congress is hereby authorized to furnish to such institutions or individuals as may desire to buy them, such copies of the card indexes and other publications of the Library as may not be required for its ordinary transactions, and charge for the same a price which will cover their cost and ten per centum added, and all moneys received by him shall be deposited in the Treasury. [32 Stat. L. 480.]

This is from the Sundry Civil Appropriation Act of June 28, 1902, ch. 1301.

[Sec. 1.] [Transfer of books from departments, etc.] * * * The head of any Executive department or bureau or any commission of the Government is hereby authorized from time to time to turn over to the Librarian of Congress, for the use of the Library of Congress, any books, maps, or other material in the library of the department, bureau, or commission no longer needed for its use, and in the judgment of the Librarian of Congress appropriate to the uses of the Library of Congress. [32 Stat. L. 865.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Feb. 25, 1903, ch. 755.

[Sec. 1.] [Transfer of books, etc., to other libraries — disposition of useless material.] * * * The Librarian of Congress may from time to time transfer to other governmental libraries within the District of Columbia, including the Public Library, books and material in the possession of the Library of Congress in his judgment no longer necessary to its uses, but in the judgment of the custodians of such other collections likely to be useful to them, and may dispose of or destroy such material as has become useless. [35 Stat. L. 858.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1909, ch. 297.

[Sec. 1.] [Superintendent of Library building and grounds — salary.] * * * Library building and grounds: Superintendent, $3,000, and the
salary of the superintendent of the Library building and grounds shall, from and after the passage of this Act, be at the rate of $3,000 per annum, and the amount appropriated for the salary of said superintendent for the balance of the fiscal year nineteen hundred and fifteen shall be available for the payment of said salary at the rate of $3,000 per annum. [38 Stat. L. 1006.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141.

The provisions of the text relating to the salary of the superintendent, supersede those of the second paragraph of the Act of Feb. 19, 1897, ch. 265, § 1, supra, p. 310.

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LIENS
Maritime Liens, see Shipping and Navigation
Miners' Labor Lien in Alaska, see Alaska

LIENS ON VESSELS ACT
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LIEU LANDS ACT
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CROSS-REFERENCES
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I. BUREAU OF Lighthouses

An Act to authorize additional aids to navigation in the Light-House Establishment, and to provide for a Bureau of Light-Houses in the Department of Commerce and Labor, and for other purposes.

[Act of June 17, 1910, ch. 301.]

Sec. 4. [Bureau of light-houses—commissioner—deputy, chief clerk, inspectors, etc.—chief constructing engineer—superintendent of naval construction—annual report—damages from collisions—adjustment of claims.] That hereafter there shall be in the Department of Commerce and Labor a bureau of light-houses and a commissioner of light-houses, who shall be the head of said bureau, to be appointed by the President, who shall receive a salary of five thousand dollars per annum. There shall also be in the bureau a deputy commissioner, to be appointed by the
President, who shall receive a salary of four thousand dollars per annum, and a chief clerk, who shall perform the duties of chief clerk and such other duties as may be assigned to him by the Secretary of Commerce and Labor or by the commissioner. There shall also be in the bureau such inspectors, clerical assistants, and other employees as may from time to time be authorized by Congress, and there shall also be employed one chief constructing engineer at a salary of four thousand dollars per annum and one superintendent of naval construction at a salary of three thousand dollars per annum, both to be appointed by the President. The commissioner of lighthouses shall make an annual report to the Secretary of Commerce and Labor, who shall transmit the same to Congress at the beginning of each regular session thereof; and such commissioner, subject to the approval of the Secretary of Commerce and Labor, is hereby authorized to consider, ascertain, adjust, and determine all claims for damages, where the amount of the claim does not exceed the sum of five hundred dollars, hereafter occasioned by collisions, for which collisions vessels of the Light-House Service shall be found to be responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor. [36 Stat. L. 537.]

Sections 1 and 2 of this Act were temporary only and are omitted. Section 3 of this Act repealed the following provision of the Act of May 27, 1908, ch. 200, 35 Stat. L. 331: "Hereafter no light-ship shall be removed from the place designated for its station in the Act authorizing its construction and be stationed elsewhere except upon express authority of Congress."

The other sections of this Act were substitutes for the various sections of the Revised Statutes repealed by sec. 13, infra, p. 326.

By the Act of March 4, 1913, ch. 141, 37 Stat. L. 736, given under the title LABOR DEPARTMENT, there was created a Department of Labor, and the Secretary of Commerce and Labor was designated the Secretary of Commerce. See LABOR DEPARTMENT.

By the Act of Feb. 14, 1903, ch. 552, § 4, the Lighthouse Board, the Lighthouse Establishment and all pertaining thereto, were transferred to the jurisdiction of the Department of Commerce and Labor, which subsequently became the Department of Commerce. See COMMERCE DEPARTMENT, vol. 2, p. 477.

Enlarging light-house reservation.—The Secretary of the Navy has authority to transfer control of certain land at San Juan, P. R., reserved by Executive order for naval purposes, to the Department of Commerce and Labor, for the extension of the light-house reservation at that place. (1904) 25 Op. Atty.-Gen. 299.

Collision with light-house tender.—See L. Boyer & Sons Co. v. U. S., (C. C. A. 2d Cir. 1912) 195 Fed. 490, 115 C. C. A. 400, wherein, in a suit in admiralty, authorized by a special act of Congress, there was a decree in favor of the owners of a vessel for damages resulting from a collision with a light-house tender.

SEC. 5. [Employees transferred.] That all employees of or in the Light-House Board or the Light-House Establishment are hereby transferred to the bureau of light-houses, excepting, however, army and navy officers. [36 Stat. L. 537.]

See the notes to the preceding section 4 of this Act.

The Lighthouse Board was organized, and its proceedings were regulated by R. S. secs. 4653-4657 repealed by section 13 of this Act, infra, p. 326.

SEC. 6. [Light-House Board — duties transferred.] That all duties performed and all power and authority now possessed or exercised by the Light-House Board, under any provision of law not hereby repealed, are hereby transferred to and imposed and conferred upon and vested in the commissioner of light-houses, under the direction and control of the Secretary of Commerce and Labor. [36 Stat. L. 538.]

As to the Secretary of Commerce and Labor see the notes to section 4 of this Act, supra, this page.
SEC. 7. [Light-House Service — control, etc., of, by Commissioner.] That the commissioner of light-houses shall, under the direction and control of the Secretary of Commerce and Labor, have charge and control of the construction, repair, illumination, inspection, and superintendence of light-house depots, supply stations, light and signal stations, light-houses, light-vessels, light-house tenders, fog signals, submarine signals, beacons, buoys, day marks, post-lantern lights, and seamarks and their appendages, and generally of the Light-House Service; and the charge and custody of all the archives, books, documents, drawings, models, returns, apparatus, and other things appertaining to the Light-House Establishment. [36 Stat. L. 538.]

See the notes to section 4 of this Act, supra, p. 316.

The general powers and duties of the Lighthouse Board were prescribed by R. S. sec. 4655, as amended by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 252, and repealed by section 13 of this Act, infra, p. 326.

SEC. 2. [Designation of Acting Commissioner.] That hereafter, in case of the absence of the Commissioner and Deputy Commissioner of the Bureau of Lighthouses, the Secretary of Commerce and Labor may designate some officer of said bureau to perform the duties of the commissioner during his absence. [37 Stat. L. 239.]

This was a provision of the Act of July 27, 1912, ch. 255, authorizing additional aids to navigation in the Lighthouse Service, and for other purposes.

As to the Secretary of Commerce and Labor see the notes to the Act of June 17, 1910, ch. 301, § 4, supra, p. 316.

II. REGULATION OF LIGHTS AND BUOYS

Sec. 4661. [Cession of jurisdiction requisite.] No light-house, beacon, public piers, or landmark, shall be built or erected on any site until cession of jurisdiction over the same has been made to the United States. [R. S.]


R. S. secs. 4659–4680 constituted title 55 of the Revised Statutes entitled "Lights and Buoys."

R. S. secs. 4653–4660, 4663–4667, 4669–4671 provided for the organization of a lighthouse board, the conduct of its business, and general regulations for the lighthouse service. These sections were all repealed by an Act of June 17, 1910, ch. 301, § 13, infra, p. 326.

The other sections of said Act of June 17, 1910, ch. 301, being sections 4–12 thereof, supra, p. 315, and infra, p. 324, made other provisions for the establishment of a Bureau of Lighthouses, prescribing its powers and duties, the provisions of said Act being in effect substitutes for those sections of the Revised Statutes which were repealed.

By the Act of Feb. 14, 1903, ch. 552, § 4, the Lighthouse Board, the Lighthouse Establishment, and all pertaining thereto were transferred to the jurisdiction of the Department of Commerce and Labor, which subsequently became the Department of Commerce. See COMMERCE DEPARTMENT, vol. 2, p. 477.

Presumption of jurisdiction.—When a lighthouse has been built it will be presumed that jurisdiction over the place has been ceded to the United States, inasmuch as this section provides that no lighthouse shall be built on any site until cession of jurisdiction over the same has been made to the United States. The Schooner Maud Webster, (1876) 8 Ben. 547, 16 Fed. Cas. No. 9,302.

Movable beacon or bug-light.—The provisions of this section do not apply to a movable beacon or bug-light, which is not designed to be permanently fixed in any one place, but whose location is contemplated to be changed on the beach from
time to time according to circumstances, from time to time require is sufficient. (1879) 16 Op. Atty.-Gen. 328.
these changes extending over a distance of half a mile. Those provisions are only Lands under navigable water of the United States.—Where lands under navigable water are needed by the government as a site for the establishment of a light-house, it may appropriate them for that purpose. This it may do, not by virtue of any ownership in the soil, but by virtue of the right of eminent domain. (1879) 16 Op. Atty.-Gen. 369.

Sec. 4662. [What cession is sufficient.] A cession by a State of juris- Right to serve state process.—When the conveyance by the state is for the right of serving state process exists, diction over a place selected as a site of a light-house, or other structure or work the purposes enumerated in this statute, the whether specifically reserved or not. of the Light-House Establishment, shall be deemed sufficient within the preceding section, notwithstanding it contains a reservation that process issued under authority of such State may continue to be served within such place. And notwithstanding any such cession of jurisdiction contains no such reservation, all process may be served and executed within the place ceded, in the same manner as if no cession had been made. [R. S.]

Act of March 2, 1795, ch. 40, 1 Stat. L. 426. See the notes to the preceding R. S. sec. 4661.

Sec. 4668. [Substitution of light-houses for light-ships.] Whenever any purposes of light-vessels occupying positions which are adapted to the erection of light-houses upon pile-foundations require to be rebuilt, or require such extensive repairs as to render the substitution of such light-houses advisable and practicable, such permanent structures may be erected in place of any such light-vessels; but the expense arising from all such changes and erec- tions shall be defrayed from the general annual appropriations for repairs, and so forth, of light-vessels, except when a special appropriation is made for such change. [R. S.]


A provision of the Act of March 3, 1879, ch. 192, 20 Stat. L. 379, that "The expense of maintaining the vessels of the light-house establishment, may be paid from any surplus of the appropriation for the works, general or special, on which the respective vessels are, for the time being, employed; and the cost of repairs to such vessels may be paid from the appropriation under which they respectively were employed when they were injured or became deteriorated to such an extent as to render the repairs necessary; or, if such appropriation be exhausted, then from the appropriation under which they are respectively to be next employed," was repealed by a provision of the Act of June 25, 1910, ch. 384, 36 Stat. L. 755.

Sec. 4672. [Collectors of customs to act as superintendents.] The Sec- terary of the Treasury shall assign to any of the collectors of the customs the superintendence of such light-houses, beacons, light-ships, and buoys, as he deems best; but no person whose compensation as collector of customs exceeds three thousand dollars a year shall receive any compensation as disbursing agent for the Light-House Establishment, whether the sums disbursed by him be for articles to be used or services rendered within or without the limits of his superintendency or collection-district: Provided, That where the compensation of any collector as disbursing agent is not
more than three thousand dollars a year, such agent shall receive for such services not more than four hundred dollars in any fiscal year. [R. S.]  


This section was in part repealed by the following provision of the Act of June 16, 1880, ch. 235, 21 Stat. L. 289: "so much of section forty-six hundred and seventy-two of the Revised Statutes of the United States as provides compensation to collectors of the customs for services as superintendents of lights or as disbursing agents for the Light-House Establishment is hereby repealed."  

The compensation of the various collectors of customs was prescribed by the Plan for the Reorganization of the Customs Service given under the title CUSTOMS DUTIES, vol. 2, p. 902.  

The Lighthouse Board and Lighthouse Establishment was transferred from the Treasury Department to the Department of Commerce by the Act of Feb. 14, 1903, ch. 552, which created that department. See COMMERCE DEPARTMENT, vol. 2, p. 474.  

Compensation.—Collectors of customs whose compensation did not exceed $3,000 a year were entitled, under this section, when acting as superintendents and disbursing agents for light-houses, to compensation for their services as such disbursing agents, the amount whereof was to be determined by the Secretary of the Treasury, but it was not to exceed $400 in any fiscal year. (1877) 15 Op. Atty.-Gen. 348. See also (1843) 4 Op. Atty.-Gen. 272.  

Sec. 4673. [Compensation of light-house keepers.] The Secretary of the Treasury is authorized to regulate the salaries of the respective keepers of light-houses in such manner as he deems just and proper, but the whole sum allowed for such salaries shall not exceed an average of six hundred dollars to each keeper. [R. S.]  


See the note to the preceding R. S. sec. 4672.  


Sec. 4674. [Discontinuance and re-establishment of lights.] The Secretary of the Treasury may, upon the recommendation of the Light-House Board, discontinue from time to time such lights as may from any cause become useless or unnecessary. And he may, upon the like recommendation, from time to time re-establish any lights which have been thus discontinued, whenever he believes such re-establishment to be required by public convenience or the necessities of trade or commerce. [R. S.]  


As to the Secretary of the Treasury, see note to R. S. sec. 4672, supra, this page.  

R. S. sec. 4675. This section was as follows:  

"Sec. 4675. The Secretary of the Treasury may, after a week's notice to the public, sell and convey any real estate no longer used for light-house purposes, the avails of such sale to be paid into the national Treasury."  


This was superseded by the provisions of the Act of June 23, 1874, ch. 455, 18 Stat. L. 217, which was superseded by the last paragraph of the Act of March 4, 1913, ch. 188, infra, p. 327.  

Sec. 4676. [Warnings to be placed over obstructions, etc.] The Light-House Board may, when they deem it is necessary, place a light-vessel, or other suitable warning of danger, on or over any wreck or temporary obstruction to the entrance of any harbor, or in the channel or fairway of any bay or sound. [R. S.]  

Act of March 2, 1868, Res. 16, 15 Stat. L. 249.
Failure of officer to perform duty.—
The United States cannot be held in de-
fault because a buoy which had been
placed on an obstruction which caused a
disaster was carried away just before, and
replaced just after, the disaster. Flush-
ing, etc., Steam Ferry Co. v. U. S., (1870)
6 Ct. Cl. 1.
Marking wreck at request of owner.—
Where the owner of a wrecked vessel in
the Hudson river requested the light-
house department to buoy the wreck and
paid the usual charge for so doing, he
was held to have complied with the pro-
visions of section 16 of the Act of March
3, 1899, c. 425, 30 Stat. L. 1152 (title
RIVERS, HARBORS AND CANALS) requiring
the owner of wrecked or sunken craft to
immediately mark it with a buoy. And in
so marking the wreck the light-house de-
partment acted not as the private agent
of the owner, but in its sovereign capac-
ty under this section, as agent for the
whole public. The Plymouth, (C. C. A.
2d Cir. 1915) 225 Fed. 483, 140 C. C. A.
1.

Sec. 4677. [Pier-heads to be marked.] The Light-House Board shall
properly mark all pier-heads belonging to the United States situated on
the northern and northwestern lakes, whenever the board is duly notified
by the department charged with the construction or repair of pier-heads
that the construction or repair of any such pier-heads has been completed.
[R. S.]

Sec. 4678. [Color of buoys prescribed.] All buoys along the coast, or
in bays, harbors, sounds, or channels, shall be colored and numbered, so
that passing up the coast or sound, or entering the bay, harbor, or channel,
red buoys with even numbers shall be passed on the starboard hand, black
buoys with uneven numbers on the port hand, and buoys with red and black
stripes on either hand. Buoys in channel-waye shall be colored with alter-
nate white and black perpendicular stripes. [R. S.]

Sec. 4679. [Restriction upon compensation of officers, etc.] No addi-
tional salary shall be allowed to any civil, military, or naval officer on
account of his being employed on the Light-House Board, or being in any
manner attached to the light-house service. [R. S.]
Act of Aug. 31, 1852, ch. 112, 10 Stat. L. 120.
Traveling expenses of certain officers of the army and navy were authorized to be
paid by the Act of Feb. 26, 1907, ch. 1638, § 6, infra, p. 322.

Sec. 4680. [Officers, etc., not to be interested in contracts.] No mem-
ber of the Light-House Board, inspector, light-keeper, or other person in
any manner connected with the light-house service, shall be interested,
either directly or indirectly, in any contract for labor, materials, or sup-
plies for the light-house service, or in any patent, plan, or mode of con-
struction or illumination, or in any article of supply for the light-house
service. [R. S.]
Act of Aug. 31, 1852, ch. 112, 10 Stat. L. 120.

Sec. 3685. [Appropriations.] Appropriations for establishing light-
houses shall be available for expenditure for two years after acts of State
legislatures ceding jurisdiction over sites take effect. This section shall not,
however, apply to general appropriations for light-house purposes. In no
case shall any special appropriation be available for more than two years
without further provision of law. [R. S.]
See the notes to R. S. sec. 4661. supra, p. 317. See generally Estimates, Appropri-
tions and Reports.
[Sec. 1.] [Jurisdiction of board extended over Mississippi, Ohio, and Missouri rivers.] The jurisdiction of the Light-House Board, created by the act entitled "An act making appropriations for light-houses, light-boats, buoys, and so forth, and providing for the erection and establishment of the same, and for other purposes" approved August thirty-first, eighteen hundred and fifty-two, is hereby extended over the Mississippi, Ohio, and Missouri Rivers, for the establishment of such beacons, day-beacons, and buoys as may be necessary for the use of vessels navigating those streams; and for this purpose the said board is hereby required to divide the designated rivers into one or two additional light-house districts, to be in all respects similar to the already existing light-house districts; and is hereby authorized to lease the necessary ground for all such lights and beacons as are used to point out changeable channels, and which in consequence can not be made permanent. [18 Stat. L. 220.]

This is from the Sundry Civil Appropriation Act of June 23, 1874, ch. 455. The provisions of the Act of Aug. 31, 1852, ch. 116, referred to in the text, are incorporated into R. S. secs. 4653-4680.
See the notes to R. S. sec. 4661, supra, p. 317.

[Sec. 1.] [Masters of light-house tenders to have police powers.] That masters of light-house tenders shall have police powers in matters pertaining to government property and smuggling. [21 Stat. L. 263.]

This is from the Sundry Civil Appropriation Act of June 16, 1880, ch. 235.

[Sec. 1.] [Appropriations to be expended by contract.] That hereafter it shall be the duty of the Light-House Board to apply the money appropriated, other than for surveys, as far as can be without detriment to the interests of the Government, by contract. [23 Stat. L. 198.]

This is from the Sundry Civil Appropriation Act of July 7, 1884, ch. 332. As to appropriations, see R. S. sec. 3685, supra, p. 320. As to contracts, see further the Act of June 17, 1910, ch. 301, § 8, infra, p. 324.

[Sec. 1.] [Estimates for Light-House Establishment.] Hereafter there shall be submitted in the annual Book of Estimates, under each item of appropriation under the head of "Light-House Establishment," notes showing the number of persons employed and the rate of compensation paid to each from each of said appropriations during the fiscal year next preceding the fiscal year for which estimates are submitted. [33 Stat. L. 433.]

This is from the Sundry Civil Appropriation Act of June 28, 1902, ch. 1301, and follows appropriations for the Light-House Establishment. Detailed statements were required to be made with estimates by a provision of the Act of June 28, 1910, ch. 384, § 1, infra, p. 326.
SEC. 3. [Maintenance of unauthorized lights — penalty.] That after the first day of January, nineteen hundred and seven, it shall be unlawful for any person, company, corporation, or municipality not under the control of the Light-House Board, to establish, erect, or maintain in the navigable waters of the United States any light as an aid to navigation, or any other aid to navigation similar to any of those maintained by the United States under the control and direction of the Light-House Board, without first obtaining permission so to do from the Light-House Board, in accordance with rules and regulations to be established by the Secretary of Commerce and Labor; and any person violating the provisions of this section or any of the rules and regulations established by the Secretary of Commerce and Labor in accordance herewith shall be deemed guilty of a misdemeanor and be subject to a fine not exceeding the sum of one hundred dollars for each offense, and each day during which such violation shall continue shall be considered as a new offense. [34 Stat. L. 324.]

This is from the Act of June 20, 1906, ch. 3447, "to authorize additional aids to navigation in the Light-House Establishment."

By the Act of March 4, 1913, ch. 141, given under the title LABOR DEPARTMENT, there was created a Department of Labor, and the Secretary of Commerce and Labor was designated the Secretary of Commerce.

The Lighthouse Board and Lighthouse Establishment has been placed under the jurisdiction of the Secretary of Commerce. See the notes to R. S. sec. 4661, supra, p. 317.

By the Act of March 3, 1915, ch. 81, § 8, infra, p. 329, the penalties prescribed by the Act of May 14, 1908, ch. 185, § 6, infra, p. 323, were made to apply to obstructions to or interference with any private aid to navigation maintained by virtue of the authority of "section six" of the Act of June 20, 1906, 34 Stat. L. 324. There being no section 6 of said Act, the reference is evidently intended to be section 3 of said Act, given in the text.

SEC. 6. [Traveling expenses of army and navy officers.] That hereafter officers of the Army and Navy detailed for service in connection with the Light-House Establishment shall be paid their actual traveling expenses when traveling under orders on official duty to and from points which can not be conveniently reached by vessel or railroad. [34 Stat. L. 997.]

This is from the Light-House Establishment Act of Feb. 26, 1907, ch. 1638.

Sea service.—An officer of the navy assigned to duty as a lighthouse inspector and ordered to inspect the light stations in his district, was held not to be entitled to sea pay under R. S. sec. 1671 (title NAVY) while making his tour of inspection, though it was by water and involved going to sea. Schoomaker v. U. S., (1884) 19 Ct. Cl. 170.


The provisions of the foregoing section 4 and the following sections 5–7, 9 are from the Act of May 14, 1908, ch. 185, "To Authorize Additional Aids to Navigation in the Light-House Establishment." Sections 1–3 and 8 were temporary only and are omitted.
SEC. 5. [Bridge lights — violation of regulations — penalty.] That any person, firm, company, or corporation required by law to maintain a light or lights upon any bridge or abutments over or in any navigable waters, who shall fail or refuse to maintain such light or lights, or to obey any of the lawful rules and regulations relating to the same, shall be deemed guilty of a misdemeanor and be subject to a fine not exceeding the sum of one hundred dollars for each offense, and each day during which such violation shall continue shall be considered as a new offense. [35 Stat. L. 162.]

See the notes to the preceding section 4 of this Act.

Liability of municipality.—Municipality held liable for negligence in failing to comply with regulations of the lighthouse board prescribing the placing of lights on draw bridges across navigable streams. Smith v. Shakopee, (C. C. A. 8th Cir. 1900) 103 Fed. 240, 44 C. C. A. 1.

SEC. 6. [Obstruction to navigation forbidden — penalty.] That it shall be unlawful for any person to obstruct or interfere with any aid to navigation established or maintained in the Light-House Establishment under the Light-House Board, or to anchor any vessel in any of the navigable waters of the United States so as to obstruct or interfere with range lights maintained therein, and any person violating the provisions of this section shall be deemed guilty of a misdemeanor and be subject to a fine not exceeding the sum of five hundred dollars for each offense, and each day during which such violation shall continue shall be considered as a new offense. [35 Stat. L. 162.]

See the notes to section 4 of this Act, supra, p. 322.

By the Act of March 3, 1915, ch. 81, § 8, infra, p. 329, the penalties prescribed in the text were extended to apply with equal force and effect to any private aid to navigation maintained under the provisions of the Act of June 20, 1906, ch. 3447, § 6, but the reference to "section six" in said Act of March 3, 1915, ch. 81, § 8, was evidently intended for section 3. See the notes to said section 8.

SEC. 7. [Report on discontinuance of lights, etc.] That the Secretary of Commerce and Labor shall annually cause the Light-House Board to make a report to him for transmission to Congress of all aids to navigation in service which may be discontinued without distinct injury to the interests of navigation. [35 Stat. L. 162.]

See the notes to section 4 of this Act, supra, p. 322.

As to the Secretary of Commerce and Labor, see the notes to R. S. sec. 4661, supra, p. 317.

SEC. 9. [Keepers, etc. — ration.] That every light-house keeper and assistant light-house keeper in the Light-House Establishment of the United States shall be entitled to receive one ration per day or, in the discretion of the Light-House Board, commutation therefor at the rate of thirty cents per ration. [35 Stat. L. 163.]

See the notes to section 4 of this Act, supra, p. 322.

[SEC. 1.] [Lease of ground for lights, etc., not permanent.] Lighting of rivers: • • • for establishing, supplying, and maintaining post lights • • • the Light-House Board being hereby authorized to lease
the necessary ground for all such lights and beacons as are for temporary use or are used to point out changeable channels, and which in consequence can not be made permanent. [35 Stat. L. 972.]

The provisions of this and the following paragraph of the text are from the Sundry Civil Appropriation Act of March 4, 1909, ch. 299.

[New machinery or equipment — competitive bids.] * * * That hereafter any and all proposals for bids for any new machinery or other new equipment necessary in the repair of any vessel in the Light-House Service shall be on specifications prepared and submitted that will secure competition in the bids for furnishing such machinery or equipment. [35 Stat. L. 973.]

See the note to the preceding paragraph of the text.
See further the Act of June 17, 1910, ch. 301, § 8, infra, p. 324.

SEC. 8. [Contracts required for materials, etc.—open market purchases.] That all materials for construction, maintenance, repair, and operation shall be procured by public contracts, under such regulations as may from time to time be prescribed by the commissioner, subject to the approval of the Secretary of Commerce and Labor, and no contract shall be made except after public advertisement for proposals in such form and manner as to secure general notice thereof, and the same shall only be made with the lowest and best bidder therefor, upon security deemed sufficient in the judgment of the commissioner of light-houses, but all bids may at any time be rejected by the commissioner: Provided, however, That the commissioner of light-houses may purchase illuminating oil, wicks, and chimney for lights, and ground tackle for light-vessels and buoys, and to an amount not exceeding five hundred dollars at any one time, other materials and supplies when immediate delivery is required by an exigency, by private contract or in the open market, if he deems it for the best interests of the service so to do; but such purchases shall be set forth in the annual report of the commissioner with the reasons for purchasing other than upon bids after public advertisement. [36 Stat. L. 538.]

This and the following sections 9–14 are from an Act of June 17, 1910, ch. 301. Sections 4, 5, 6 and 7 of this Act relating to the establishment of a Lighthouse Bureau are given under subdivision 1 of this title.
Sections 1, 2, and 3 of this Act are noted under section 4 thereof, supra, p. 315. The remaining sections are given in the following paragraphs of the text.
Earlier provisions relating to contracts, etc., were contained in R. S. secs. 4665, 4666, 4667, repealed by section 13 of this Act, infra, p. 326.
As to the Secretary of Commerce and Labor, see the notes to section 4 of this Act, supra, p. 315.


SEC. 9. [Purchase of sites.] That the commissioner, under the direction of the Secretary of Commerce and Labor, is authorized, whenever an appropriation is made by Congress for a new light-house, the proper site for which does not belong to the United States, to purchase the necessary land for such site, provided the purchase money be paid from the amount appropriated for such light-house without exceeding the limit of cost, if any,
fixed in such case; and the commissioner of light-houses is authorized to employ temporarily draftsmen for the preparation of plans for tenders and light-vessels which may be authorized by Congress, to be paid from the respective appropriations therefor. [36 Stat. L. 538.]

See the notes to the preceding section 8 of this Act, supra, p. 524.

Earlier provisions relating to the purchase of sites were made by R. S. sec. 4660, repealed by section 13 of this Act, infra, p. 326.

Subsequent provisions relating to this subject were made by the Act of March 4, 1913, ch. 168, the provisions of which are given infra, p. 327.

Range lights in navigable rivers.—Proprietary of the adjacent lots is not necessary, nor is any permission from riparian proprietor required, to give the United States right to erect range lights in the waters of Saginaw river; this is a matter between the United States and the state, and not one that concerns the shore owners. (1875) 14 Op. Atty.-Gen. 47.

Boundaries of site.—The grant to the government of a site for a lighthouse, which is bounded by a line running to the shore and thence by the shore, does not include the shore. But a grant bounded on or by the sea, instead of by the shore, would carry to low water and include the shore. (1887) 10 Op. Atty.-Gen. 20.

Sec. 10. [Administrative regulations.] That the commissioner of light-houses, under the direction and control of the Secretary of Commerce and Labor, shall, from time to time, prescribe and distribute such regulations as he may deem proper for securing an efficient, uniform, and economic administration of the Light-House Service. [36 Stat. L. 538.]

See the notes to sec. 8 of this Act, supra, p. 324.

R. S. sec. 4669, repealed by section 13 of this Act, infra, p. 326, provided that regulations should be prescribed by the Light-House Board, with the approval of the Secretary of the Treasury.

Judicial notice of regulations.—Courts of admiralty will take judicial notice of the regulations of the lighthouse board, although they are neither pleaded nor offered in evidence. Smith v. Shakopee, (C. C. A. 8th Cir. 1900) 103 Fed. 240, 44 C. C. A. 1, overruling (C. C. A. 8th Cir. 1896) 97 Fed. 974, 38 C. C. A. 617.

Regulations under prior statute.—R. S. sec. 4669, embodied in part herein, restricted the power of the lighthouse board to the adoption and enforcement of such regulations as concerned the management and control of lighthouse keepers, inspectors, and employees for the purpose of properly administering the lighthouse establishment. (1895) 18 Op. Atty.-Gen. 344.

And that statute did not authorize the board to adopt and enforce regulations controlling in any manner the appointment of lighthouse keepers or other inferior officers, or to designate the appointees. (1886) 10 Op. Atty.-Gen. 344.

Where a regulation, made under and within the power granted by R. S. sec. 4669, was regularly approved, neither the board without the approval of the secretary nor the approval of the board could change it. But such regulation could not abridge or control in any manner the power of appointment conferred by law upon the secretary. (1887) 18 Op. Atty.-Gen. 529.

Sec. 11. [Light-house districts — inspectors — salaries — temporary assignment of Army and Navy officers — engineer officer for Mississippi river districts — detail for construction, etc.] That the commissioner of light-houses, subject to the approval of the Secretary of Commerce and Labor, as soon as practicable, shall rearrange the ocean, gulf, and lake coasts and the rivers of the United States, Porto Rico, and the naval station in Cuba into not exceeding nineteen light-house districts, and a light-house inspector shall be assigned in charge of each district. The light-house inspectors shall each receive a salary of two thousand four hundred dollars per annum, except the inspector of the third district, whose salary shall be three thousand six hundred dollars per annum. The President may, for a period not exceeding three years from the taking effect of this section,
assign army and navy officers to act in lieu of the appointment of civilian light-house inspectors, but such army and navy officers shall not receive any salary or compensation in addition to the salary or compensation they are entitled to as such army or navy officers: Provided, That in the districts which include the Mississippi River and its tributaries the President may designate army engineers to perform the duties of and act as inspectors. The President may detail officers of the Engineer Corps of the United States Army for consultation or to superintend the construction or repair of any aid to navigation authorized by Congress. [36 Stat. L. 538.]

See the notes to sec. 8 of this Act, supra, p. 324.

Provisions for the arrangement of the various lighthouse districts were made by R. S. sec. 4670, amended by an Act of July 28, 1896, ch. 779, 24 Stat. L. 148, and provisions for the appointment of an officer of the army or navy, who should act as inspector, were made by R. S. sec. 4671, both of which sections were repealed by section 13 of this Act, infra, this page.

SEC. 12. [Appropriations transferred.] That all unexpended appropriations which shall be available at the time when this Act takes effect, in relation to the Light-House Board, the Light-House Establishment, and the Light-House Service, shall be available from the time that this Act takes effect for expenditures in and by the bureau of light-houses, and shall be treated the same as though the bureau of light-houses had been named directly in the Acts making said appropriations. [36 Stat. L. 539.]

See the notes to sec. 8 of this Act, supra, p. 324.

SEC. 13. [Laws repealed.] That sections forty-six hundred and fifty-three, forty-six hundred and fifty-four, forty-six hundred and fifty-five, forty-six hundred and fifty-six, forty-six hundred and fifty-seven, forty-six hundred and fifty-eight, forty-six hundred and fifty-nine, forty-six hundred and sixty, forty-six hundred and sixty-three, forty-six hundred and sixty-four, forty-six hundred and sixty-five, forty-six hundred and sixty-six, forty-six hundred and sixty-seven, forty-six hundred and sixty-nine, forty-six hundred and seventy, and forty-six hundred and seventy-one of the Revised Statutes of the United States are hereby repealed. [36 Stat. L. 539.]

See the notes to sec. 8 of this Act, supra, p. 324.

SEC. 14. [Effect.] That sections four to thirteen, inclusive, of this Act, shall take effect on the first day of July next succeeding its passage. [36 Stat. L. 539.]

See the notes to sec. 8 of this Act, supra, p. 324.

[Sec. 1.] [Lighthouse establishment — detailed statements to be made with estimates.] * * * Hereafter there shall be submitted, following each estimate for support of the Light-House Establishment, statements showing the amount required for each object of expenditure mentioned in each of said estimates, together with a statement of the expenditures under each of such objects for the fiscal year terminated next preceding the period of submitting said estimates. [36 Stat. L. 755.]

This is from the Sundry Civil Appropriation Act of June 26, 1910, ch. 384. See the earlier provision of the Act of June 28, 1902, ch. 1301, § 1, supra, p. 321.
SEC. 2. [Clothing for crews of vessels — reimbursement for supplies to shipwrecked persons.] * * * And hereafter the Secretary of Commerce and Labor is authorized to purchase, from the appropriations for the Lighthouse Service, clothing for the crews of vessels, to be sold to the employees of said service and the appropriations reimbursed; and hereafter reimbursement, under rules prescribed by the Secretary of Commerce and Labor, is authorized to keepers of light stations and masters of light vessels and of lighthouse tenders for rations and provisions and clothing furnished shipwrecked persons who may be temporarily provided for by them, not exceeding in all five thousand dollars in any fiscal year. [37 Stat. L. 239.]

This is a provision of an Act of July 27, 1912, ch. 255, authorizing additional aids to navigation in the Light-House Service, and for other purposes.

A further provision of this section provided that "hereafter the benefits of the Act of May thirtieth, nineteen hundred and eight (Thirty-fifth Statutes, page five hundred and fifty-six), entitled 'An Act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment,' shall be extended to persons employed by the United States in any hazardous employment in the Lighthouse Service," and is given, together with the Act of May 30, 1908, ch. 236, to which it refers, under the title labor.

As to the Secretary of Commerce and Labor, see the notes to R. S. sec. 4661, supra, p. 317.

[Additional land purchases — limit of cost.] * * * Hereafter the purchase of necessary additional land for light stations and depots is authorized under rules prescribed by the Secretary of Commerce and Labor: Provided, That no single acquisition of such additional land shall cost in excess of $500. [37 Stat. L. 1018.]

This and the two following paragraphs of the text are provisions of an Act to authorize aids to navigation and other works in the Lighthouse Service, and for other purposes, of March 4, 1913, ch. 168.

Earlier provisions relating to the purchase of land for sites were made by the Act of June 17, 1910, ch. 301, § 8, supra, p. 324.

[Supplies to be furnished from general stock.] Hereafter supplies and equipment for special works of the Lighthouse Service may be furnished from general stock and the appropriation "General expenses, Lighthouse Service," reimbursed therefor from the respective appropriations for special works. [37 Stat. L. 1018.]

See the note to the preceding paragraph of the text.

[Sale of condemned supplies, etc.— proceeds.] Hereafter when any condemned supplies, materials, equipment, or land can not be profitably used in the work of the Lighthouse Service the same shall be appraised and sold, either by sealed proposals for the purchase of the same or by public auction after advertisement of the sale for such time as in the judgment of the Secretary of Commerce and Labor the public interests require, the proceeds of such sales, after the payment therefrom of the expenses of making the sales, to be deposited and covered into the Treasury as miscellaneous receipts as now provided for by law in like cases. [37 Stat. L. 1019.]

See the note to the second preceding paragraph of the text.

The provisions of this paragraph superseded those of R. S. sec. 4675 and the Act of June 23, 1874, ch. 455, noted supra, pp. 319, 321.
[Sec. 1.] [Construction of buildings — improvements — wages and supplies — vouchers.] * * * That any oil or carbide house erected hereunder shall not exceed $550 in cost; construction of necessary outbuildings at a cost not exceeding $200 at any one light station in any fiscal year, the improvements of grounds and buildings connected with light stations and depots, wages of laborers attending post lights, pay of temporary employees and field force while engaged on works of general repair and maintenance, and pay of laborers and mechanics at lighthouse depots; rations and provisions or commutation thereof for keepers of lighthouses, officers and crews of light vessels and tenders, and officials and other authorized persons of the Lighthouse Service on duty on board of such tenders or vessels, and money accruing from commutation for rations and provisions for the above-named persons on board of tenders and light vessels may be paid on proper vouchers to the person having charge of the mess of such vessels, reimbursement under rules prescribed by the Secretary of Commerce of keepers of light stations and masters of light vessels and of lighthousetenders for rations and provisions and clothing furnished shipwrecked persons who may be temporarily provided for by them, not exceeding in all $5,000 in any fiscal year. [38 Stat. L. 870.]

This is from the Sundry Civil Appropriation Act of March 3, 1915, ch. 75, following appropriations for the Lighthouse Service.

See the Act of July 27, 1912, ch. 255, § 2, supra, p. 327.

Sec. 4. [Leaves of absence to employees.] That hereafter employees of the Lighthouse Service compensated at a per diem rate of pay may be granted fifteen working days' leave of absence each year without forfeiture of pay during such absence, under rules prescribed by the Secretary of Commerce: Provided, That no employee of the class herein mentioned shall be entitled to any leave until he has served twelve consecutive months, when he may be granted fifteen days' leave, and that during the second or any subsequent year fifteen days' leave at the rate of one and one-fourth days per month, as earned, may be granted from the beginning of the second service year: Provided further, That the inspectors of the several lighthouse districts shall have discretion as to the time when the leave can be allowed without detriment to the service, and that absence on account of sickness shall be deducted from the leave hereby granted. [38 Stat. L. 927.]

The provisions of the foregoing section 4 and the following sections 5, 6, 7, and 8 are from an Act of March 3, 1915, ch. 81, entitled "An Act To authorize aids to navigation and other works in the Lighthouse Service, and for other purposes."

Sections 1, 2, and 3 are omitted as temporary.

The Sundry Civil Appropriation Act of Aug. 1, 1914, ch. 223, 38 Stat. L. 658, provided as follows: "... Hereafter employees of the Lighthouse Service, who are not now entitled to leave of absence with pay and who have served twelve consecutive months, shall be given fifteen days' leave of absence with pay each year: Provided, That pro rata leave shall be allowed those serving fractional parts of a year: Provided further, That heads of divisions shall have discretion as to the time when the leave shall be granted."

Sec. 5. [Lights and other aids to navigation authorized in Florida.] That hereafter post-lantern lights and other aids to navigation may be established and maintained, in the discretion of the Commissioner of Light-
houses, out of the annual appropriations for the Lighthouse Service, on Lakes Okeechobee and Hispoochee and connecting waterways across the State of Florida and on the Apalachicola River and Chipola cutoff. [38 Stat. L. 927.]

See the note to the preceding section 4 of this Act.

SEC. 6. [Expenses of cooperation between Lighthouse Service and Forest Service — how met.] That hereafter the annual appropriations for the Lighthouse Service shall be available for defraying the expenses of cooperation between the Lighthouse Service and the Forest Service in the management of forest land on lighthouse reservations. [38 Stat. L. 928.]

See the note to section 4 of this Act, supra, p. 328.

SEC. 7. [Chief clerks, etc., in offices of lighthouse inspectors — power to administer oaths.] That hereafter the provisions of section eight of the Act of Congress approved August twenty-fourth, nineteen hundred and twelve (Thirty-seventh Statutes, page four hundred and eighty-seven), relative to the administering of oaths to travel accounts or other expenses against the United States shall be extended to chief clerks in the offices of lighthouse inspectors or other employees in the Lighthouse Service designated by them, and hereafter chief clerks in offices of lighthouse inspectors and employees designated by them are authorized to administer oaths of office to employees of the Lighthouse Service. [38 Stat. L. 928.]

See the note to section 4 of this Act, supra, p. 328.

For the provisions of the Act of Aug. 24, 1912, ch. 355, § 8, 37 Stat. L. 487, mentioned in the text, see Public Officers and Employees.

SEC. 8. [Obstruction to navigation — penalties.] That hereafter the penalties provided in section six of the Act of May fourteenth, nineteen hundred and eight (Thirty-fifth Statutes, page one hundred and sixty-two), for obstruction to or interference with any aid to navigation maintained by the Lighthouse Service shall apply with equal force and effect to any private aid to navigation lawfully maintained under the authority granted the Secretary of Commerce and the Commissioner of Lighthouses by section six of the Act of June twentieth, nineteen hundred and six (Thirty-fourth Statutes, page three hundred and twenty-four). [38 Stat. L. 928.]

See the note to section 4 of this Act, supra, p. 328.

The Act of May 14, 1908, ch. 168, § 6, mentioned in the text, is given supra, p. 323.

The reference to “section six” of the Act of June 20, 1906, mentioned in the text, is evidently intended to be section 3 of said Act of June 20, 1906, ch. 3447, supra, p. 322, since said section 3 provides for the maintenance of private aids to navigation, and the Act of which it was a part contained no “section six.”
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CROSS-REFERENCES
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Sec. 4281. [Liability of masters, etc., as carriers.] If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or time-pieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form.
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or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered. [R. S.]


Sections 4281-4282 are a part of chapter 6 (entitled "Transportation of Passengers and Merchandise") of title 48 (entitled "Regulation of Commerce and Navigation") of the Revised Statutes.

Application of statute.—This section has reference alone to the liability of carriers by water who transport goods and merchandise of the kind designated. It has no application whatever to carriers by land, and does not assume to declare or restrict their liability for the baggage of passengers. New York Cent., etc., R. Co. v. Fraloff, (1879) 100 U. S. 24, 25 U. S. (L. ed.) 531.

Effect of statute—extent of exemption.—Prior to the enactment of this statute, the carrier was liable for any loss, except such as was attributable to the act of God or the public enemy. The statute merely relieves the carrier where the notice is not given and entrance made as required thereby from any liability as carrier, but does not attempt to relieve it from any duty as bailee. Mallory Steamship Co. v. G. A. Bahn Diamond, etc., Co., (Tex. Civ. App. 1913) 154 S. W. 252.

The provision of this section which declares that any shipper of certain articles specified, among which are "pictures" shall lade the same as freight or baggage on any vessel without, at the time, giving notice to its owner, master or agent of the true character and value of the property shipped, and having the same entered upon the bill of lading "the master and owner of such ship or vessel shall not be liable as carriers thereof in any form or manner," while it relieves the ship owner from liability as carrier, when the property has been entered on the manifest, does not affect his liability as bailee for hire. As bailee therefore the owner is liable where it is shown that the property was lost through his negligence. Wheeler v. Oceanic Steam Nav. Co., (1891) 125 N. Y. 165, 26 N. E. 248, 21 A. S. R. 729; reversing (1899) 52 Hun 75, 5 N. Y. S. 101.

The words "as a carrier thereof" are vital to the true interpretation of the statute. The liability of the carrier as such was well understood by the framers of the statute. By force of his public employment, he became an insurer of the property entrusted to his care, and liable for its loss, irrespective of the cause, unless from the act of God or the public enemy. But involved in this greater liability and absorbed by it was a lesser liability as bailee for hire; of no consequence while the greater liability existed, but paramount on the destruction of that, so that when the carrier ceased to be liable as carrier, he yet remained liable as bailee.

So much, and no more than that, this section accomplished, for it distinctly removes the liability as carrier without touching that of bailee. Wheeler v. Oceanic Steam Nav. Co., (1891) 125 N. Y. 155, 26 N. E. 248, 21 A. S. R. 729, reversing (1899) 52 Hun 75, 5 N. Y. S. 101.

Nor is this construction affected by the added words "in any form or manner." They are not used disjunctively, and so as to constitute a separate command, but qualify the expression "shall not be liable as carriers thereof." The full form of the words being that the liability as carrier shall not exist in any form of action or through any manner of procedure. Wheeler v. Oceanic Steam Nav. Co., (1891) 125 N. Y. 155, 26 N. E. 248, 21 A. S. R. 729.

"A possible criticism upon this view of the statute is quite likely to suggest itself," said the court in Wheeler v. Oceanic Steam Nav. Co., supra. "One may inquire of what value to the shipowner is the enactment when, after all, he is left liable for the loss, and responsible, whether the property is entered upon the ship's manifest or not? The inquiry goes to the root of the matter, and its answer will further test the justice and propriety of our interpretation. Under it, the shipowner is protected as far as he should be, and in two very important respects. First, the statute leaves him at liberty to refuse to carry the property at all unless its value and character are disclosed and entered upon the ship's manifest. The law makes him master of the situation, and able, if he shall please, to enforce obedience to it. As carrier he could not refuse, but since he does not become such unless the proper entry is made, he may refuse until then to transport the property at all. As a simple bailee he may take the property or decline it. If now he chooses to take it in that character the act is voluntary; there is no compulsion about it; and on what principle shall we say that because he so takes it he shall be absolved from all care over it, at liberty to be as negligent as he pleases, and that only bailee in the world having that lawless control? Second, if a loss occurs he is no longer liable as an insurer. The door to a just defense is opened before him, and the burden of proof to establish negligence is shifted to his adversary. If the ship-owner has in truth exercised due care, he may show it and go discharged.
If he has not exercised it, if he has been negligent and careless, he ought to respond in damages and must do so."

Stipulation in bill of lading.—A stipulation in a bill of lading in regard to non-accountability for gold or silver, manufactured plated articles, jewelry, trinkets, and goods contained in any package or parcel shipped under a bill of lading, "unless the value thereof will be therein expressed, and extra freight, as may be agreed, be paid," cannot be questioned as to its reasonableness, for it is authorized by this section. The Bermuda, (E. D. N. Y. 1896) 29 Fed. 399.

A condition in bills of lading issued by a steamship company, limiting its liability in case of loss to a specified sum per package unless the value of the goods shall be expressed therein, is not an agreed valuation of the goods, and is invalid to relieve the company from liability for the full loss in case of their loss or injury through negligence, but a limitation to the invoice or declared value is reasonable and enforceable. U. S. Lace Curtain Mills v. Oceanic Steam Nav. Co., (S. D. N. Y. 1899) 145 Fed. 701.

Limitation of liability in passenger ticket.—There is a well recognized distinction between mere notices by the carrier, printed upon the ticket or otherwise given to the passenger, that the carrier will not be liable beyond a certain amount, and provisions to that effect contained in the contract of carriage itself. The former are not valid unless distinctly brought home to and accepted by the passenger; the latter, entering into and forming part of the contract, are necessarily accepted with the ticket, unless repugnant to public policy. The Cretic, (D. C. Mass. 1914) 224 Fed. 216, citing The Majestic, (1897) 166 U. S. 375, 17 S. Ct. 597, 41 U. S. (L. ed.) 1039; Bachman v. Clyde Steamship Co., (C. C. A. 2d Cir. 1907) 152 Fed. 403, 81 C. C. A. 529; The Morro Castle, (S. D. N. Y. 1909) 168 Fed. 555; Hohl v. Nordduetscher Lloyd, (C. C. A. 2d Cir. 1910) 175 Fed. 544, 99 C. C. A. 166.

Value of baggage. In the Cretic, (D. C. Mass. 1914) 224 Fed. 216, which was a libel in rem, brought to recover for the loss of a trunk and contents, limitations of liability to $100, in the passenger's ticket, were held valid and binding. In that case it appeared that the libelant purchased a ticket for first class passage for transportation of himself and family, with baggage from Boston to Genoa. A trunk in question formed part of the personal baggage. It was delivered on board the steamer and tagged for the "stateroom." The trunk contained jewelry and personal effects to a total value of $2,000. It was never delivered to the stateroom or to the libelant and the findings of fact were that it was undoubtedly lost by the negligence or willful misconduct of some officers or members of the crew after the voyage began. The passenger ticket contained a provision in effect that the liability of the company or the vessel to the passenger referred to in the ticket for the loss of baggage should not exceed $100 and the defense principally relied upon was, that by reason of such provision contained in the ticket, the steamer was not liable for the value of the jewelry lost. Limiting the damages to the sum of $100, with costs, the court said: "It seems to me that the limitation of liability to $100 per passenger was valid and was binding. Presumably this limitation entered into the price charged for the ticket. It the passenger desired further protection, he could obtain it by declaring a greater value and paying thereon or by shipping under a bill of lading. . . . Even though R. S. sec. 4281, does not apply to personal baggage for which no bills of lading are taken, it certainly shows legislative recognition of the wisdom of allowing ocean carriers to protect themselves against claims for undelivered jewelry in baggage or freight, a thing so plainly just and well settled as to need no elaboration." The court held also that the fact that the libelant chose to accept the ticket without reading it, or familiarizing himself with its provisions, did not enlarge his rights in the suit. He was to be held to the terms of the contract which he accepted, so far as those terms were not invalid as against public policy.

On the contrary in Weinberger v. Compagnie Generale-Transatlantique, (S. D. N. Y. 1906) 146 Fed. 616 it was held that a provision printed in a steamer ticket for the carriage of six passengers, limiting the liability of the carrier for loss or damage to baggage to $100, not read by nor called to the attention of the passenger, was unreasonable and void. But this case is doubtless is distinguishable from The Cretic, cited supra. The court said: "These clauses [limiting liability to $100] although entitled 'Conditions of Passage' do not appear to be anything more than notices. They are printed in connection with the ticket but not made a part thereof and are of no greater force than if printed on the back of the ticket. The libelants have testified that they did not read them nor were they brought to their attention. Moreover, they were not reasonable and are, therefore, not enforceable, especially, although the ticket was designed to cover a number of passages, no provision is made for a greater liability than 500 francs for all and such amount is insisted was the extent of the respondent's liability. The contention can not be sustained.

A steamship company issued a passage ticket limiting its liability for loss of the
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personal effects of passengers to $100, unless the value of the same, in excess of that sum, be declared before the issue of the contract of carriage by the named party, and the payment of said sum, in addition to the ship and payment of freight at current rates thereon. Hand baggage was delivered to the company's baggage master at his direction, and on his statement that it would be sent to the passenger's room, but it was never delivered. It was held that the loss, if unexplained, established a prima facie case of negligence for which the company was liable, notwithstanding the failure of the passenger at the time of delivery to declare the value thereof or pay excess freight thereon; such requirement not applying to hand baggage. Holmes v. North German Lloyd Steamship Co., (1906) 184 N. Y. 280, 77 N. E. 21, 5 L. R. A. (N. S.) 650. This case is distinguished in The Cretic, cited supra, on the ground that the property lost was not actually delivered as baggage whereas in The Cretic, the property in question was delivered to the steamer and accepted by her as baggage belonging to the person traveling under the ticket which determined the rights and liabilities of the parties.

Whether a limitation of liability to goods above the value of $100 per package applies to "gold, silver, bullion, specie, documents, jewelry, pictures, embroidery, works of art, silks, furs, Chins, porcelain, watches, clocks," as well as to goods of other description, may admit of some doubt, in view of the fact that by this section the vessel and her owners would not be liable for such articles at all unless specifically mentioned at a value agreed upon. Calderon v. Atlas Steamship Co., (1898) 170 U. S. 272, 18 S. Ct. 688, 42 U. S. (L. ed.) 1033.


A passenger simply carrying, as part of ordinary baggage, such small articles of jewelry and silverware as under any circumstances would only be regarded as a proper and legitimate part thereof, does not come within the provisions of the statute and is not a shipper of such articles within the meaning of the law. Carlson v. Oceanic Steam Nav. Co., (1888) 109 N. Y. 359, 16 N. E. 546.

Articles carried by a passenger as baggage and which are properly so carried are not affected by this section, but articles like silk and lace not intended for personal use when carried as baggage are within the terms of the section. Haddad v. Hartford, etc., Transp. Co., (1915) 38 Atl. 261, 94 Atl. 697.

Jewelry worn by passenger.—The provision of this section that if any shipper of jewelry, etc., contained in any parcel or package or trunk shall take the same as freight or baggage on any vessel without giving written notice of its character and value, and having the same entered on the bill of lading, the shipowner shall not be liable as carrier, is intended to apply where such goods are received from a shipper by a carrier for transportation in the usual course of business, and does not relieve a shipowner from liability for jewelry worn and carried on board by a passenger with the intention of placing it in the custody of the purser, as permitted by the rules of the ship, but which was stolen by an employee of the ship before there was opportunity to do so. The Finnentoks, (C. C. A. 2d Cir. 1906) 146 Fed. 509, 77 C. C. A. 217, affirming (S. D. N. Y. 1904) 132 Fed. 52.

Trinkets.—Elaborate fans and parasols were held to be trinkets in the sense in which that word is used in the statute so when the proof showed that they were made of delicate and expensive material, highly ornamented with carving and extremely fragile in construction, and that they were really intended more for ornament than for use, though they may have some possessed to some extent the quality of utility, and this consideration constituted a very small element of the purpose for which they were designed and contributed incomensurably to their value. Savannah Ocean Steamship Co. v. Way, (1892) 90 Ga. 747, 17 S. E. 57, 20 L. R. A. 123.

Lace.—A Chantilly lace shawl, valued at $400, is lace within the meaning of this statute. Savannah Ocean Steamship Co. v. Way, (1892) 90 Ga. 747, 17 S. E. 57, 20 L. R. A. 123.

Writings.—Memorandum books in which a traveler had entered, from time to time, results of his experience and observation as respects the quality, quantity, use, and combination of articles used in his business in numerous different localities, and valuable to him for information and comparison in the continued prosecution of the same business, are within the provisions of this section. The St. Cuthbert, (S. D. N. Y. 1890) 97 Fed. 346.

Documents.—The term "documents" in a bill of lading is not a substitute for or equivalent to the term "writing" in the statute. The St. Cuthbert, (S. D. N. Y. 1890) 97 Fed. 346.

Contract by foreigner with foreign corporation.—It is questionable whether the law is applicable to a foreigner who made a contract of carriage with a foreign corporation outside the jurisdiction of this country, even though action is brought in this country on such contract. Carlson v. Oceanic Steam Nav. Co., (1888) 109 N. Y. 359, 16 N. E. 546.
Burden of proof.—Under this statute the burden of proof is upon the steamship company to show a failure on the part of the shipper to give the notice required and cause the entry to be made in the bill of lading. Mallory Steamship Co. v. G. A. Gahn Diamond, etc., Co., (Tex. Civ. App. 1913) 164 S. W. 282.

Sec. 4282. [Loss by fire.] No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. [R. S.]


Source and history of act.—The first section of the Act of March 3, 1851, embodied herein, was copied from the second section of Act 26 Geo. III. c. 86, which received a judicial interpretation by the Court of Queen's Bench in Morewood v. Pollok, (1853) 1 El. & Bl. 743, 72 E. C. L. 741, 18 Eng. L. & Eq. 341. The City of Clarksville, (D. C. Ind. 1899) 94 Fed. 201.

The earliest American legislation upon this subject is found in a statute of Massachusetts passed in 1818, and revised in 1836. This was taken substantially from the Statute of George II. It was followed by an act of the legislature of Maine in 1831, copied from the Statute of Massachusetts. The attention of Congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of The Lexington reported under the name of the New Jersey Steam Nav. Co. v. Merchants' Bank, (1848) 6 How. 344, 12 U. S. (L. ed.) 465, was decided by the Supreme Court. In that case the owners of a steamboat, which was burnt on Long Island Sound, were held liable for about $18,000 in coin which had been shipped under the steamer and lost. In consequence of the unreasoned produced among shipowners by this decision and for the purpose of putting American shipping upon an equality with that of other maritime nations, Congress, in 1851, enacted what is known as the Limited Liability Act, which was incorporated into the Revised Statutes, sections 4282 to 4290. The Main v. Williams, (1894) 152 U. S. 122, 14 S. Ct. 486, 38 U. S. (L. ed.) 381.

Constitutionality.—The Act of March 3, 1851, ch. 43, from the first section of which this section derives, was not only a maritime regulation in its character but was clearly within the scope of the power given to Congress "to regulate commerce." Providence, etc., Steamship Co. v. Hill Mfg. Co., (1883) 109 U. S. 578, 3 S. Ct. 379, 167, 27 U. S. (L. ed.) 1058.

Purpose of statute.—It is evident from the provisions in pari materia with this, that the legislative intent was to relieve the carrier from a liability which had theretofore entered into the contract for carriage of goods. This object is recognized in Moore v. American Transp. Co., (1861) 24 How. 1, 16 U. S. (L. ed.) 674, and the opinion states: "The decision in the case of The Lexington, which was burned upon Long Island Sound led to this Act of 1851," referring to New Jersey Steam Nav. Co. v. Merchants' Bank, (1848) 6 How. 344, 12 U. S. (L. ed.) 465, where the carrier was subject to liability for a loss of goods by fire in transit under the rule at common law. By that rule the carrier became absolutely responsible for the safety of the goods entrusted to him for transportation, excepting only for acts of God or the King's enemies. The liability as an insurer which was thus imposed by the common law, had proved onerous and discouraging when applied to cases of loss by accidental fire, and relief had been extended in England by statute; this similar enactment followed here. Both the circumstances and the context show that this provision was intended only to affect the contract for carriage, so that this insurance against loss by fire should no longer be implied as a part of that contract. The Roanoke, (C. C. A. 7th Cir. 1893) 59 Fed. 161, 18 U. S. App. 407, 8 C. C. A. 67.

Construction of statute.—This statute is a remedial statute. It was enacted to remedy the rigor of the common law, which it was deemed unwise, on grounds of public policy, to continue. It should, therefore, be construed, if not literally, at least fairly, to carry out the policy which it was enacted to promote. Chamberlain v. Western Transp. Co., (1871) 44 N. Y. 305, 4 Am. Rep. 681, reversing (1866) 45 Barb. (N. Y.) 218. See also Providence, etc., Steamship Co. v. Hill Mfg. Co., (1883) 109 U. S. 578, 3 S. Ct. 379, 167, 27 U. S. (L. ed.) 1058, favoring a liberal construction in behalf of the ship owners.

But in The Main v. Williams, (1894) 152 U. S. 122, 14 S. Ct. 486, 38 U. S. (L. ed.) 381, the court observed: "The English courts have held, very properly we think, that these statutes [limited liability statutes] should be strictly construed."
Effect of statute.—The statute affords a complete defense when there is no proof to support an accusation against the owners of any Intentional act or negligence which could have been the cause of the fire and consequent injury to the vessel and her cargo. The Rapid Transit, (D. C. Wash. 1892) 52 Fed. 320.

The shipowners cannot be held liable, as for neglect, when it appears that the vessel was built by responsible shipbuilders and passed the scrutiny of Lloyd's surveyors, and that in the particular complained of, which was alleged to have caused the fire, from the testimony of skilled persons it complied with all the known demands of skill and safety. The Strathdon, (E. D. N. Y. 1888) 89 Fed. 374.

Any vessel.—As to what vessels are within the statute, see infra, R. S. sec. 4289, p. 367.

Liability under R. S. sec. 4283.—Cases of loss by fire fall within R. S. sec. 4283, infra, p. 336, as well as this section. There is no inconsistency or repugnancy in allowing a partial exemption in cases falling within R. S. sec. 4283; that is, cases of loss by fire happening without the privity or knowledge of the owners. They may not be, under this section, to show that it happened without any neglect on their part, or what a jury may hold to be neglect, while they may be very confident of showing, under R. S. sec. 4283, that it happened without their privity or knowledge.

The conditions of proof, in order to avoid a total or a partial liability under the respective sections, are very different. Providence, etc., Steamship Co. v. Hill Mfg. Co., (1883) 109 U. S. 578, 3 S. Ct. 379, 617, 27 U. S. (L. ed.) 1038.

"Design or neglect."—The word "design" contemplates a causative act or omission, done or suffered wilfully or knowingly by the shipowner. It involves an intention to cause the fire or to suffer it to be caused by another. The word "neglect" has an opposite meaning, and involves the absence of willful injury and is an unintended breach of duty, resulting in injury to the property or person of another. The Strathdon, (E. D. N. Y. 1898) 89 Fed. 374.

Design or neglect of part owner as affecting liability of co-owners.—A circumstance that the master owned an eighth interest in the vessel can have no effect to enlarge the liability of his co-owners. If a master be sued in his character of master, he will be held responsible notwithstanding that he is one of the part owners; but if he be sued as a part owner, with the other part owners, the circumstance that the loss was occasioned by his fault and with his privity will not take away from the other part owners the protection which the statute intended to give them. Keene v. The Bark Wm., (1878) 2 Savy. 348, 14 Fed. Cas. No. 7,645.


Fire originating upon dock.—A fire originating upon the dock could not be said to have happened to the ship within the meaning of this section even though the fire extended to and did some damage to the vessel. Constable v. National Steamship Co., (1894) 154 U. S. 51, 14 S. Ct. 1062, 33 U. S. (L. ed.) 903.

A fire which originated upon the dock and extended to the steamer so far as to do some damage to her hull and rigging before she was towed away, is not such a fire as is contemplated by the statute. The loss of the goods must be "by reason or by means of" a fire that happens "to the ship" or "on board" of her. The Egypt, (S. D. N. Y. 1885) 25 Fed. 320. See Richardson v. Goddard, (1859) 23 How. 28, 16 U. S. (L. ed.) 418; Salmon Falls Mfg. Co. v. The Tangier, (1857) 10 C. & L. Ware 111, 23 Me. 10; Coope v. Perlick, (1853) 122 U. S. 12, 267; Salmon Falls Mfg. Co. v. The Tangier, (1857) 21 Law Rep. 6, 6 Am. L. Reg. 504, 21 Fed. Cas. No. 12,205; Scott v. Baltimore, etc., Steam Boat Co., (C. C. Md. 1884) 19 Fed. 56.

In Dill v. Bertram, (1857) 7 Fed. Cas. No. 3,910, it was held that freight delivered on the wharf and taken charge of by the vessel's officers is to be regarded as laden on board the ship, and if destroyed by a fire originating on land, and the loss of it was occasioned by the negligence of the officers of the ship in not taking it sooner on board, such loss and damage must be regarded as happening to the goods "shipped, taken in, or put on board the ship," and the owners are therefore exempt from responsibility.

Fire originating upon wharf-boat.—This statute limits its operation to a fire happening to or on board the vessel and does not extend to a fire happening on board of a wharf boat while lying alongside the shore, into which cargo has been unloaded. The City of Clarksville, (D. C. Ind. 1889) 94 Fed. 201.

Nor does the statute have reference to a loss by fire after the merchandise is unloaded and placed in the warehouses of third parties. Black v. Ashley, (1890) 80 Mich. 90, 44 N. W. 1120.

Fire result of collision.—This section can have no application in a case where fire is but an incident of a collision. Losses by collision are provided for in a subsequent section. The Steamer City of Norwich, (1889) 3 Ben. (U. S.) 575, affirmed
Fire during deviation.—The owner of a vessel which has deviated from her voyage by his order is not relieved from liability for loss of cargo by fire during such deviation by R. S. sec. 4282, which exempts him from liability "by the design or neglect of such owner." The Indrapura, (D. C. Ore. 1909) 171 Fed. 929.

Fire during transfer to connecting carrier.—The owner of a vessel in which goods are shipped to be transferred to a connecting steamship line is not liable where the goods are destroyed by fire while being transferred to the ship of the connecting carrier by lighters, if the loss is not caused by design or neglect. (1914) D'Uttas v. Mallory Steamship Co., 162 App. Div. 410, 147 N. Y. S. 313.

Fire as proximate cause.—Where a steamer, with a cargo consisting principally of lime, suffered damage by fire in a city harbor, and was, by the fire department of the city, beached and scuttled for the purpose of extinguishing the flames and the sinking of the vessel, which was the only method by which a total loss of the vessel could be prevented, caused a total destruction of the lime, it was held that the shipowner was exempt from liability under this section. The Rapid Transit, (D. C. Wash. 1892) 52 Fed. 329. See also The Stratdon, (E. D. N. Y. 1898) 89 Fed. 374.

Merchandise.—Horses, trucks, and harness, in charge of drivers, who were teamsters, and came aboard a ferryboat as passengers on their way home at noon, without any goods or other load, were held not to be merchandise within the meaning of the statute, and the liability of the ferryboat for the loss, by fire, of such horses, trucks, harness, etc., is not a liability as for merchandise, but a wholly different and much more restricted liability, namely, that of passengers and their baggage. The Garden City (S. D. N. Y. 1895) 26 Fed. 706.

Passenger’s baggage is not included in the word merchandise. The Marine City, (E. D. Mich. 1881) 6 Fed. 413. Umphors Chamberlain v. Western Transp. Co., (1870) 44 N. Y. 305, 4 Am. Rep. 681, wherein the term, "any goods or merchandise whatsoever" used in the Act of March 3, 1861, were held to include baggage.


General average.—This statute does not exempt the vessel from general-average contribution. The Roanoke, (C. C. A. 7th Cir. 1893) 89 Fed. 161, 18 U. S. App. 407, 8 C. C. A. 67; The Win. J. Quillian, (S. D. N. Y. 1909) 168 Fed. 407; The Wm. J. Quillian, (S. D. N. Y. 1910) 175 Fed. 207, reversed on other grounds, (C. C. A. 2d Cir. 1910) 180 Fed. 651, 103 C. C. A. 647. See also The Rapid Transit, (D. C. Wash. 1892) 52 Fed. 320. See Rall v. Troop, (1895) 157 U. S. 386, 15 S. Ct. 657, 39 U. S. (L. ed.) 742, as to the right of general average when the vessel was scuttled by direction of municipal authorities, without the order or concurrence of the master or commanding officer of the vessel.

An action against the owners of a vessel for having improperly and negligently delivered the cargo without exacting contribution, is not within the provisions of this section. Heye v. North German Lloyd, (S. D. N. Y. 1867) 33 Fed. 90.

Contract to insure cargo.—A contract between carrier and shipper that the carrier should insure the cargo, operates to restore the carrier’s common-law liability for loss by fire, abrogated by this section. Southern Cotton Oil Co. v. Merchants’, etc., Transp. Co., (S. D. N. Y. 1910) 179 Fed. 133.

Burden of proof.—After the loss has been shown to have arisen by fire, the burden is on those asserting that the fire was caused by the shipowners’ design or neglect to prove it. The Stratdon, (E. D. N. Y. 1898) 89 Fed. 374.

After judgment in state court.—If a libel for loss of cargo by fire be filed in a state court and judgment rendered therein, the judgment must be treated in a federal court with due deference, governed by the comity between courts. The limitation of liability in the federal court on the judgment will then be governed by R. S. sec. 4283, and not by this section. In re Old Dominion Steamship Co., (E. D. N. C. 1902) 115 Fed. 845.

Waiver of statutory exemption.—The immunity from liability is statutory, but the carrier may waive the same and extend its liability. D’Uttas v. Mallory Steamship Co., (1914) 162 App. Div. 410. 147 N. Y. S. 313.

Sec. 4283. [Liability of owner not to exceed his interest.] The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall
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in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending. [R. S.]

Act of March 3, 1851, ch. 43, 9 Stat. L. 635.
See R. S. sec. 4289, infra, p. 367.
Further provisions relating to the individual liability of shipowners were made by the Act of June 26, 1894, ch. 121, § 18, infra, p. 368.

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I. CONSTITUTIONALITY

There is no doubt that Congress had power to pass this statute. It is only a maritime regulation in its character, but it is clearly within the scope of the power given to Congress "to regulate commerce." Providence, etc., Steamship Co. v. Hill Mfg. Co., (1883) 100 U. S. 578, 3 S. Ct. 379, 617, 27 U. S. (L. ed.) 1038. See also In re Morrison, (1893) 147 U. S. 14, 15 S. Ct. 346, 37 U. S. (L. ed.) 60; King v. American Transp. Co., (1859) 1 Flipp. 1, 14 Fed. Cas. No. 7,878; The Garden City, (S. D. N. Y. 1886) 26 Fed. 766. Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same state. As limited by R. S. sec. 4289, infra, p. 367, this section is constitutional. Lord v. Goodall, etc., Steamship Co., (1880) 102 U. S. 541, 26 U. S. (L. ed.) 324.

A state constitutional provision against any limitation of the amount to be recovered for injuries resulting in death cannot be set up against a right given by this section. The control by Congress of the maritime law of the country is paramount, and when it has been exercised in a particular way all state authority must conform to it. Loughlin v. McCauley, (1889) 186 Pa. St. 517, 40 Atl. 1020, 65 A. S. R. 876, 48 L. R. A. 33.

II. PURPOSE AND EFFECT OF STATUTE

In Moore v. American Transp. Co., (1861) 24 How. 1, 16 U. S. (L. ed.) 674, the court thus stated the purpose of the limitation of liability which the statute grants: "The act was designed to promote the building of ships and to encourage persons engaged in the business of navigation and to place that of this country on a footing with England and on the continent of Europe."

The purpose of this section was the public benefit which was to be derived from the upbuilding of the shipping interests, to induce capitalists to invest money in this branch of industry, and to establish a uniform rule of liability, which should not overwhelm merchants if a tremendous catastrophe should happen, as is always likely to occur at sea. In re P. Sanford Ross (E. D. N. Y. 1912) 196 Fed. 921; U. S. v. Hamburg-Amerikanische Pachersforehft Actien Gesellschaft, (C. C. A. 2d Cir. 1914) 212 Fed. 40, 128 C. C. A. 496.

The manifest and adjudged effect of the Act has been to afford a shipowner, in those cases where the blame is not brought too nearly home to him, the opportunity of escaping further liability by giving up his ship, as if at the end of the voyage, with freight earned, or the value of what his interest therein would be at the end of the voyage, or a bond therefor. The Act is one for the owner's advantage and he must bring himself within its spirit to escape further responsibility. The Defender, (W. D. Wash. 1914) 214 Fed. 316, wherein the court said: "The right to take advantage of the statute for limitation of liability to the vessel and her freight pending does not..."
depend upon whether the value exceeds or falls below the claims made or ultimately established, although the excess over such value would ordinarily be the actuating motive for invoking the statute. The object of the law was to afford certainty for uncertainty, and to establish a limitation beyond which a shipowner could not be pursued by certain creditors. It is neither intended that he should give less, nor his creditors take less, than the value of his interest at the end of the voyage. If there be subsequent liens, though they may be inferior to such as libellant's, and it ultimately prevail against them, it is not intended that it should sustain the burden of litigation to determine this, or that the ship's owner should have the advantage of the act and escape further liability by the surrender of a thing worth less to him than the vessel at the end of the voyage, which would be the result if there were subsequent liens thereon, or the vessel lessened in value to him for other reasons."

III. CONSTRUCTION

In The Main v. Williams, (1894) 152 U. S. 122, 14 S. Ct. 486, 38 U. S. (L. ed.) 391, it was held that a strict construction should be given to the limited liability statutes, the court observing: "The English courts have held, very properly we think, that these statutes [limited liability statutes] should be strictly construed." But in the earlier case of Providence, etc., Steamship Co. v. Hill Mfg. Co., (1885) 109 U. S. 578, 3 S. Ct. 379, 617, 27 U. S. (L. ed.) 1038, a liberal construction of the limited liability law was favored, the court saying: "If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations will be of the last importance: but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment." See to the same effect, Chamberlain v. Western Transp. Co., (1871) 44 N. Y. 305, 4 Am. Rep. 681, reversing (1866) 45 Barb. 218.

IV. SCOPE OF STATUTE

1. Territorially

"If a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was and if not shown, we would apply our own law to the case. But if a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would prima facie determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practiced therein, would probably furnish the rule of decision." The Scotland, (1881) 105 U. S. 24, 26 U. S. (L. ed.) 1001.

The statute applies as well when adverse to as when for the benefit of foreign ships or foreign owners. In re Leonard, (S. D. N. Y.) 14 Fed. 3d.

This statute is not merely a local and municipal regulation applicable only to American vessels, but is a modification of the common law of a general and universal character. Levinson v. Oceanic Steam Nav. Co., (1876) 17 Alb. L. J. 283, 15 Fed. Cas. No. 8290.

The statute has no extraterritorial effect and cannot be resorted to for the purpose of limiting the liability of a foreigner for a collision occurring upon the high seas and beyond the territorial limits of the United States. Churchill v. The British America, (1878) 9 Ben. 516, 5 Fed. Cas. No. 2,715.

2. Extent of Liability


3. Owners Affected

In general.—All owners of vessels are not entitled to the privileges of the limitation of liability, but only such as fall within the description named in the Act, to wit, those who had no privity or knowledge of the act to which affirmative steps are to secure it. The Maria and Elizabeth, (D. C. N. J. 1882) 11 Fed. 520.
LIMITATION OF VESSEL OWNERS' LIABILITY

Carriers by land and water.—The statute does not except from its operation owners of vessels who are common carriers partly by land and partly by water, nor those whose vessels are not registered. Wallace v. Providence, etc., Steam-Ship Co., (C. C. Mass. 1882) 14 Fed. 56. Mobile Steamboat Owners v. Brownell, (1875) Holmes 467, 23 Fed. Cas. No. 13,695. But under a more liberal construction of the statute, it has been held that a steam engine and hoist of a fuel scow is a part of the vessel. The Buffalo, (C. C. A. 2d Cir. 1907) 154 Fed. 815, 85 C. C. A. 531.

A scow, upon which a piledriver is placed, and which is moved about from place to place by a tug, is included within the term vessel. In re P. Sanford Ross, (E. D. N. Y. 1912) 106 Fed. 321, reversed (C. C. A. 2d Cir. 1913) 204 Fed. 248, 132 C. C. A. 516, on the question of privity or knowledge without determining whether under all the circumstances the piledriver came within the limited liability statutes.

A motorboat is within the provisions of the statute where the evidence established that the vessel was properly manned and equipped at the time of the accident which occurred without the owner's privity or knowledge. The Alola, (E. D. Va. 1915) 228 Fed. 1006.

Dismantled vessel.—In the C. H. Northam, (D. C. Mass. 1909) 181 Fed. 983, it appeared that the owners of the vessel had started to dismantle her and had removed her masts and engines, though part of her machinery remained on board the hull, with a derrick and dummy engine belonging to her owner, which were being used in the dismantling process. It was held that as she was still capable of floating, of carrying a cargo, and of being towed from place to place, she was a vessel within the meaning of the statute.

A floating boathouse used merely as a storage room and as a part of a dock, rising and falling with the tide, was held not to be a vessel, even though the floating part was similar in construction to that of a scow. Woodruff v. One Covered Scow, (E. D. N. Y. 1887) 30 Fed. 269.
Ferry.—In The Southside, (S. D. N. Y. 1907) 155 Fed. 384, the benefit of the statute was allowed to a ferry company operating between two places in the same state.

Other boats of same owner.—The fact that other boats belonging to the same owner as the boat in fault are in the immediate vicinity when the injury occurs does not make them liable, or require the owner to surrender them under the limited liability statute, where no negligence is alleged against them. The Sunbeam, (C. C. A. 2d Cir. 1912) 195 Fed. 488, 115 C. C. A. 370.

Foreign vessel.—In The Titanic v. Mellor, (1914) 233 U. S. 718, 34 S. Ct. 754, 58 U. S. (L. ed.) 1171, the court had under consideration questions certified to it by the Circuit Court of Appeals, the facts of the case being as follows: The Titanic, a British steamship, which had sailed from Southampton, England, on her maiden voyage for New York, collided on the high seas, on April 14, and sank the next morning, with the loss of many lives and total loss of vessel, cargo, personal effects, mails and everything connected with the ship except certain life boats. The owner, alleging that the loss was occasioned and incurred without its privity or knowledge, filed a petition for limitation of its liability under the laws of the United States, R. S. secs. 4283, 4294, 4295, and Admiralty Rules 54 and 58. 210 U. S. 562, 564. Before it did so a number of actions to recover for loss of life and personal injuries resulting from the disaster had been brought against the petitioners in federal and state courts. The persons who sustained loss were of many different nationalities, including citizens of the United States. Mellor, a British subject, excepted to the petition, on the ground that "the acts by reason of which and for which [the petitioner] claims limitation of liability took place on board a British registered vessel on the high seas" and therefore the law of the United States would not apply. Anderson, a citizen of the United States, excepted on the ground that the law of the United States could not and that of England was not shown to apply. The District Court dismissed the petition as to these two, (S. D. N. Y. 1913) 209 Fed. 501. The petitioner appealed, and the Circuit Court of Appeals certified the following questions: "A. Whether in the case of a disaster upon the high seas, where (1) only a single vessel of British nationality is concerned and there are claimants of many different nationalities; and where (2) there is nothing before the court to show what, if any, is the law of the foreign country to which the vessel belongs, touching the owner’s liability for such disaster,—such owner can maintain a proceeding under §§ 4283, 4294 and 4285 U. S. Rev. Stat. and the 54th and 56th Rules in Admiralty? B. Whether, in such a case it appears that the law of the foreign country to which the vessel belongs, and the provision for the limitation of the vessel owner’s liability, upon terms and conditions different from those prescribed in the statutes of this country, the owner of such foreign vessel can maintain a proceeding in the courts of the United States, under said statutes and rules? In the event of the answer to question B being in the affirmative, C. Will the courts of the United States in such proceeding enforce the law of the United States or of the foreign country in respect to the amount of such owner’s liability?" The first two questions were answered "yes," and the last, "'The law of the United States." The court in part said: "The general proposition that a foreign ship may resort to the courts of the United States for a limitation of liability under R. S. sec. 4293 is established. The Scotland, (National Steam Nav. Co. v. Dyer) [1882] 105 U. S. 24, 26 U. S. (L. ed.) 1001; La Bourgogne, (Deilongs v. La Compagnie Generale Transatlantique) [1908] 210 U. S. 95, 52 U. S. (L. ed.) 973, 28 S. Ct. 684. These were cases respectively of collisions between American and English and English and French vessels. See also The Chattahoochee, [1899] 173 U. S. 540, 43 U. S. (L. ed.) 801, 19 S. Ct. 491. The Germanic, (Oceanic Steam Nav. Co. v. Atkin) [1908] 186 U. S. 589, 589, 49 U. S. (L. ed.) 610, 614, 25 S. Ct. 317. But it is argued that there is an exception in a case like this, where only a single foreign ship is concerned. The argument is supported by a quotation from Mr. Justice Bradley in The Scotland, to the effect that if a collision occurred on the high seas between two vessels belonging to the same nation, the court would determine the controversy by the law of their flag. For, it is said, if the foreign law would govern in that case, it must govern in this, and therefore, at least, in the absence of allegations bringing the case within the foreign law, the petition must be dismissed. If, in the observation referred to, Mr. Justice Bradley had been speaking of proceedings of this class, it would be important as sanctioning the view that the United States courts offered a forum concursus for the administration of other systems as well as of our own; but we apprehend that he was speaking of an ordinary collision case, and merely indicating that, in such a case, the principle usually governing foreign torts would apply. That principle may be accepted equally governing here, but it does not carry us far. It is true that the act of Congress does not control or profess to control the conduct of a British ship on the high seas. See American Banana Co. v. United Fruit Co. [1900] 213 U. S. 547, 565 U. S. (L. ed.) 1226, 29 S. Ct. 511, 16 Ann. Cas. 1047. It is true that
the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation, even though it be contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. Cuba R. Co. v. Crosby, [1912] 222 U. S. 473, 478, 480, 56 U. S. (L. ed.) 274-276, 38 L. R. A. (N. S.) 40, 32 S. Ct. 132; Dicey, Conf. L. 2d ed. 947. It is competent, therefore, to Congress to enact that, in certain matters belonging to admiralty jurisdiction, parties resorting to our courts shall recover only to such extent or in such way as it may mark out. Butler v. Boston, etc., Steamship Co., [1889] 130 U. S. 557, [9 S. Ct. 615, 32 U. S. (L. ed.) 1017]. The question is whether the owner of the Titanic by this proceeding can require all claimants to come in and can cut down rights vested under English law, as against, for instance, Englishmen living in England who do appear. It is only when we are dealing with a suit in this country are limited in their recovery irrespective of the English law. That they are so limited results in our opinion from the decisions of this court."

Inland navigation.—By R. S. sec. 4289, if applicable, the provisions of the statute are made applicable to all vessels used on lakes, rivers, or in inland navigation, including canal boats, barges and lighters. The Columbia, (C. C. A. 9th Cir. 1886) 73 Fed. 226, 44 U. S. App. 326, 19 C. C. A. 436. See also In re The Annie Faxon, (D. C. Wash. 1895) 66 Fed. 575; In re P. Sandford Ross, (E. D. N. Y. 1912) 196 Fed. 921.

5. Losses Covered

Three classes of damage.—This section limits the shipowner's liability in three classes of damage or wrong happening without their privity and by the fault or neglect of the master or other person on board, namely: 1. Damage to goods on board; 2. damage by collision to other vessels and their cargoes; 3. any other damage or forfeiture done or incurred. Norwex, etc., Transp. Co. v. Wright, (1871) 13 Wall. 154. 20 U. S. (L. ed.) 585.

Cases of personal injury and death.—This section applies to cases of personal injury and death, as well as to cases of loss or injury to property. In re Meyer, (N. D. Cal. 1896) 74 Fed. 881; The Southside, (S. D. N. Y. 1907) 153 Fed. 304; Monongahela River Consol. Coal., etc., Co. v. Hurst, (C. C. A. 9th Cir. 1915) 200 Fed. 711, 118 C. C. A. 127; The Rochester, (W. D. N. Y. 1916) 250 Fed. 519; State v. Daggett, (1915) 87 Wash. 253, 158 Pac. 645, L. R. A. 1916A 446. See also Matter of The Steam Propeller Epsilon, (1873) 6 Ben. 378, 8 Fed. Cas. No. 4,506; Butler v. Boston, etc., Steamship Co., (1889) 130 U. S. 557, 9 S. Ct. 612, in which case the deceased was a passenger, and Craig e. Continental Ins. Co., (1891) 141 U. S. 638, 12 S. Ct. 97, in which case the deceased was one of the crew.

This section extends to claims for personal injury or death, or for loss of property, or for loss of life of passengers, whether arising under the general law of admiralty or under the federal or state statutes. The City of Columbus, (D. C. Mass. 1884) 22 Fed. 400. See also The Longfellow, (C. C. A. 9th Cir. 1900) 104 Fed. 360, 45 C. C. A. 370.

Passenger falling on gangplank.—Conflicting evidence considered, and held insufficient to sustain the burden resting upon a passenger to prove, in a proceeding for limitation of liability, that the injury for which she claimed damages, and which resulted from her falling while passing over the gangplank of petitioner's barge, was due to the wet and unfit condition of that gangplank. In re Starin, (E. D. N. Y. 1906) 151 Fed. 274.

Loss by fire.—Cases of loss by fire fall within this section as well as R. S. sec. 4282, supra, p. 334. There is no inconsistency or repugnancy in allowing a partial exemption in cases falling within this section; that is, cases of loss by fire happening without the privity or knowledge of the owners. They may not be able, under section 4282, to show that it happened without any neglect on their part, or what a jury may hold to be neglect, whilst they may be very confident of showing, under this section, that it happened without their privity or knowledge. The conditions of proof, in order to avoid a total or a partial liability under the respective sections, are very different. Providence, etc., Steamship Co. v. Hill Mfg. Co., (1883) 100 U. S. 578, 3 S. Ct. 379, 617, 27 U. S. (L. ed.) 1028.

Collision.—Loss arising from a collision is included in this statute, and the loss of a vessel and her cargo arising from a collision is on an equality with the lien for the loss of the cargo of the other vessel for the same cause. Norwich, etc., Transp. Co. v. Wright, (1871) 13 Wall. 154. 20 U. S. (L. ed.) 586.

In case of collision the cargo owners, not being in fault, are entitled to be first paid in full. All the vessels and their owners were held ultimately jointly and severally liable in solido for this claim, subject only to the statutory limitation of liability as respects each vessel so far as applicable. The Doris Eckhoff, (S. D. N. Y. 1890) 41 Fed. 156.

Mutual fault.—In the case of collision where two parties are in fault, the charge in such a case is joint, and it is correct to divide the damage; but the injured party, if without fault, is entitled to full compensation; and it follows that if either of the guilty parties is unable to pay the whole of the moneys it is in general the right of the injured party to collect the

Where both vessels were in fault and the damages are divided, the rule is that as each vessel is liable for one-half of the damage done to both, if one suffered more than the other the difference should be equally divided and the one which suffered least should be decreed to pay one-half of such difference to the one which suffered most, so as to equalize the burden. In other words, as both parties were in fault, the damage done to both vessels should be added together in one sum and equally divided, and a decree should be pronounced in favor of the owners of the vessels which suffered most against those of the vessel which suffered least for one-half of the difference between the amounts of their respective losses. The Manitoba, (1887) 122 U. S. 97, 7 S. Ct. 165, 30 U. S. (L. ed.) 1095. See also Duncan v. The C. H. Foster, (C. C. Mass. 1880) 1 Fed. 733; The North Star, (1882) 106 U. S. 17, 1 S. Ct. 41, 27 U. S. (L. ed.) 91; The Bristol, (S. D. N. Y. 1857) 29 Fed. 867, when the cargo in one vessel is owned by the owner of the vessel.

"If the doctrine of The North Star, (1882) 106 U. S. 17 [1 S. Ct. 41, 27 U. S. (L. ed.) 91], be a sound one, that in cases of mutual fault the owner of the vessel which has been totally lost by collision is not entitled to the benefit of an act limiting his liability to the other vessel until after the balance of damage has been struck, it would seem to follow that the sunken vessel is not entitled to the benefit of any statute tending to lessen its liability to the other vessel, or to an increase of the burden of such other vessel, until the amount of such liability has been fixed upon the principle of an equal division of damages." The Chattahoochee, (1899) 173 U. S. 540, 19 S. Ct. 491, 43 U. S. (L. ed.) 897.

Both vessels having same ownership.—Where, after collision, the corporation owning both boats filed a petition to limit its liability with reference to the boat lost only, and did not offer to surrender the colliding boat, an interlocutory decree that the owner of the boat lost was entitled to limit its liability to the appraised value of such boat with its freight pending was no bar to libellant's subsequent action against the owner for damages for the death of a passenger in such collision, in which it was held that both boats were at fault, though libellant had appeared and presented a claim for such damages in the limitation proceeding. Hall r. North Pac. Coast R. Co., (N. D. Cal. 1904) 124 Fed. 309.

The purpose of proceedings for limitation of liability for a collision is to exempt the petitioner from all personal liability on account of the collision, on whatever ground it may rest; and where the petition is for the limitation of liability as owner of a vessel sunk, but it is found on the hearing, on appropriate allegations in the answer, that petitioner was also owner of the other vessel concerned, and both were in fault for the collision, it is a condition precedent to the granting of the relief sought that both vessels and their pending freight be surrendered. The San Rafael, (C. C. A. 9th Cir. 1905) 141 Fed. 270, 72 C. C. A. 388, reversing (N. D. Cal. 1904) 134 Fed. 749, certiorari denied (1906) 200 U. S. 619. 28 S. Ct. 765, 50 U. S. (L. ed.) 623.

Claim for salvage.—By the Act of June 26, 1884, ch. 121, infra p. 388, the right to limit liability is extended to nonmaritime torts. Richardson v. Harmon, (1911) 222 U. S. 96, 32 S. Ct. 27, 56 U. S. (L. ed.) 110. Under this amendment claims for salvage are included in the indemnity against which the vessel's owner may limit his liability. The San Pedro, (1912) 223 U. S. 365, 32 S. Ct. 275, 56 U. S. (L. ed.) 473, Ann. Cas. 1913D 1221, wherein the court said: "But it is contended that a salvage claim such as the one here involved is not a claim for damages or injury by collision within the meaning of § 4283, Revised Statutes, and therefore not one to which the limited liability act applies; that the damages there referred to are damages by collision to other vessels and their cargo, and that the expense of being towed to port is a claim like one for repairs. It is also said that even if the vessel owners may be able to include what they must pay for such a service in the damages recoverable from the guilty vessel, it is notwithstanding not a damage arising from collision within the meaning of that section. But we need not consider whether the claim is one against the owner of the character described either in § 4283 or the succeeding, § 4284. Those sections have been amended by the sixteenth section of the Act of June 26, 1884 (23 Stat. 55, c. 121), (infra, p. 368) so as to include 'any and all debts and liabilities of the owner incurred on account of the ship without his privity or fault.' Richardson r. Harmon, (1911) 222 U. S. 96 [32 S. Ct. 27, 56 U. S. (L. ed.) 110]. The service was rendered to the sea, benefiting alike owner and creditors. The claim is, therefore, of a highly meritorious character. But the question of preference in payment out of the fund is one to be determined in the limited liability case. We, therefore, express no opinion as to whether such a claim may be preferred or must share pro rata with others."
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Sums paid salvors for services rendered in rescuing a vessel, and also contributions, if any, in respect of a vessel jettisoned, may be allowed. The salvage expenses are to be apportioned upon the vessel, freight, and cargo in proportion to their respective values, and the shares belonging to the vessel and freight are to be deducted from the proceeds in the registry. The general average contribution apportioned upon the vessel and freight for cargo jettisoned is to be deducted in full. The Abbie C. Stubbs, (D. C. Mass. 1886) 28 Fed. 719.

A barge sank while in tow of a tug, and it was found that under the contract of towage the tug was liable for the damages. The owners of the tug raised the barge and brought her into port. They libeled the barge for salvage. The salvage services were rendered by the owners of the tug before application for limiting their liability. It was held that salvage compensation could not be deducted from the sums awarded against the owners of the tug. The Pine Forest, (C. C. A. 1st Cir. 1904) 129 Fed. 700, 64 C. C. A. 228, 1 L. R. A. (N. S.) 873.

The wages of the master and seamen after the collision and the expense of the tug in towng the vessel to port are not salvage services, but the ordinary expenses of the voyage incurred in earning the freight, and no deduction can be allowed therefor. The Abbie C. Stubbs, (D. C. Mass. 1886) 28 Fed. 719.

Liens for supplies, repairs, etc.—Upon proceedings for limitation of liability for damages resulting from collision there cannot be deducted from the amount to be distributed among libelants and claimants, according to law, a sum equal to the full amount of all debts due for supplies, repairs, etc., for which liens against the vessel could be enforced. The real value of the vessel in fault, without regard to liens upon her at the termination of her voyage upon which she negligently caused the injury complained of, measures equitably and justly the value of the interest of the owner therein as contemplated by the limited liability Act. The Leonard Richards, (D. C. N. J. 1890) 41 Fed. 818.

Parties suffering loss have a right to priority of payment out of the fund without any deduction for the amount of bottomry, mortgage, pilothage, towage, seamen's wages, or other contracts of the master or owners. Barnes v. Steamship Co. (1368) 6 Phila. (Pa.) 479, 23 Leg. Int. (Pa.) 190, 2 Fed. Cas. No. 1,023.

Personal or agency contract.—The owners are individually liable for the contracts of the managing agent made in the home port in the ordinary repair of the vessel, the repairs being known and approved by some of the owners. Such repairs are treated as the personal debts of the owner and cannot be discharged by a surrender of the vessel. Gookey v. Fort, (S. D. N. Y. 1890) 44 Fed. 364.

A proceeding in admiralty under this section and the rules of the Supreme Court is substantially a proceeding in rem for the distribution of a fund, and does not determine the question of the owners' liability except to those whose claims are limited by the Act, or possibly others who voluntarily become parties to the cause. It cannot affect the rights of those who have not submitted themselves to the jurisdiction and whose claims are not limited to the amount to be distributed, but rest upon the owners' personal liability at common law as a wrongdoer. The proceedings and decree in a District Court of the United States do not bar a suit brought by such persons in the state court. Hill Mfg. Co. v. Providence, etc., Steamship Co. (1787) 125 Mass. 292.


The purpose of the statute was to limit the liability of the owner as to any damage his vessel should do without his privy or knowledge, whether the person or thing damaged was upon the water or the land, and so covers the case of a collision with the abutment of a bridge, or Vessel Owners' Towing Co., (N. D. Ill. 1886) 26 Fed. 160. See also In re Vessel Owners' Towing Co., (N. D. Ill. 1884) 26 Fed. 172.

Unauthorized sale of cargo.—An unauthorized sale of cargo by the master upon condemnation of his vessel as unserviceable is within the statute. The Giles Loring, (D. C. Me. 1890) 48 Fed. 463.

"A claim for prepaid freight is not a claim based upon the loss or destruction of the goods." Matter of Liverpool, etc., Steam Co., (S. D. N. Y. 1880) 3 Fed. 165.

Damages provable on loss by stranding.—Damages provable against a fund representing the vessel, for injury to cargo caused by stranding, will include the loss of perishable cargo made worthless by delay and thrown overboard, as well as the partial damage to that brought into port, and also the costs and charges pending the salvage of the cargo; that is to say, its proper proportion of the aggregate costs.
and charges up to the time of its arrival in port as well as any further damage, if any, by reason of any difference in market prices from the delay in arrival. The City of Para, (S. D. N. Y. 1891) 44 Fed. 689.

Baggage belonging to one who had purchased a ticket, which was on the wharf boat to which the steamboat was moored, was held to have been "shipped" within the meaning of this section. In re Louisville, etc., Packet Co., (S. D. Ohio 1899) 95 Fed. 996. See also The Longfellow, (C. C. A. 6th Cir. 1900) 104 Fed. 360, 45 C. C. A. 379.

Losses occurring on distinct voyages.—The casualties or losses of different voyages cannot be aggregated or grouped together, and all of the losses be credited in to share what has been saved from shipwreck or other disaster. The voyage or trip, each separate journey which the ship makes from one port to another, must be treated as a separate venture involving its own particular hazards, losses, and earnings. When each such voyage is ended, it is for the owner to decide whether the losses have been such as to make it expedient for him to invoke the protection given by this Act of Congress. If he does not decide to do this, but sends his ship upon a new voyage, he thereby concedes his personal liability for the damages incurred upon the past voyage. The Alpena, (N. D. Ill. 1881) 8 Fed. 280.

V. PRIVITY OR KNOWLEDGE OF OWNER

1. In General

"Privity" or "knowledge" defined.—In Lord v. Goodsell, etc., Steamship Co., (1877) 4 Sawyer, 292, 15 Fed. Cas. No. 8,508, it was held: "The word 'privity' of the owner, used in section 4283 of the Revised Statutes, means some fault or neglect in which the owner of the vessel personally participates; and 'knowledge' as used, means some personal cognizance; or means of knowledge, of which he is bound to have, of a contemplated loss, or of a condition of things likely to produce or contribute to a loss, without adopting appropriate means to prevent it. The owner is bound to exercise the utmost care in the selection of a competent master and crew, and in providing a vessel in all respects seaworthy; and if by reason of any neglect or fault in these particulars, a loss occurs, the owner is in privity within the meaning of the statute."

Privity of owner.—It is not necessary that an owner of a vessel, in order to be entitled to limit his liability under the statutes, must, before sending his vessel on her way, acquaint himself with the science of navigation, or acquire expert knowledge concerning his vessel, its equipment, its machinery, or the necessary crew therefor, or must place between himself and the master an intermediary who shall possess such knowledge. Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., (C. C. A. 9th Cir. 1912) 197 Fed. 703, 117 C. C. A. 97.

Owner's neglect.—A loss is not occasioned without the knowledge or privity of the shipowner when it arises from his personal neglect to inform himself of the defective condition of the vessel, the vessel being under his personal supervision. The Republic, (C. C. A. 2d Cir. 1894) 61 Fed. 100, 20 U. S. App. 561, 9 C. C. A. 386. See In re Sinclair, (1880) 8 Am. L. Reg. 206, 22 Fed. Cas. No. 12,885.

Deviation by order of owner.—The owner of a vessel whose cargo was injured by fire while the vessel was in dry dock by the owner's order under circumstances constituting a deviation cannot claim exemption from liability on the ground that the loss was without his "privity or knowledge." The Indrapura, (D. C. Ore. 1909) 171 Fed. 929.

Mere negligence.—Mere negligence, of itself, does not necessarily establish the existence of the part of the owner of a vessel of "privity or knowledge," so as to preclude the shippers from limiting their liability. La Bourgonne, (1908) 210 U. S. 95, 28 S. Ct. 664, 62 U. S. (L. ed.) 973.


An owner who, after a general inspection, purchases a vessel from a shipbuilder of recognized standing and reputation, who equips her with machinery, means, and appliances which are suitable and sufficient, if properly used, may limit his liability for injuries to a stevedore, occasioned by the negligent use of such appliances by his employees. The Harry Hudson Smith, (C. C. A. 2d Cir. 1905) 142 Fed. 724, 74 C. C. A. 56, affining (E. D.) N. Y. 1905) 136 Fed. 271.

Negligence of agent.—A shipowner, who has provided a suitable person as his agent to inspect or provide for the proper equipment of the vessel, is not deprived of the benefit of the statute limiting liability by proof of negligence of such agent in failing to provide such equipment or to maintain it in good condition of which the owner had no knowledge or notice. The Tommy, (C. C. A. 2d Cir. 1907) 131 Fed. 570, C. C. A. 50; The Alola, (E. D. Va. 1916) 228 Fed. 1008.
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Negligence of superintendent.— Where the superintendent of the owner of a floating derrick or hoist failed to exercise a proper degree of care in directing the manner in which work was to be performed and in inspecting the equipment and appliances for doing such work, it was held that liability for the injury of an employee arose with the knowledge and privity of the owner. The Teddy, (W. D. N. Y. 1915) 226 Fed. 498.

Privity of master who is part owner.— If the alleged privity or personal fault of the master and a part owner in the negligence which caused a collision be determined against him, that will not prevent the proceeding going on for the benefit of the other innocent owner. In re Leonard, (S. D. N. Y. 1892) 14 Fed. 53. See The Maria and Elizabeth, (D. C. N. J. 1892) 12 Fed. 627.

In a collision case it appeared that the master of the vessel was part owner, and on the night of the collision was on board and was taking his full share in the navigation of the vessel. He had served out his watch at midnight, when the mate and two others of the crew took charge, and had gone to his berth and was asleep at about one o'clock in the morning when the collision occurred. The wind was light, the night fair, and there was nothing in the situation that called for any special diligence. It was held that under these circumstances, as such part owner, the master had no privity or knowledge of the collision within the meaning of the statute. The Maria and Elizabeth, (D. C. N. J. 1892) 12 Fed. 627.

Inevitable accident.— A steamer owned by petitioners was placed by them on the beach, where she had been for several weeks, and had been partially broken up and her machinery removed, when during a storm and high tide at night she floated, broke free from her moorings, and drifted across the bay. She did not float at ordinary high tide, and lay in a hollow, with a bank between her and the sea. She was made fast by five hawsers, three of which parted, and the others slipped from their fastenings. A watchman was on board. The storm and height of the tide were extraordinary, and exceeded any that had been known for several years, and many other vessels dragged their anchors or broke from their moorings. The direction of the wind at high water was such as to force the vessel off shore, but in most storms occurring at that time of year the wind blows on shore. The court held (1) that there was no absence of reasonable care or skill on the part of petitioners, which would charge them with privity or knowledge, such as to prevent them from limiting their liability; and (2) that the breaking away of the steamer was due to an inevitable accident or via major, and she could not be held liable for injuries to other vessels into which she may have drifted. The C. H. Northam, (D. C. Mass. 1900) 181 Fed. 986.

Hearing and determination of question.— In a proceeding by the owner of a vessel for limitation of liability on account of a collision, where an answer is filed by the owner of the other vessel setting up a claim for damages, the question of the knowledge or privity of the petitioner, though jurisdictional, and the question of liability for the collision, where both are put in issue by the pleadings and are to be determined largely upon the same evidence, may properly be heard at the same time as a matter of convenience, and the court is not required to hear and dispose of the jurisdictional question separately. In re Eastern Dredging Co., (D. C. Mass. 1906) 159 Fed. 541.

2. Corporation


Privity and knowledge are chargeable upon a corporation when brought home to its principal officers and to the superintendent, who is its representative. The privity or knowledge referred to in the statute is not that which rises out of the mere relation of principal and agent by legal construction. The knowledge or privity that excludes the operation of the statute must therefore be in a measure actual, and not merely constructive; that is, actual through the owner's knowledge, or authorization, or immediate control of the wrongful acts or omissions, or through some kind of personal participation in them. The Colima, (S. D. N. Y. 1897) 82 Fed. 655.

One to whose management the company's entire fleet of boats in remote waters, as well as all of its other property in that region, is intrusted, should be regarded as the company's representative, and his dispatch of any of the company's boats to a neighboring point as being at least within his ostensible authority. His knowledge must therefore be regarded as his company's knowledge and his acts as the acts of the company, and for gross negligence the company will be held responsible. Parsons v. Empire Transp. Co., (C. C. A. 9th Cir. 1901) 111 Fed. 202, 49 C. C. A. 302.

Imputation of privity or knowledge.— There can be no imputation to a corporation of privity or knowledge of defects in the boilers of a vessel unless the defects were apparent and of such a character as to be detected by the inspection of
an unskilled person. It is sufficient if the corporation employ, in good faith, a competent person to make such inspection; when it has employed such a person in good faith, and has delegated to him that branch of its duty, its liability beyond the value of the vessel and freight ceases so far as concerns injuries from defects of which it has no knowledge, and which are not apparent to the ordinary observer, but which require for their detection the skill of an expert. The Annie Faxon. (C. C. A. 9th Cir. 1896) 75 Fed. 312, 44 U. S. App. 591, 21 C. C. A. 366.

Knowledge of president.—The privity or knowledge of a president of a corporation is chargeable to the corporation, and for loss of life resulting from an attempt to transport passengers in an overcrowded boat, in the presence of the president, the liability of the company cannot be limited. Weisshaar v. Kimball Steamship Co., (C. C. A. 9th Cir. 1904) 128 Fed. 307, 310, 55 L. R. A. 373, 65 L. R. A. 87.

The privity or knowledge of a corporation is established when it appears that the president, by his omission of proper care in his examination of the vessel, failed to discover her defective condition. The Republic, (C. C. A. 2d Cir. 1894) 61 Fed. 100, 20 U. S. App. 561, 9 C. C. A. 386.

Where a judgment was rendered in a state court against a corporation for the death of a person killed on a derrick scow owned by the defendant, by the breaking of a part of the derrick, the court finding that the part was obviously defective on inspection, but that no inspection or repair was made, that the derrick was being used at the time in the raising of a sunken vessel under the personal direction of the defendant’s president, who was on board, and that the defendant was chargeable with negligence causing or contributing to the death, the corporation cannot maintain a petition for limitation of liability against such judgment, on the ground that the deceased was occasioned without its privity or knowledge, through the fault or negligence of the master of the scow. The Capt. Jack, (D. C. Conn. 1909) 169 Fed. 453.

Negligence of watchman in permitting vessel to go adrift.—Where the precautions taken by the petitioner to secure and care for the vessel were sufficient, and it appeared that none of its managing officers had knowledge of her going adrift or of the negligence of the watchman, it was not chargeable with privity or knowledge which precluded it from limiting its liability. In re Eastern Dredging Co., (D. C. Mass. 1906) 159 Fed. 541.

Excessive speed in fog.—A steamship company, which establishes rules and regulations requiring the masters of its vessels to maintain only the moderate speed required by the international rules in case of fog, and has not knowingly tolerated or encouraged the violation of such rules or neglected their enforcement, and which has exercised due care in securing officers of experience and ability, is not deprived of the right to a limitation of liability for damages caused by a collision for which its vessel was in fault by reason of maintaining excessive speed in a fog, on the ground that the collision occurred with its privity or knowledge. La Bourgogne, (C. C. A. 2d Cir. 1907) 130 Fed. 433, 71 C. C. A. 480, affirmed (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

3. Competency of Master and Crew

Privity of owner.—Incompetency of master.—Incompetency of the master, such as will charge the owners of the vessel with privity and knowledge because they employed him, is not shown by proof that he was not possessed of the knowledge which might have enabled him to avoid the particular danger which caused the injury, where it was shown that he had had thirty years’ experience at sea, and was in full use of all his faculties, with nothing to his discredit in his record. The Murrell, (D. C. Mass. 1911) 200 Fed. 826.

Duty of owner.—It is the duty of the owner to provide the vessel with a competent master and a competent crew, and to see that the ship when she sails is in all respects seaworthy. He is bound to exercise the utmost care in these particulars; such care as the most prudent and careful men exercise in their own matters under similar circumstances. And if by reason of any fault or neglect in these particulars, a loss occurs, it is with his privity and within the meaning of the Act. If some secret defects exist which could not be discovered by the exercise of such due care, the owner is exonerated by the exercise of all proper care in making his ship seaworthy. Matter of Wright, (1878) 10 Rem. 14, 111 N. Y. 1008.

Chinese sailors.—It is the duty of the owners of a vessel to provide a crew not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen and which calls for instant action to save the lives of passengers and crew. A ship is insufficiently manned when the sailors can only receive orders through a boatswain. In re Pacific Mail Steamship Co., (C. C. A. 9th Cir. 1904) 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71.

Fault in navigation.—Where it appears that the boat was seaworthy, in view of the voyage she was to make, and the loss was due to faulty navigation, liability of the owners is limited under this section. The Longfellow, (C. C. A. 6th Cir. 1900) 104 Fed. 720, 68 C. C. A. 379.

The owners are entitled to limitation of their liability when the negligence in the
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management of the vessel and the ordinary or proper caution and care in navigation were the proximate and efficient causes of its stranding. The City of Para. (S. D. N. Y. 1889) 44 Fed. 683.

For injury resulting from the imprudence of the master of the tow, the owner is entitled to limitation of liability. The Bordentown. (S. D. N. Y. 1889) 40 Fed. 682.

Failure to keep lookout.—When watchmen, whose duty it was to serve as lookouts, were supplied by the owners, but the master chose to assign to the lookouts a duty which took them from their stations or divided their attention, the owner is not to be deprived of the benefit of the statute for such misconduct of the master. The George W. Roby. (C. C. A. 6th Cir. 1901) 111 Fed. 601, 49 C. C. A. 481.

Bad loading and bad management.—If the accident is to be ascribed to bad loading and bad management combined, and there was no unseaworthiness or faults in the ship herself, or in her equipment, both of the causes of the disaster fall within the peculiar duties of the master as such; and considering that neither of them was within the knowledge or in actual privity or actual personal superintendence of the petitioner, or its managing agent, but belonged to the master of the ship in that capacity only, and in the exercise and manner of his official functions as master, the case is within the intent as well as the language of this section. The Colima. (S. D. N. Y. 1897) 82 Fed. 665.

4. Unseaworthiness of Vessel

In general.—The question of the unseaworthiness of a vessel on account of her equipment is largely determined by custom and usage. Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., (C. C. A. 9th Cir. 1912) 197 Fed. 703, 117 C. C. A. 97.

"It is well settled that the owner of a vessel is not entitled to limit his liability arising from the unseaworthiness of a vessel. If the libellant was ignorant of the condition of the vessel, it was because of a negligent examination, as in The Republic, (C. C. A. 2d Cir. 1894) 61 Fed. 109, [20 U. S. App. 561, 9 C. C. A. 386]." Braker v. F. W. Jarvis Co., (S. D. N. Y. 1908) 166 Fed. 987.

Proper equipment in general.—"The right of a shipowner to limit his liability is dependent upon his want of complicity in the acts causing the disaster, and the burden of proof rests upon him to show affirmatively that he has properly equipped and equipped the vessel for the contemplated service." McGill v. Michigan Steamship Co., (C. C. A. 9th Cir. 1906) 144 Fed. 789, 75 C. C. A. 518, revering (N. D. Cal. 1904) 132 Fed. 577; certio


The owner of a barge is not entitled to a limitation of liability for the death of an employee engaged in discharging a cargo of rails, which resulted from the fact that the vessel lacked the necessary equipment for handling the rails, and the master borrowed and used a set of tongs which were worn and unfit for use, although warned of their defective condition; it not appearing that such owner had delegated power to any competent person to provide the vessel with proper equipment to render her seaworthy for the service in which she was engaged. Thc Tommy. (S. D. N. Y. 1905) 142 Fed. 1034, affirmed (C. C. A. 2d Cir. 1907) 161 Fed. 570, 81 C. C. A. 50.

Failure of owner's agent to ascertain condition.—A contention on the part of the respondent company that its liability should be limited to the value of the boats, not sustained because the responsible agent of the company neglected to avail himself of an opportunity to ascertain the condition of the boats. Sanbern v. Wright, etc., (C. C. A. 9th Cir. 1909) 171 Fed. 449, affirmed (C. C. A. 2d Cir. 1910) 179 Fed. 1021, 102 C. C. A. 666.

Failure to comply with inspection law.—The failure to comply with the inspection law may be invoked to prove that the owner is not entitled to the benefit of limitation of liability. The Annie Faxon, (C. C. A. 9th Cir. 1896) 75 Fed. 312, 44 U. S. App. 591, 21 C. C. A. 366; Braker v. F. W. Jarvis Co., (S. D. N. Y. 1908) 106 Fed. 987.

But if local inspectors, who are public officers, fail to perform their duty and make an insufficient examination of the vessel, the fault does not rest upon the petitioners, nor is there imputation to them of knowledge of such defective inspection, they having delegated the whole matter of the inspection of their vessel to a competent company. The Annie Faxon, (C. C. A. 9th Cir. 1896) 75 Fed. 312, 44 U. S. App. 591, 21 C. C. A. 366.

Master a habitual drunkard.—To establish the unseaworthiness of a vessel for the reason that her master was a drunkard, it is necessary to prove that the master was a habitual drunkard within the knowledge, or the means of knowledge, of the owner. The Anna, (D. C. S. C. 1891) 47 Fed. 520.

Deviating compass.—Where there are several correct compasses, but one compass for any cause deviates, and a competent master, by the exercise of ordinary care and skill, can discover the deviation and correct the deviating compass by comparison with the others, and be thus enabled to steer the proper course, the ship in this respect is seaworthy. Matter of Wright. (1878) 10 Ben. 14, 30 Fed. Cas. No. 18,086.
Life preservers.—While a sailing vessel ought to carry a sufficient number of life preservers, and the captain should make requisition for them, although there is no statutory requirement, where the owners depend upon the captain to see that the equipment of the vessel for the voyage is complete in every particular, they are exempt from personal liability in this regard. The Jane Grey, (D. C. Wash. 1900) 99 Fed. 582.

Failure to have survey made.—A barge leased by libellant corporation to one of the respondents to be used in coaling a vessel in port, while being unloaded alongside the vessel capsized, and the cargo was lost and one person drowned. The immediate cause of the capsizing was the unusual quantity of water in the hold, which had come in during the latter part of the time she was being loaded. The evidence tended to show that she was loaded and was being unloaded in the usual and proper manner. She was an old vessel, had been two extensively overhauled and repaired, the last time some five years before. The superintendent and the manager of the libellant had both been through the hold only a few days previously, but without lights; and it did not appear that they made more than a casual examination, nor had she been surveyed by any one having skill; and there was evidence that some of her interior timbers were broken. It was held that the sinking was attributable to her unseaworthiness, which was not without the privity of libellant, and that it was not entitled to a limitation of liability. Oregon Round Lumber Co. v. Portland, etc., Steamship Co., (D. C. Ore. 1906) 162 Fed. 912. See also Braker v. F. W. Jarvis Co., (S. D. N. Y. 1908) 166 Fed. 987.

Loss of vessel at sea by striking submerged obstruction.—Evidence considered, and held to entitle the owner of the Danish steamship Norge to a limitation of liability on account of her loss at sea while on a voyage from Copenhagen to New York, through striking a derelict or unknown obstruction under the surface of the water to the southward of Rockall Rock, by which she was so injured that she sank in twenty minutes, and a number of persons lost their lives; it being shown that she was seaworthy and properly manned and equipped, that she was on an approved route with a lookout properly stationed, and that there was no fault or negligence in her management. Claims made by representatives of persons who lost their lives by the disaster also dismissed. The Norge, (S. D. N. Y. 1907) 156 Fed. 845.

VI. MEASURE OF LIABILITY

1. Value of Vessel

The value of the ship at the time of the ending of the voyage must be taken as the measure of the owners' liability. In case of a collision resulting in the sinking of the vessel the proper valuation is that which she had when she had sunk; that was the termination of the voyage. The City of Norwich, (1886) 115 U. S. 468, 30 L. ed. 1150; The Envoy, (1883) 113 U. S. (L. ed.) 134; The H. F. Dimock, (S. D. N. Y. 1910) 186 Fed. 662. See also The Benefactor, (1880) 103 U. S. 239, 26 U. S. (L. ed.) 354; The Alpena, (N. D. Ill. 1881) 8 Fed. 250; The Rose Culkin, (S. D. N. Y. 1892) 52 Fed. 322; Im re Meyer, (N. D. Cal. 1896) 74 Fed. 881; Im re La Bourgogne, (S. D. N. Y. 1902) 117 Fed 261.

When the vessel was not sunk or wrecked by means of the collision, but afterwards, by the carelessness of her master or crew, the voyage was not terminated until the vessel was sunk or stranded. The Great Western, (1886) 119 U. S. 529, 6 S. Ct. 1172, 30 U. S. (L. ed.) 156.

When a vessel sunk in a creek not far from the landing in shoal water, was raised and the cargo delivered at the landing, the appraisement must be made as she was at the landing, with a deduction of the expense incurred in raising. The Anna, (D. C. S. C. 1891) 47 Fed. 525.

Determination of value of vessel.—In determining the value of a vessel in proceedings to limit the owner's liability for the damage caused by a collision, a fair estimate of the expense and cost of taking her to that port, together with a reasonable sum on account of the risk and the hazard to which she might be subject, affecting her then value, and on account of such hazard as the conditions existing at that time would make it reasonable to suppose might attend the work of salvaging her, may be deducted from the value of the vessel when brought into port, although the amount so deducted exceeds the amount allowed for salvage. Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., (C. C. A. 9th Cir. 1912) 197 Fed. 703; 139 C. C. A. 228; 1 L. R. A. (N. S.) 873; The H. F. Dimock, (S. D. N. Y. 1910) 186 Fed. 662.

There is authority, however, to the effect that salvage and general average are not to be treated as diminishing the value of the vessel at the end of her voyage. The Pine Forest, (C. C. A. 1st Cir. 1904) 129 Fed. 790, 64 C. C. A. 228; 1 L. R. A. (N. S.) 873; The H. F. Dimock, (S. D. N. Y. 1910) 186 Fed. 662.

No deduction can be allowed for the wages of the master and seamen after the collision and the expense of a tug in towing the vessel to port. The Abbie C. Stubbs, (D. C. Mass. 1889) 29 Fed. 720.

Additional value which the owners have put upon the vessel by repairing her constitutes no part of her at the time the damage was sustained. Matter of Wright, (1879) 10 Ben. 14, 30 Fed. Cas. No. 18,666.
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In a proceeding for limitation of liability arising out of an accident which occurred more than two years before the proceeding, in appraising the value of the vessel, the court, in deducting from her present value on account of additions made since the accident, should also be made at their present value, and not at their cost. The Captain Jack, (D. C. Conn. 1903) 162 Fed. 508.

A libellant’s recovery cannot exceed the value of the vessel. The valuation of the vessel, whether by consent or otherwise, for the purpose of bond or stipulation to discharge it from the custody of the marshal, is not the test or real value in the case of collision. Wells v. The Ann Caroline, (1861) 29 Fed. Cas. No. 17,389B.

**Damasges for collision awarded to owner.**

— In case of a collision an owner who retains the sum of the damages which have been awarded him for the loss of his ship and the damages allowable for the amount or value of his interest in the ship, and therefore, to the extent of the damages paid on account of the collision, is liable to the creditors of the ship. O’Brien v. Miller, (1897) 106 U. S. 287, 18 S. Ct. 140, 42 U. S. (L. ed.) 469.

**Insurance money received by owners.**


**Hoisting apparatus as part of vessel.**

A traveling steam hoist or derrick, mounted on a fuel scow specially designed to be towed, although removable, it had been removed but once in fourteen years, is a part of the vessel, within the meaning of the limitation of liability statute. The Buffalo, (C. C. A. 2d Cir. 1907) 154 Fed. 815, 33 C. C. A. 531, affirming (W. D. N. Y. 1906) 148 Fed. 331.

**Tug and scow used together.**

Where a contractor for raising a sunken vessel employed in the work an outfit consisting, of a scow on which was mounted a derrick, and a tug to supply motive power, in order to maintain a petition for limitation of liability for the killing of a person by the breaking of a part of the derrick during the work the contractor was required to surrender the entire outfit, including the tug. The Captain Jack, (D. C. Conn. 1909) 169 Fed. 455.

**Dismantled ship.**

Where a vessel, at the time of the commission of injuries for which her owner is liable, had been so far dismantled as to have no market value as a vessel, for the purpose of fixing the amount of the stipulation to be given by petitioners, the net value of the materials in her after she is broken up may properly be taken; but in such computation the value of a dummy engine placed on board for use in removing the machinery, and which was no part of her equipment, should be excluded. The C. H. Northam, (D. C. Mass. 1909) 181 Fed. 985.

**Time of surrender.**

An owner may not keep the boat and elect to retain her for his own benefit, rather than to turn her over to the court for sale, and after some time, if a claim arises, yield up a boat greatly deteriorated in value or even partially destroyed, in place of what was subject to the claims at the time those claims arose. The Passaic, (E. D. N. Y. 1911) 190 Fed. 644.

A surrender upon a petition to limit liability, at a date long after the liability was incurred only allows the amount of the boat has not depreciated beyond ordinary wear and tear. In other words, if the owner surrenders the boat, or desires to substitute a bond for the ship at the time when the liability was incurred. The owner of the boat has no right to limit his responsibility by surrendering the property, and at the same time use up that property to his own profit. The T. W. Wellington, (E. D. N. Y. 1916) 235 Fed. 728. See The Capt. Jack, (D. C. Conn. 1909) 169 Fed. 455 wherein it was held that a petition to limit liability will be dismissed if the entire vessel is not surrendered.

2. Freight Pending

This section requires not only the surrender of the ship, but also of the freight pending. Sumner v. Caswell, (S. D. N. Y. 1884) 20 Fed. 249.

**Definition of term “freight pending.”**

By the terms “freight pending” as used in this section and “freight for the voyage,” as used in the succeeding R. S. sec. 4254, is meant the earnings of the voyage, whether for the carriage of passengers or merchandise, and where passage or freight money is prepaid under contracts by which it becomes the absolute property of the shipowner whether the voyage is completed or not, it must be regarded as earned, although the vessel is lost, and must be surrendered by the owner to entitle him to a limitation of liability under the statute for claims growing out of such loss. La Bourgogne, (C. C. A. 2d Cir. 1905) 139 Fed. 433, 71 C. C. A. 489, affirmed (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L ed.) 973.

**Inclusiveness of term “freight pending.”**

— Unless the freight and passengers they are pending in the sense that they are earned as a result of the maritime advan-
ture, they do not fall within the terms of the statute. In re La Bourgogne, (S. D. N. Y. 1902) 117 Fed. 281.

The words "freight pending" include freight earned at the end of the voyage for cargo on board at the time of collision. If the ship is sunk or destroyed and no freight earned, the owners' whole responsibility is at an end. The Abbie C. Stubs, (D. C. Mass. 1886) 28 Fed. 719.

"Pending" freight is limited to that due to or to be earned by the particular vessel through whose fault the loss occurred, and the fact that goods when lost or injured were being transported under through bills of lading on different vessels of the same owner does not require a surrender of the freight earned by a different vessel in the course of such shipment. Ralli v. New York, etc., Steamship Co., (C. C. A. 2d Cir. 1907) 154 Fed. 286, 83 C. C. A. 290.

But where goods were loaded on one boat and she sank at the pier, damaging a larger part of her cargo, the fact that the undamaged cargo was then transferred by her owner to another vessel and that the first boat did not deliver any part of it, did not relieve the owner in proceedings for limitation of his liability from the necessity of surrendering as "pending freight," the freight which she would have earned if she had carried the cargo. Ralli v. New York, etc., Steamship Co., (C. C. A. 2d Cir. 1907) 154 Fed. 286, 83 C. C. A. 290.

Identie ownership of vessel and cargo.—When the same persons own the vessel and the cargo, the earnings of the vessel in transporting the goods will be deemed freight within the meaning of the statute, and the amount will be what would have been a fair compensation for transporting the same goods had they belonged to other persons. Allen v. Mackay, (1854) 1 Sprague 219, 1 Fed. Cas. No. 228.

Freight prepaid at the port of departure is included in the term "freight then pending." The Main v. Williams, (1894) 153 U. S. 122, 14 S. Ct. 486, 38 U. S. (L. ed.) 381.

Passage money is included in the term "freight then pending." The Main v. Williams, (1894) 152 U. S. 122, 14 S. Ct. 486, 38 U. S. (L. ed.) 381. See also In re Meyer. (N. D. Cal. 1896) 74 Fed. 881; The Jane Grey, (D. C. Wash. 1890) 90 Fed. 382.

Decommerce due and unpaid must be treated as pending freight. The Giles Loring, (1890) 48 Fed. 473.

Salvage.—The words "freight pending" do not include salvage, for that is paid as a reward to the vessel, its officers and crew, for their efforts to save life and property, and is personal to the salvors irrespective of any relation they bear to others. In re Meyer. (N. D. Cal. 1896) 74 Fed. 881.

Earnings of fishing vessel.—The season's cruising of a fishing vessel is to be accounted as a single voyage, and the earnings during the whole season's fishing are, equally with the vessel, liable for its contract on the vessel's account. Whitcomb v. Emerson, (D. C. Mass. 1892) 50 Fed. 128.

Earnings in wrecking service.—Where, at the time of an injury which gave rise to proceedings for limitation of liability, the vessel surrendered was employed in raising a sunken vessel under a contract by which the petitioner received a stated sum for the service, such sum may properly be considered as "freight pending" within the meaning of the statute, which must also be surrendered, and no deduction can be made therefrom on account of other vessels or appliances also used in the service, but which the petitioner did not surrender. The Captain Jack, (D. C. Conn. 1908) 162 Fed. 808.

Subsidies.—When the owners of the ship were entitled to a subsidy from a foreign government if they made a certain number of trips a year, with certain deductions and bonuses for lesser or greater speed than the average called for, it was held that no part of the subsidy need be turned into the court as "freight pending." La Bourgogne, (1908) 210 U. S. 95, 28 S. Ct. 684, 52 U. S. (L. ed.) 973, affirming (C. C. A. 2d Cir. 1905) 139 Fed. 453, 71 C. C. A. 489.


VII. EFFECT OF PROCEEDINGS ON OTHER ACTIONS


Enjoining actions on claims.—"A court of admiralty, in which is pending a pro-
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ceeding for the limitation of the liability of a shipowner, may enjoin the prosecution of suits in state courts against the shipowners. In re Whitehall, [N. D. Cal. 1890] 17 Fed. 371, 372, and cases cited; The Tolchester, [D. C. Md. 1890] 42 Fed. 180, 185. And in proceedings of this character, which have been designated as 'equity proceedings in admiralty,' to prevent a multiplicity of suits, it has frequently been decided that the powers of an admiralty court are as extensive, and its remedies are as effective, as are those of a court of chancery when its jurisdiction is invoked in an equitable proceeding, and that all persons having claims, whether in rem or in personam, against a ship or its owners, can have their rights determined therein. This principle was clearly recognized by this court in In re Pacific Mail Steamship Co., [C. C. A. 9th Cir. 1904] 130 Fed. 76 [64 C. C. A. 410, 69 L. R. A. 71]; In re Meyer [N. D. Cal. 1896] 74 Fed. 897; The Annie Faxon, [C. C. A. 9th Cir. 1896] 76 Fed. 318, 320; [44 U. S. App. 591] 21 C. C. A. 366; Dowdell v. U. S. Dist. Ct., [C. C. A. 9th Cir. 1905] 139 Fed. 444, 71 C. C. A. 288.

Whether an injunction may be granted under any circumstances by the United States Supreme Court to stay proceedings in the state courts during the pendency of an appeal in a suit brought by the owners of a vessel to obtain the benefit of the limitation of liability, such relief should not be granted when the United States Circuit Court and the District Court have decided that the vessel did not come within the purview of the statute. The Mamie, (1884) 110 U. S. 742, 4 S. Ct. 104, 28 U. S. (L. ed.) 313. See also The Benefactor, (1880) 103 U. S. 239, 28 U. S. (L. ed.) 351. And see cases under side-heading Injunction in notes to R. S. sec. 4225, infra, p. 384.

The provisions of the Acts of Congress limiting liability apply to death claims when brought in the state court, and such suits in the state court may be enjoined and the litigation and the adjustment of all such claims transferred to the courts of admiralty. "Since, therefore, under the provisions of the Acts of Congress, the recovery of damages for death in maritime cases may be wholly withdrawn from the state courts by order of the admiralty courts after the actions are begun in the state courts, or may be prosecuted in the first instance in a court of admiralty for a pro rata distribution, citing all claimants to appear, it is evident that a court of admiralty must have jurisdiction over the whole subject, and may award the damages given by the state statute upon a simple libel, as the greater includes the lesser." The City of Norwalk, (S. D. N. Y. 1893) 55 Fed. 98, affirmed (C. C. A. 2d Cir. 1894) 61 Fed. 384, 20 U. S. App. 570, 9 C. C. A. 521. See The St. Nicholas, [S. D. Ga. 1891] 49 Fed. 671.

Materialmen having claims against the vessel cannot be enjoined from bringing their actions for recoveries under the Limited Liability Act does not, in terms or by implication, include such claims; and as to them the owner's liability is not by force of the statute in any degree limited. The Leonard Richards, [D. C. N. J. 1890] 41 Fed. 822.

Effect of restraining order.—A court of admiralty in which proceedings are instituted by a vessel owner for limitation of liability has exclusive jurisdiction to settle in such proceedings all claims arising out of the matters on which they are based, and an order made therein restraining all persons having claims from prosecuting suits thereon elsewhere is a bar to a subsequent suit on a claim in another court, although brought by an administrator who had not at that time been appointed. Seece v. Monongahela River Consol. Coal, etc., Co., [W. D. Pa. 1907] 153 Fed. 507.

Effect on existing judgments.—Proceedings to limit a vessel owner's liability do not affect the status of a decree already entered in a collision suit. Such a decree is a final adjudication, both as to liability and the amount of damages. But if the defendant's liability is limited only a portion of the judgment may be paid. Monongahela River Consol. Coal, etc., Co. v. Hurst, [C. C. A. 6th Cir. 1912] 200 Fed. 711, 119 C. C. A. 127.

VIII. PROCEDURE

1. Jurisdiction

a. In General


When the jurisdiction of the District Court in Admiralty has been invoked for the purpose of limiting the liability of the petitioner and adjusting such claims it is proper for the court to obtain by its own process, or upon its own order, the possession of the vessel which should have been surrendered in the first instance

Before the abolition of the Circuit Court it was held that a proceeding in a District Court for limitation of liability, could not be kept open until the same could be tried in the Circuit Court, and the question of negligence of the owner passed upon by a jury. In re Old Dominion Steamship Co., (E. D. N. C. 1902) 115 Fed. 849.

Of claims against vessel.—A court of admiralty in which proceedings are instituted by a vessel owner for limitation of liability has exclusive jurisdiction to settle in such proceedings all claims arising out of the matters on which they are based, and order the same therein restraining all persons having claims from prosecuting suits thereon elsewhere is a bar to a subsequent suit on a claim in another court, although brought by an administrator who had not at that time been appointed. See In re Monongahela River Coal, etc., Co., (W. D. Pa. 1907) 155 Fed. 507.

District Courts having jurisdiction to enforce the statutory rule of limited liability, have jurisdiction of the enforcement of claims as auxiliary and incident to their jurisdiction of the main subject. In re Goodrich Transp. Co., (E. D. Wis. 1888) 26 Fed. 715.

Reducing claim below appraised value of vessel.—Where a District Court has acquired jurisdiction of a proceeding for limitation of liability for a claim for damages on which the owner has been sued in another district, the claimant cannot defeat such jurisdiction by appearing specially and offering or attempting to reduce the amount of his claim below the appraised value of the vessel and her pending freight. The John K. Gilkinson, (S. D. N. Y. 1907) 150 F. 457, 158 F. 100 (S. D. N. Y. 1907) 158 Fed. 868.

Effect of pleading—settlement of questions of fact.—In White v. Island Transportation Co., (1914) 233 U. S. 346, 34 S. Ct. 589, 58 U. S. (L. ed.) 993, it appeared that the owner of a vessel sued for personal injuries received on a vessel, filed a petition in the District Court to secure the benefit of this statute limiting the liability of vessel owners. One of the questions involved related to the jurisdiction of the court, the objection being raised that the court was without jurisdiction because the pleadings showed that the damage was occasioned by the negligence of the owner. On this question the court said: "The objection that the court was without jurisdiction, because the pleadings showed that the damage was occasioned by the negligence of the owner, evidently resulted from a misapprehension of what was in the pleadings. So far they were from settling where the fault lay that they put the matter directly in issue, the petition alleging that the injury was occasioned without the owner's privity or knowledge and the answer affirming that it was caused by the owner's negligence and not otherwise. If the fact was as alleged in the petition, the case was within the statute. . . . And while the claimant was at liberty, under admiralty rule 56, to contest the owner's right to a limitation of liability, the decision of the question necessarily rested with the court. Its jurisdiction was not ousted merely because the claimant took issue with what was alleged in the petition. Butler v. Boston, etc., Steamship Co., (1889) 130 U. S. 327, 552, 553, (9 S. Ct. 612, 32 U. S. (L. ed.) 1017). The questions of fault were to be settled by a trial, and this was so whether the facts were jurisdictional or otherwise. But there was no trial. Instead of insisting that the allegations of the petition be proved, the claimant expressly waived proof of them, thereby consenting that they be taken as true. As they were pleaded to, the effect that the injury was without the privity or knowledge of the owner, there was no defect in the jurisdiction at that point."

Averment of claim in excess of value of vessel.—It is not necessary to aver or prove that claims against the vessel are in excess of her value as a condition of the jurisdiction of the District Court to entertain a proceeding for limitation of liability. The Garden City, (S. D. N. Y. 1886) 26 Fed. 768.

Recovery of loss within value of vessel.—The fact that loss within the value of the vessel is recovered does not oust the District Court of jurisdiction of the proceeding to limit liability when the claim made was much greater than her value, and there may also be other claims thereafter presented. Briggs v. Day, (S. D. N. Y. 1884) 21 Fed. 727.

b. In Which District

The rules of the Supreme Court require the owner to commence his proceedings for limited liability where the libel has been filed or suit brought against the owners, and provide that if no libel has been filed or suit brought, then he may present his petition to the District Court of the district where the vessel is. If suit has been brought in a District Court other than that of the district where the vessel is, then he must resort to that district; but if different suits are brought in different districts, then he has his election either to go into any district where a libel has been filed or suit brought, or he may go into the district where the vessel then is. Likewise, if suit
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is brought in a state court, he has the right to bring his petition before a District Court of the United States where the vessel is. The Enterprise, (W. D. Pa., 1912) 196 Fed. 404.

Under admiralty rule 57, 9 S. Ct. iii, where the owner of a vessel has been sued on a claim for damages against which he is entitled to a limitation of his liability under the statute, but the vessel has not been libeled, a proceeding for limitation of liability may be brought either in the District Court of the district in which the owner has been sued or in that of the district in which the vessel may be, and an allegation in the petition that the vessel is within the district gives the court jurisdiction. The John K. Gilkinson, (S. D. N. Y. 1907) 150 Fed. 454.

A tug which, in pursuit of her business, was frequently within the Southern District of New York, and was there in a regular way at the time of the filing of a petition for limitation of liability by her owner, was within the district for the purpose of giving the court jurisdiction, under admiralty rule 57, although the domicile of the owner was elsewhere. The John K. Gilkinson, (S. D. N. Y. 1907) 150 Fed. 866.

In the case the vessel be not libeled the proceeding for limitation of liability may be brought in the District Court in any district in which the owner is sued; the presence of the vessel within the jurisdiction of the court is not essential to jurisdiction. Gleason v. Duffy, (C. C. A. 7th Cir. 1902) 116 Fed. 293, 54 C. C. A. 100.

The District Court in which the fund or security is, and where the litigation is instituted for the recovery of claims against the owner, is the proper court in which to present the petition for limitation, if any, of the owner's liability. In re Leonhard, (S. D. N. Y. 1882) 14 Fed. 53.

The District Court within whose territorial limits the stranding of a vessel occurred is the proper court in which to institute a proceeding for the limitation of the vessel owners' liability when no suit has been instituted in any other district. The Steamship John Bramall, (1879) 10 Ben. 495, 13 Fed. Cas. No. 7,334.

c. In Case of Single Claim

A plurality of claims is not essential to support a proceeding for limitation of liability. In White v. Island Transp. Co., (1914) 233 U. S. 346, 34 S. Ct. 589, 58 U. S. (L. ed.) 993, the question arose whether there must be a plurality of claims against an owner of a vessel to entitle him to bring a proceeding under this section to limit his liability. The answer was in the negative, the court saying: "The objection that the court could not entertain the proceeding, because the petition disclosed only one claim arising out of the injury, is grounded upon the terms of §§ 4284 and 4285, which require a pro rata distribution of the value of the vessel and freight when not sufficient to satisfy all claims, authorize proceedings to obtain the benefit of the statute, make the surrender of the vessel and freight for the benefit of claimants a sufficient compliance with the statute on the part of the owner, and declare that upon such surrender all claims and proceedings against the owner shall cease. It must be conceded that these sections, if taken alone, give color to the objection, for, with a single exception, their words apparently contemplate a plurality of claims. But to a right understanding of these sections it is essential that they be read with § 4283. It contains the fundamental provision on which the others turn. It broadly declares that "the liability for the damages . . . shall be no case exceed the value of the vessel and freight. The succeeding sections are in the nature of an appendix and relate to the proceedings by which the first is to be made effective. Therefore, they should be so construed as to bring them into correspondence with it. It was so held in Butler v. Boston, etc., Steamship Co., (1899) 130 U. S. 527, (9 S. Ct. 612, 32 U. S. (L. ed.) 1017), where it became necessary to consider another difference in terms between them and it. . . . In the lower federal courts there has been some contrariety of opinion upon the point now being considered, but the prevailing view has been that due regard for the broad terms and dominant force of § 4283 requires that §§ 4284 and 4285 be construed as authorizing a proceeding for limitation of liability whether there be a plurality of claims or only one. Quinlan v. Prew, (C. C. A. 1st Cir. 1909), 56 Fed. 111, 120, (5 U. S. App. 382, 5 C. C. A. 438); The S. A. McCaulley [E. D. Pa. 1899] 99 Fed. 302, 304; The Hoffmans, (S. D. N. Y. 1909), 171 Fed. 455, 457; Benedict's Admiralty, 4th ed. § 553. In the recent case of Richardson v. Harmon, (1911) 222 U. S. 96, (32 S. Ct. 27, 56 U. S. (L. ed.) 110), where there was but a single claim, it was assumed by both courts and counsel that a plurality of claims was not essential. We think that is the true view of the statute." To the same effect see In re Starin, (E. D. N. Y. 1903) 124 Fed. 101; The Tommy, (S. D. N. Y. 1905) 142 Fed. 1034; The John K. Gilkinson, (S. D. N. Y. 1907) 160 Fed. 454; The Southside, (S. D. N. Y. 1907) 155 Fed. 364; The Hoffmans, (S. D. N. Y. 1909) 171 Fed. 455; The Defender, (E. D. N. Y. 1912) 201 Fed. 189. For cases in the lower federal courts, supporting the opposite contention,

In The Dauntless, (N. D. Cal. 1914) 212 Fed. 255, the court said: "The statute providing for limitation of liability is designed for the protection of the shipowner, and the object of proceedings thereunder is to afford such protection by preventing recoveries in excess of the value of the vessel and freight pending and distributing such value in proper proportions where there are more claimants than one. Where there is but one claimant, however, and his claim is for much less than the amount to which the liability of the shipowner may properly be limited, there is neither danger of recovery above such amount, nor necessity for distribution among a number of claimants."

In Shipowners, etc., Tugboat Co. v. Hammond Lumber Co., (C. C. A. 9th Cir. 1914) 218 Fed. 161, 134 C. C. A. 575, the court held that where there is but a single claim and the value of the vessel largely exceeds the amount of the claim, the proceedings should be dismissed where an action had already been brought in the state court to recover judgment for the claim. The acts of Congress for limitation of liability apply only to cases where liability may be limited and except for that particular purpose it clearly was not the intention of Congress to oust the jurisdiction of other courts.

2. Nature of Proceeding

The proceeding to limit liability is not an action against the vessel and her freight, except when they are surrendered to a trustee, but is an equitable action. In re Morrison, (1893) 147 U. S. 14, 13 S. Ct. 246, 37 U. S. (L. ed.) 60.

3. Mode of Procedure

The proper course of procedure for obtaining the benefit of the statute would seem to be this: "When a libel for damage is filed, either against the ship in rem or the owner in personam, the latter (whether with or without an answer to the merits) should file a proper petition for an apportionment of the damages according to the statute and should pay into the court (if the vessel or its proceeds is not already there), or give due stipulation for such sum as the court may, by proper inquiry, find to be the amount of the limited liability, or else surrender the ship and freight by assigning them to a trustee in the manner pointed out in the fourth section. Having done this, the shipowner will be entitled to a monition against all persons to appear and intervene pro interesse suo, and to an order restraining the prosecution of others suits. If an action should be brought in a state court the shipowner should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact, in bar in the state court or procure an order from the District Court to restrain the further prosecution of the suit. The court having jurisdiction of the case, under and by virtue of the Act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties." Norwich, etc., Transp. Co. v. Ward, 187 Mass. 132, 91 N. E. 202 (L. ed.) 583; The Great Western, (1886) 118 U. S. 520, 6 S. Ct. 1172, 30 U. S. (L. ed.) 156; Monongahela River Consol. Coal, etc., Co. v. Hurst, (C. C. A. 6th Cir. 1912) 200 Fed. 711, 119 C. C. A. 127.

4. Time to Invoke Statute

A vessel owner has the right to take the benefit of the limitation of liability directly in a suit brought for injuries caused by a collision but he is not bound to do so. He has the right to first contest liability for the collision in any court, state or federal, in which action therefor may be brought, including the appellate court of last resort, without raising the question of limitation, and without thereby waiving the right to take the benefit of the statute. Monongahela River Consol. Coal, etc., Co. v. Hurst, (C. C. A. 6th Cir. 1912) 230 Fed. 371, 119 C. C. A. 127.

A vessel may be surrendered under the statute allowing limitation either before or after a verdict has been obtained settling the responsibility for the accident. The Benefactor, (1881) 103 U. S. 230, 26 U. S. (L. ed.) 351; The City of Boston, (11 Mass. 1906) 159 Fed. 277; The P. Sanford Ross, (E. D. N. Y. 1912) 196 Fed. 921.

When the question of liability of a vessel for a collision has been determined, it is res adjudicata and is in no way involved in the application of the owners for the benefit of the limited liability act. The Maria, (D. C. N. J. 1882) 12 Fed. 630.

But the right of the shipowner to invoke the provisions of this statute, is not suspended until suits or libels have been actually instituted against him. The Alpena, (N. D. Ill 1851) 8 Fed. 284. See also The John Bramall, (1879) 10 Ben. 495, 13 Fed. Cas. No. 7,334.

The determination of the question of fault in general liability does not preclude the owners from instituting proceedings for a limited liability. The omission to take the benefit of the law in reference to a particular party does not,
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preclude the owners of the ship from claiming its benefit as against other parties suffering loss by the same collision. In case of the payment of a demand against a vessel before proceedings for limited liability are commenced, the court will refuse its aid in compelling the return of the money received. The Benefactor, (1881) 103 U. S. 239, 26 U. S. (L. ed.) 351.

5. Consolidation of Proceedings

In The City of Boston, (D. C. Mass. 1909,) 182 Fed. 171, a motion to consolidate proceedings to limit the liability of each of two colliding vessels was denied. The court said: "Both these petitions, it is true, grow out of the same collision. The petition in this case is a damage claimant in the other. The total damage from the collision is now to be borne, one-half each, by the owners of the two vessels. Notwithstanding these facts, I am not clear that consolidation of the two cases should be ordered. No precedent for such consolidation of two petitions of this kind is found. I am not convinced that the advantages to be gained would outweigh the possible disadvantages. It seems to me that the rights of the parties can be secured as well by continuing the distinction between the two proceedings, and that no loss of time will necessarily be involved."

6. Parties

Necessary parties.—On appointment of a commissioner to take proofs on a damage claim filed in a proceeding for limitation of liability by the owner of one of two vessels in collision, after an authoritative determination by the Circuit Court of Appeals that both vessels were in fault, the owner of the other vessel, if not a party, should be brought in by notice, being liable to contribution if the claim is established and enforced. The City of Boston, (D. C. Mass. 1909,) 182 Fed. 171.

7. Notice

It is not necessary, in order to sustain a proceeding for limiting liability in case of a collision, that the injured parties should have been personally served with notice within the district in which the original libel was filed, or that the vessel in fault should have been taken and held by the court. In re Morrison, (1893) 147 U. S. 14, 13 S. Ct. 246, 37 U. S. (L. ed.) 60.

Where a monition and publication is made according to the rules and practice in admiralty proceedings, it becomes notice to all persons having any claims, whether they receive actual notice thereof or not, and if they fail to appear within the time designated they are liable to lose the opportunity of presenting their claims in that proceeding or in any other. Dowell v. U. S. District Ct., (C. C. A. 9th Cir. 1905) 139 Fed. 444. 71 C. C. A. 288.

8. Petition

Essentials.—The petition must state the facts and circumstances by reason of which exception from liability is claimed, even though no libel or suit for recovery is pending. The Sacramento, (E. D. Wis. 1904) 131 Fed. 373; In re Davidson Steamship Co., (E. D. Wis. 1904) 132 Fed. 411.

Sufficiency of petition.—On the question of the sufficiency of the allegations in a petition for a limitation of liability, and offering to surrender the vessel to a trustee for the benefit of a libelant and others entitled to share therein, see The Defender, (W. D. Wash. 1914) 214 Fed. 316.

Where a petition in admiralty to limit the liability of a vessel and cargo for collision, as authorized by admiralty rules 54-57, failed to state the facts and circumstances by reason of which exemption from liability was claimed, as required by rule 56, the petition was sufficient to entitle petitioner to contest the question of fault on the part of its vessel. The Sacramento, (E. D. Wis. 1904) 131 Fed. 373.

Pleading limitation of liability.—Upon a petition for limitation of liability the petitioner, while denying all liability for any damage, may nevertheless claim the benefits of the provisions providing for the limitation of the liability of shipowners if the court should find the petitioner or steamer liable. The alternative prayer of the petitioner is proper. In re Piper Aden Goodall Co., (N. D. Cal. 1898) 86 Fed. 670.

A petition for limitation of liability held sufficient to give the court jurisdiction as against a special plea. In re Eastern Dredging Co., (D. C. Mass. 1905) 138 Fed. 942.

9. Answer

Essentials.—The answer must be full, explicit and distinct, and this requirement is not met by a denial alone. If the party answering is uninformed in the premises, he may so state and thus raise the issue without denying; but a denial must be founded on information, and possessing that the pleader must state the facts accordingly upon information and belief. In re Davidson Steamship Co., (E. D. Wis. 1904) 133 Fed. 411; In re Starin, (E. D. N. Y. 1909) 173 Fed. 721; The Pire Marquette 18, (E. D. Wis. 1913) 203 Fed. 127.

Sufficiency of answer.—Affirmative allegations of an answer, which seem to comingle matters going to defeat the right to limit liability with matters upon which a claim for damages may be
founded, are properly subject to exception. For example, allegations that petitioner "breached and violated its duties to" claimant's intestate, which "proximately and directly caused the loss of life" and that "the sinking of the said steamer as aforesaid and the loss of life . . . proceeded directly and proximately from the fault and want of care of the petitioner, . . . and was due directly to causes within the privity and knowledge of petitioner and its said managing officers" all fail to meet that degree of fullness and particularity required not only by the admiralty but by other rules of pleading. They are not allegations of fact, but merely the ultimate conclusion of the pleader, predicated upon facts presumed to be in his possession and of which his adversary can demand disclosure. The Pere Marquette 18, (E. D. Wis. 1913) 203 Fed. 127.

Equally insufficient are allegations that the steamer was "insecure and unsalvageable and unequal to meet the perils of navigation, and was unsafely constructed so that water was likely to fill the hold of the said boat and cause it to sink, . . . and that the officers, agents, and servants carelessly and negligently failed to inspect the same and to repair;" and "that the engines, appliances, machinery and equipment" were so "defective and insufficient that the boat was caused to sink." These are mere general conclusions, apprising the petitioner of no fact showing negligent construction, unsafe condition or a breach of duty on which liability could be predicated. The Pere Marquette 18, (E. D. Wis. 1913) 203 Fed. 127.

In a proceeding by the owner of a vessel for limitation of liability, where the petition alleges generally, without fault on the part of claimant, he must allege and offer evidence to prove the same; and it is not sufficient merely to deny such allegation of the petition, but the answer should specify in what the fault consisted. In re Starin, (E. D. N. Y. 1900) 173 Fed. 721.

Claimants who pleaded as a defense to a petition for limitation of liability the negligence of petitioner, because of the unseaworthiness of the vessel, but failed to comply with an order requiring them to specify the particulars, will not be permitted to give testimony as to such defense under a general denial, to controvert petitioner's prima facie case. The John H. Starin, (E. D. N. Y. 1909) 175 Fed. 327.

Where all parties injured are represented by libelants or interveners, an answer setting up the defense of limited responsibility is fully adequate to give the shipowners all the protection they need. The Scotland, (1881) 105 U. S. 24, 26 U. S. ed. 1031.

Exceptions to answer.—The filing and bringing on for hearing of exceptions to an answer is the recognized and proper way to obtain more definite statements of the elements of any defense or answer. In re Starin, (E. D. N. Y. 1909) 173 Fed. 721.

10. Evidence

Burden of proof.—The petitioner has the burden of proving the absence of its privity or knowledge, as one of the facts and circumstances on which limitations of liability is claimed, and therefore as a jurisdictional fact without sufficient proof of which, whether denied by answer or not, the authority of the court to make the degree sought is not established. Whether it makes sufficient proof of the absence of its privity or knowledge may be a question both of law and of fact. But if the claimants should offer evidence upon it of facts not specifically pleaded and it should appear that the petitioner was taken by surprise and had not a fair opportunity to meet the evidence offered, delay might prove prejudicial in order to afford him such an opportunity, and delay after the trial has once begun would be undesirable from every point of view. The Murrell, (D. C. Mass. 1910) 168 Fed. 727.

The right of the shipowner to limit its liability is dependent upon its want of complicity in the acts causing the disaster and the burden of proof rests upon him to show affirmatively that he has properly officered and equipped the vessel for the contemplated service. McGill r. Michigan Steamship Co., (C. C. A. 9th Cir. 1906) 144 Fed. 788, 75 C. C. A. 518, reversing (N. D. Cal. 1904) 133 Fed. 577, certiorari denied (1906) 203 U. S. 593, 27 S. Ct. 782, 51 U. S. (L. ed.) 332; In re P. Sanford Ross, (C. C. A. 2d Cir. 1913) 204 Fed. 248, 192 C. C. A. 516. See also In re H. H. Starin, (C. C. A. 2d Cir. 1911) 191 Fed. 506, 112 C. C. A. 286.

Effect of proof.—The proof required in support of the petition that any liability incurred was without the privity or knowledge of the petition does not reach the subsequent issue of liability, as it relates only to the personal negligence or conduct of the owners. In re Davidson Steamship Co., (E. D. Wis.) 133 Fed. 411.

Interrogatories annexed to answer.—Interrogatories annexed to an answer in a proceeding for limitation of liability, which are directed solely to the discovery of assets of the petitioner, are immaterial to the issues, and are inadmissible. In re Knickerbocker Steamboat Co., (S. D. N. Y. 1905) 136 Fed. 966.

Compelling answers to interrogatories. —Upon the petition of a steamship company for the purpose of limiting its liability for loss of property and life in the sinking of a steamship, interrogatories addressed to the petitioner were filed and with the answer. It was held that the mere loss of the right of the steamship
company to limitation of liability under this statute, though proof of "privity" with the cause of the damage, would not be of itself such "forfeiture" as to exempt the petitioner from answering interrogatories or from compulsory testimony as a witness. The exemption can only be based upon the liability to such penalties or forfeitures as may be made the subjects of a penal or criminal proceeding. La Bourgogne, (S. D. N. Y. 1900) 104 Fed. 823.

11. Payment into Court

The time when the amount of liability should be paid into court will depend upon circumstances. If the owner sets up his claim to limited liability in his answer, and does not seek a general concurrence of creditors, it will be sufficient if the amount is paid after the trial of the cause and the ascertainment of the amount of liability in the decree. Payment and satisfaction of the decree will be a discharge of the owner as against all creditors represented in the decree. The City of Norwich, (1886) 118 U. S. 468, 6 S. Ct. 1150, 30 U. S. (L. ed.) 134.

When the owners have set up a defense of limitation of liability by answer it is not necessary that they should pay the money into court or make a surrender of the vessel. The Doris Eckhoff, (S. D. N. Y. 1890) 41 Fed. 156.

Under admiralty rule 23, which permits the libellant to require the defendant to answer on oath interrogatories at the close of the libel, and the provisions of the statute taken in connection with admiralty rule 54, allowing a vessel owner to take proceedings to limit liability by filing a libel or petition, it has been held that the petitioner has a right to propound interrogatories and require a damage claimant to answer them. The Murrell, (D. C. Mass. 1910) 188 Fed. 727.

12. Issues

Issues on petition and answer.—In a proceeding for limitation of liability the petition and answer on the one hand and the individual claims for damages on the other present distinct issues, which are to be separately adjudicated in the order named. In re Davidson Steamship Co., (E. D. Wis. 1904) 133 Fed. 411.

Where unseaworthiness of the vessel is pleaded by the claimants to show negligence on the part of the petitioner, and a bill of particulars is ordered, the claimants if they do not give the bill of particulars, will not be allowed to give evidence of unseaworthiness under their general denial, to rebut the prima facie case made by the petitioner. The John H. Stain, (E. D. N. Y. 1909) 175 Fed. 522.

Where a claimant has filed an answer to a petition for limitation of liability and a claim for damages, the court may determine on the same proceeding the question of the petitioner's privity or knowledge and the question as to its liability for the accident. In re Eastern Dredging Co., (D. C. Mass. 1908) 159 Fed. 541.

13. Interest

Right to interest.—The allowance of interest on damages is not an absolute right. Whether it should or should not be allowed depends upon the circumstances in each case and rests very much upon the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury. The Scotland, (1886) 118 U. S. 507, 6 S. Ct. 1174, 30 U. S. (L. ed.) 153.

In affirming a decree in admiralty in the Supreme Court, if interest is not expressly allowed it is not included. The Scotland, (1886) 118 U. S. 507, 6 S. Ct. 1174, 30 U. S. (L. ed.) 153.

When issue is raised by answer.—Where the owner obtains an appraisement it is established that a bond to be given should bear interest as a substitute for the benefit a surrender of the vessel would be to those entitled to it; and when the shipowner resorts to an answer to establish his limitation he should not be placed in a better position than where he surrenders the vessel or gives a bond but should be required to pay interest on the value of the vessel as it was at the time of or immediately after the accident. Attorney v. Booth, (S. D. N. Y. 1901) 112 Fed. 553.

Time of allowance.—Interest should be allowed from the day on which the final decree is entered in the District Court, and when the amount is insufficient to pay the principal of the claim the decree for interest was also awarded against the owner of the vessel and not against the stipulator for value. The H. F. Dimock, (C. C. A. 1st Cir. 1896) 77 Fed. 226, 33 U. S. App. 547, 28 C. C. A. 123. See also The Cygnet, (C. C. A. 1st Cir. 1903) 126 Fed. 742, 61 C. C. A. 548.

Where a damage claimant, in proceedings by a vessel owner for limitation of liability on account of a collision, had instituted an action in a state court, and obtained a verdict therein before the commencement of the limitation proceedings, on which she was subsequently permitted to take judgment, and which was accepted by the court of admiralty as a liquidation of her claim, she was also entitled to interest on the amount of the verdict from the time of its rendition. The City of Boston, (D. C. Mass. 1909) 182 Fed. 174.

Rate.—An agreement in a bond given for the release of a vessel to pay the value of the vessel at the time of collision "and the interest on the same as provided by law," is an agreement to pay the legal
rate of interest from the date of its execution. The George W. Roby, (C. C. A. 6th Cir. 1901) 111 Fed. 601, 49 C. C. A. 481.

14. Costs


The allowance of costs in many cases is largely a matter of discretion with the court, but the general rule is that the successful party in the action is entitled to them. Where there were really two distinct and separate issues, the first relating to the owners and the benefits of the limited liability Act, and the second to the negligence and fault of the vessel in the collision, it was held that upon maintaining the first issue the owners should be allowed such costs as accrued solely upon that issue; and upon the second issue, as the vessel was found guilty, the owners of the tug should pay the costs accruing on that issue. The Leonard Richards, (D. C. N. J. 1890) 41 Fed. 818.

Costs on issuing monition.—The cost of issuing and publishing the monition should be paid out of the fund. All that the petitioner in such a case is required to pay is the expense incurred in availing himself of the Act of Congress, the cost of filing the petition and stipulation for costs and value, and the expense of appraisals, etc. Boston Marine Ins. Co. v. Metropolitan Redwood Lumber Co., (C. C. A. 9th Cir. 1912) 197 Fed. 703, 117 C. C. A. 97.

Costs under stipulation.—If the owner, in lieu of the transfer of the vessel, desires to give a stipulation, as the appraising is necessarily a condition precedent to giving the stipulation, he cannot get his fund into court without paying the taxable costs of the stipulation. All the expenses of administration, including the fees and other charges of the officers of the court and the fees and other charges of the commissioner, shall be paid from the bond which the stipulation represents unless, and so far as, parties have made issue. The appraising on every contest of issue should fall on the party losing, and as to this the owner stands not otherwise than any other party. The H. F. Dimock, (C. C. A. 1st Cir. 1896) 77 Fed. 226, 33 U. S. App. 647, 23 C. C. A. 123. See also The Cygnet, (C. C. A. 1st Cir. 1903) 126 Fed. 742, 91 C. C. A. 348.

Costs cannot be allowed against the sureties in an admiralty stipulation where it appears that the decree for damages exhausts the whole amount of the stipulation for value. Seasonable payment of the sum expressed in the instrument is all that can be required; but if the sureties neglect to fulfill the terms of the instrument and the suffering party is driven by such neglect to resort to legal measures to recover the amount to satisfy his loss, they are then, like the delinquent shipowner, liable for costs and interest occasioned by their neglect. The Wanata, (1877) 85 U. S. 600, 24 U. S. (L. ed.) 461.

Laches.—When the owners have failed to assert their rights to limitation of liability until after judgment in the common-law action against them, it is only equitable that they should be required, as a condition of granting the relief demanded, in addition to the payment into court of the appraisal value of the vessel, to pay the costs awarded in the common-law action. Gleason v. Duffy, (C. C. A. 7th Cir. 1902) 116 Fed. 298, 54 C. C. A. 100.

Security for costs.—Security for costs must be given by all contesting claimants unless the party is suing in forma pauperis. The Pere Marquette, 18, (E. D. Wis. 1913) 203 Fed. 127.

15. Reopening Proceeding After Decree

Where proceedings in a court of admiralty by a shipowner, for limitation of liability, have been terminated, so far as the parties before the court are concerned, by a final decree, the court has no power to reopen the proceedings for the purpose of allowing other claimants, who have not appeared therein, to come into the case and prove their claims. If for any reason the decree is not binding on such claimants, their remedy is by an independent suit. Dowell v. U. S. Dist Ct., (C. C. A. 9th Cir. 1905) 139 Fed. 444, 71 C. C. A. 288.

16. Appeal

Parties.—A proceeding for the limitation of liability is a joinder of separate and distinct causes of action, the decrees in which are several in their nature and should be treated as several in their operation even though joint in form, and an appeal may be prosecuted by one or more of the parties. The Columbia, (C. C. A. 9th Cir. 1896) 73 Fed. 226, 44 U. S. App. 326, 19 C. C. A. 438, reversing (C. C. A. 9th Cir. 1895) 67 Fed. 942, 29 U. S. App. 647, 15 C. C. A. 91.

Time for taking appeal.—A decree in admiralty in proceedings for limitation of liability adjudging the rights of the parties and referring the cause to a commissioner to take testimony on claims for damages is reviewable on an appeal taken after the entry of a final decree on the commissioner's report, although the time for taking an appeal from the first decree had expired, such decree being in its nature interlocutory. La Bourgogne,
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Decisions reviewable—Jurisdiction of District Courts.—The Circuit Court of Appeals has no jurisdiction to review an appeal from the District Court and admiralty in proceedings for limitation of liability where the only question contained in the record on appeal is the question of the jurisdiction of the District Court to hear and determine the issues as to liability and to render a personal judgment or decree against the owners of the vessel. The Annie Faxon, (C. C. A. 9th Cir. 1898) 87 Fed. 961, 59 U. S. App. 421, 31 C. C. A. 323.

Injunction.—An order granting an injunction restraining claimants from beginning actions pending the determination of the question of the right to limit liability is a final decision and therefor appealable. In re Oceanic Steam Nav. Co., (C. C. A. 2d Cir. 1913) 204 Fed. 259, 124 C. C. A. 347.

Jurisdiction of Supreme Court.—As petitions for the limitation of liability of shipowners are admiralty cases, and the decrees of the Circuit Courts of Appeal in such cases were made final by the sixth section of the Judiciary Act of March 3, 1891, now embodied in section 128 of the Judicial Code (in JUDICIARY, vol. 5, p. 607), an appeal therefrom to the Supreme Court will not lie. Oregon R., etc., Co. v. Balfour, (1900) 179 U. S. 53, 21 S. Ct. 28, 45 U. S. (L. ed.) 82.

IX. Effect of Other Statutes

The Federal Employer's Liability Act. —The Act of April 22, 1908, ch. 149, 35 Stat. L. 65 (title RAILROADS) does not by implication repeal this section in so far as it may be used to limit claims for personal injury of employees who employed on work coming within the provisions of the act. The Passaic, (E. D. N. Y. 1911) 190 Fed. 644.

Contrasted with R. S. secs. 4284 and 4285.—The provision of the Act of March 3, 1851, which is substantive in character, and sections 4284 and 4285 are adjectival or procedural. The two latter are not as broad as the former. White r. Island Transp. Co., [1914] 233 U. S. 346, 34 S. Ct. 389, 58 U. S. (L. ed.) 983. Section 4283 is negative in its terms. It merely provides that in cases covered by it the liability of the owner of the vessel shall not exceed the amount or value of his interest in the vessel and her freight then pending. It does not expressly confer on the vessel owner a right to institute a proceeding to limit his liability thereunder. But it does confer such right by implication. The basis of the implication is the circumstance that sections 4284 and 4285 authorize the vessel owner in cases of injuries to property, where there is a plurality of claimants, to institute such a proceeding. The sense of section 4283 is completed by inference from sections 4284 and 4285. It is to be gathered therefrom that it is the thought of section 4283 that the vessel owner, not only in cases covered by sections 4284 and 4285, but in all cases covered by that section—i.e., where there are injuries to person as well as to property, and where there is a single claimant, as well as where there is a plurality of claimants—may institute a proceeding to limit his liability to the value of the vessel, or to the vessel itself, as he may prefer, and her pending freight, as much so as if the same had been expressed therein; that no provision is made for a proceeding in cases where the injuries are to the person, or where there is but a single claimant, where the injuries are to property and there are several claimants, is not against the vessel owner's right to institute a proceeding in such cases; it being the thought of section 4283 that where a proceeding may be had in such case the character thereof is to be determined by analogy to the proceedings authorized in sections 4284 and 4285 in the cases covered by them. In re Louisville, etc., Packet Co., (E. D. Ky. 1915) 223 Fed. 185.

Relation to R. S. sec. 4493.—This section and R. S. sec. 4493 (in STEAM VESSELS) "stand together in the Revised Statutes, and provide for two distinct classes of liability—the one prescribing the general rule that, for damages through negligent acts done without the privity or knowledge of the owner, liability should not exceed the amount or value of the interest of such owner in the vessel and her freight then pending; the other providing that for injury occurring through the neglect or failure of the owner to comply with the provisions of title 52 of the Revised Statutes for the regulation of steam vessels, or occurring through known defects or imperfections of the steering apparatus or of the hull, there should be, as to passengers, liability to the full amount of the damage. They are statutes in pari materia, the one creating a general rule of limitation of liability, the other making exceptions in favor of passengers." The Annie Faxon, (C. C. A. 9th Cir. 1896) 75 Fed. 312. 44 U. S. App. 591. 21 C. C. A. 366.

Act of Feb. 13, 1853.—As to the relation of secs. 3 and 6 of the Act of Feb. 13, 1893, infra, pp. 377, 393, to this section, see The Viola, (S. D. N. Y. 1803) 39 Fed. 632.

Act of March 3, 1851.—The provisions in section 1 of the Act of 1851 that nothing in the Act contained should prevent the parties from making such a contract as they pleased extending or limiting the liability of the shipowners, was not re-
enacted in Revised Statutes, and as a portion of the section containing it is embraced in this section, the provision is repeated by force of R. S. sec. 5596 (title Statutes) The Montana, (E. D. N. Y. 1884) 22 Fed. 715.

Act of June 26, 1884.—This section and the Act of June 26, 1884, sec. 18, infra p. 368, were designed to bring the law of this country into harmony with the maritime law of most other countries in respect to the limitation of the liability of shipowners arising from the navigation of their vessels and the acts of masters, whether growing out of contract or tort. Miller v. O'Brien, (S. D. N. Y. 1888) 25 Fed. 779; Force v. Providence Washington Ins. Co., (S. D. N. Y. 1888) 35 Fed. 767.

This section was amended by the Act approved June 26, 1884, ch. 121, 23 Stat. L. 55, infra p. 368, so as to do away with the restriction upon the character of debts and liabilities against which the limitation might be asserted. O'Brien v. Miller, (1897) 168 U. S. 287, 18 S. Ct. 140, 42 U. S. (L. ed.) 469.

State Workmen's Compensation Act.—The federal limited liability statutes create no irreconcilable conflict with the Workmen's Compensation Act of California (St. 1913, p. 279) since giving them full force it would result only that the accident commission would be in duty bound to limit its award so that it would not exceed the ascertained value of the interest of the owner and the California Workmen's Compensation Act will therefore be read as though the federal statutes were embodied in it. North Pac. Steamship Co. v. Industrial Acc. Commission, (Cal. 1917) 163 Pac. 199.

X. WAIVER OF STATUTORY LIMITATION

Surrender of vessel.—The right to proceed for a limited liability is not waived or lost by a surrender of the vessel to the insurers. The City of Norwich, (1886) 118 U. S. 408, 6 S. Ct. 1150, 30 U. S. (L. ed.) 134.

Provision in bill of lading.—The right to petition for limitation of liability is not waived by a provision in a bill of lading that the transportation shall be subject to certain specified conditions. The Hoffmans, (N. Y. 1909) 171 Fed. 455.

Supersedes bonds.—The giving of a supersedeas bond, in an action in personam, is not a waiver of the limited liability statute. Monongahela River Consol. Coal, etc., Co. v. Hurst, (C. C. A. 6th Cir. 1912) 200 Fed. 711, 119 C. C. A. 127.

Sec. 4284. [General average of losses.] Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and owners of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto. [R. S.]


The word "owners," as it appears preceding the words "of the property," was substituted by Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 251, for the word "owner" appearing in the section as originally enacted.

See R. S. sec. 4289, infra, p. 367.

Purpose and effect of section.—The limitation of liability to the value of the ship and freight is general, and when the proceeds of the latter are insufficient to pay the entire loss, the object of R. S. sec. 4284 is mainly to prescribe a pro rata distribution amongst the parties who have sustained loss or damage. Butler v. Boston, etc., Steamship Co., (1889) 130 U. S. 527, 9 S. Ct. 612, 32 U. S. (L. ed.) 1017.

The effect of this section is to provide a general average of loss in case the value of the vessel and freight is insufficient to make full compensation to all sustaining a loss. Monongahela River Consol. Coal, etc., Co. v. Hurst, (C. C. A. 6th Cir. 1912) 200 Fed. 711, 119 C. C. A. 127.

Scope of section.—Cases of personal injury and death.—The designation of losses and injuries in this section and R. S. sec. 4283, infra, p. 363, is imperfect, a part being mentioned representatively for the whole; these sections extend to injuries to the person as well as to injuries to property. Butler v. Boston, etc., Steamship Co., (1889) 130 U. S. 527, 9 S. Ct. 612, 32 U. S. (L. ed.) 1017. See also The Catskill. (S. D. N. Y. 1899) 95 Fed. 706.

Where only one claim.—Where suit has been brought upon one claim and the circumstances are such as to make probable the existence of other claims arising out of the same accident, as in cases of col-
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The earnings of the voyage which a shipowner is required by the statute to surrender in order to obtain a limitation of liability for losses occurring on such voyage are those only of the particular voyage which exposed the passengers or property to risk; and where a steamship was engaged in making regular trips across the Atlantic from Havre to New York and return, discharging her passengers and cargo at each terminal port, each of the trips between such ports constitutes a voyage, within the meaning of the statute, and in proceedings for limitation of liability for claims arising out of the sinking of the ship in collision while on her way from New York to Havre the owner is not required to surrender the earnings of the preceding trip from Havre to New York. La Bourgogne, (C. C. A. 2d Cir. 1908) 139 Fed. 433, 71 C. C. A. 489, affirmed (9th Cir. Y. 1902) 117 Fed. 261, affirmed (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973; The Americana, (N. D. Cal. 1915) 230 Fed. 863.

"Freight for the voyage."—In proceedings by a French steamship company for limitation of liability for claims arising out of the sinking of one of its ships while on a voyage from New York to Havre, the "freight for the voyage" which the petitioner is required by the statute to surrender cannot be construed to include any part of an annual subsidy paid to the company by the French government, in consideration for which the company agreed to build and maintain a weekly steamship service between Havre and New York, the vessels to be built in France and to be of a character, size, speed, and equipment specified, and to use of its government in case of war or other extraordinary political circumstances, and to transport gratuitously all mails and specie for the use of the state. In such case it is impossible to determine what part of subsidy is to be considered as compensation to any vessel for transportation of the mails on a single trip. La Bourgogne, (C. C. A. 2d Cir. 1905) 139 Fed. 433, 71 C. C. A. 489, affirmed (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973; The Americana, (N. D. Cal. 1915) 230 Fed. 863.

Jurisdiction.—This section expressly allows the owner to institute appropriate proceedings in any court, that is to say, any court of competent jurisdiction, for the purpose of ascertaining among the proper parties the sum for which he is liable. R. S. sec. 425-5 provides, that it shall be deemed a sufficient compliance on his part with the requirements of the act if he shall transfer all his interest in the vessel and freight to a trustee, appointed by the court for the persons who may prove to be legally entitled thereto. Any court, therefore, which gets actual
possession of the things to be transferred, and about which the concourse of claimants is to be had, is a court of competent jurisdiction to try the questions that will properly arise upon the apportionment to be made. Ex p. Slayton (1881) 105 U. S. 451, 26 U. S. (L. ed.) 1066.

Destruction of property on land.—The District Court, as a court of admiralty, has no jurisdiction of proceedings for the limitation of the liability of the owner of a vessel for the destruction of property on land by fire caused by the steamer. "Our decision against the jurisdiction of the District Court is made without deciding whether or not the statutory limitation of liability extends to the damages sustained by the fire in question, so as to be enforceable in an appropriate court of competent jurisdiction. The decision of that question is unnecessary for the disposition of this case." Ex p. Sunnix Bros. Co., (1886) 118 U. S. 610, 7 S. Ct. 25. 30 U. S. (L. ed.) 274. See further the notes under R. S. sec. 4282, supra, p. 334.

As to jurisdiction in general under the limited liability statutes see the notes under R. S. sec. 4285, supra, p. 336.

Procedure.—Four modes are provided by which the statute may be availed of: 1. By the simple answer of the shipowner when sued; 2, by his libel or petition, offering a transfer of the ship to a trustee appointed by the court under R. S. sec. 4285: 3, by a similar libel or petition offering, instead of a transfer of the ship, a stipulation, under rule 54 of the Supreme Court in Admiralty, to pay her value as appraised under the order of the court, or a deposit in court of the amount of such appraised value; 4, by a creditor's suit for an apportionment and pro rata distribution. The H. F. Dimock. (S. D. N. Y. 1892) 52 Fed. 598, citing The Scotland, (1851) 105 U. S. 24, 26 U. S. (L. ed.) 1001.

"Appropriate proceedings."—In construing the phrase "appropriate proceedings," as used in this section, Seaman, J., said: "With no precedents interpreting the rules as to the practice upon such issue [liability of the vessel], I am of opinion that they [the provisions of the statute] intend the appropriate judicial hearing of the controversy over liability, with the issues presented upon distinct allegations of fact for and against the claim: that claimant must state, as the fundamental requisite of apportionment and recovery for damages, the fact of the collision and the prima facie case of liability on the part of the petitioner's vessel, such liability being expressly reserved for contest; and that the petitioner becomes respondent in respect of such issue, and may either answer the claim, or make allegations by counter statements of facts, consistent with the petition, or have the averments of the petition thereupon adopted for the purpose of the issue. Unless the rules intend that the fact of collision, followed by the petition to limit liability, creates a presumption of liability which the petitioner must overcome, the contention is untenable that the claimant may rest its claim upon specification of damages sustained and averment that the injuries occurred without fault on its part. Such departure from the general doctrine cannot be upheld under my understanding of the letter or spirit of the rules." In re Davidson Steamship Co., (E. D. Wis. 1904) 133 Fed. 411.

Right to institute proceedings.—The owner of the vessel may institute proper proceedings in a court of competent jurisdiction to obtain the benefit of the limitation of liability provided for by this section and R. S. sec. 4285, infra, p. 363, without waiting for a suit to be begun against him or his vessel for the loss out of which the liability arises. Rules promulgated by the Supreme Court are not intended to prevent the owner from availing himself of any other remedy or process which the law itself entitles him to adopt, but to aid him in bringing into court those having claims against him arising from the acts of the master or crew. Ex p. Slayton, (1881) 105 U. S. 451, 26 U. S. (L. ed.) 1066.

Delay in bringing proceeding.—Delay for more than two years after action brought in a state court for a maritime tort will not bar a proceeding in a United States District Court by the owners of the vessel for the limitation of their liability, but the petitioners should be required to pay the costs that have accrued upon the suit in the state court, including costs in the state Supreme Court. The S. A. McCaulley, (E. D. Pa. 1899) 99 Fed. 302. See also In re The Garden City, (S. D. N. Y. 1886) 27 Fed. 234.

Parties entitled to distribution.—Not more appropriate proceeding could be taken where all the parties are before the court in admiralty, and where the owners plead their exemption under the statute, than to give a decree against them for the amount of their liability and to distribute the same amongst the parties entitled to it. If there are parties not represented in the suit who have claims for damages, it is the owners' fault for not bringing them in as might be done under the rules by pursuing the remedy pointed out in those rules. As to the actual libelants and interveners in the suit, there is no reason why the owners should not pay the sum recovered into court, nor why such amount should not be distributed pro rata among the claimants. The Scotland, (1881) 105 U. S. 24, 26 U. S. (L. ed.) 1001.

The pro rata distribution of the funds when the amount is not sufficient to pay all claims in full relates to a distribution among those whose losses arise from the collision, and has no reference to losses of an inferior grade and quality upon the
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wrongdoing vessel, such as the wages of seamen. The Maria and Elizabeth, (D. C. N. J. 1882) 12 Fed. 627.

Appraisement and stipulation.—The making of the appraisement ex parte and the taking of the appraisement are at most an irregularity which the District Court may correct. In re Morrison, (1893) 147 U. S. 14, 13 S. Ct. 246, 37 U. S. (L. ed.) 60. See also The H. F. Dimock, (S. D. N. Y. 1892) 52 Fed. 598.

It is competent for a court having had an appraisement on an ex parte application to order a reappraisement and further security upon application by any creditor showing that the previous appraisement was mistaken and inadequate, and that the duty of the appraisers had been inadequately performed. The H. F. Dimock, (S. D. N. Y. 1892) 52 Fed. 598.

Interest on bond.—The statute contains no provision for the giving of a bond. Under a rule of the Supreme Court an owner may elect whether he will transfer his interest to a trustee or substitute the appraised value. If the owner prefer to take the alternative offered by the rule and to substitute the appraised value of the vessel, it is left to the discretion of the court to determine whether such value should be paid into court in cash or secured by bond. In case the owner elect not to transfer, and asks to be allowed to receive his vessel upon stipulating to pay the appraised value of his interest at some future day, he should be required to stipulate for interest from the time when he thus releases his ship. In re Harris, (C. C. A. 2d Cir. 1893) 57 Fed. 243, 14 U. S. App. 506, 6 C. C. A. 320.


Sec. 4285. [Transfer of interest of owner to trustee.] It shall be deemed a sufficient compliance on the part of such owner with the requirements of this Title relating to his liability for any embezzlement, loss, or destruction of any property, goods, or merchandise, if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person who may prove to be legally entitled thereto; and from and after which transfer all claims and proceedings against the owner shall cease. [R. S.]

Act of March 3, 1851, ch. 43, 9 Stat. L. 635.

See R. S. sec. 4289, supra, p. 336.

Measure of owner's liability.—See notes under R. S. sec. 4283, supra, p. 336.

Effect of proceedings.—The effect of the proceedings to limit liability as provided for in this section is to bar all claimants against the vessel or its owner in every other tribunal except the one in which such proceedings are pending. But this is true only when the petitioner shall have transferred the vessel as she was at the end of the voyage on which the liability occurred, or in lieu of such transfer shall have furnished a stipulation for the amount of her value at the end of such voyage to be ascertained by a due appraisement caused to be made by the court. The American, (N. D. Cal. 1915) 230 Fed. 853.

Jurisdiction.—This section, in providing for the transfer to a trustee of the interest of the owner in the vessel and freight, provides only that the trustee may be appointed by any court of competent jurisdiction, leaving the question of such competency to depend on other provisions of law. Ex p. Phenix Ins. Co., (1886) 18 U. S. 610, 7 S. Ct. 25, 30 U. S. (L. ed.) 274.

On the question as to whether a state court is a court of competent jurisdiction within the meaning of this section, the court in The S. A. McCasuley, (E. D. Pa. 1899) 69 Fed. 302, said: “I cannot avoid the conclusion that the Circuit Court of Appeals for the First Circuit was right in deciding (Quinlan v. Pew, [C. C. A. 1st Cir. 1893] 56 Fed. 111, [5 U. S. App. 382], 5 C. C. A. 438) that a state court does not possess the machinery fully to administer the act of Congress, even in cases where there is only one claimant. It may be (although I do not decide the point) that a state court is a 'court of competent jurisdiction' within the meaning of section 4283 of the Revised Statutes, and may therefore have power to appoint a trustee under that section. But, even if this be true, a state court has no power to appraise the vessel under rule 54 in admiralty, or to carry out the other provisions there to be found, and these provisions are now as much a part of the right as is the statutory direction concerning the appointment of a trustee.”

As to jurisdiction in general under the limited liability statutes see the notes under R. S. sec. 4283, supra, p. 336.

Actual or constructive transfer.—The operation of the Act in this behalf cannot be regarded as confined to cases of actual
'transfer' (which is merely allowed as a sufficient compliance with the law), but must be regarded, when we consider its reason and equity and the whole scope of its provisions, as extending to cases in which what is required and done is tantamount to such transfer; as where the value of the owners' interest is paid into court, or secured by stipulation and placed under its control, for the benefit of the parties interested." Providence, etc., Steamship Co. v. Hill Mfg. Co. (1883) 109 U. S. 578, 3 S. Ct. 379, 617, 27 U. S. (L. ed.) 1038. See also In re Morrison, (1893) 14, U. S. 14, 15 S. Ct. 246, 37 U. S. (L. ed.) 60.

Option to surrender vessel or to pay appraised value.—This section and R. S. sec. 4283, supra, p. 336, clearly give the owner of any vessel the right to personal exemption from liability for any damage occasioned by such vessel without his privity or knowledge by transferring her and her pending freight to a trustee to be appointed by a Court of Admiralty, and although admiralty rule 54, prescribing forms and procedure under said sections, permits him at his option to retain the vessel by having her appraised and paying her appraised value and pending freight into court or giving a stipulation therefor, he still has the right before an appraisement made on his petition has been accepted, or any order has been made thereon, to dismiss that part of his petition, and, instead, to ask for the appointment of a trustee to whom he may transfer the vessel and her freight. Ohio Transp. Co. v. Davidson Steamship Co., (C. C. A. 7th Cir. 1908) 145 Fed. 185, 78 C. C. A. 319, certiorari denied (1906) 203 U. S. 593, 27 S. Ct. 782, 51 U. S. (L. ed.) 332.

Time of transfer.—It has been held that an owner upon a petition to limit liability, at a date long after the liability was incurred, could only be allowed where the boat had not depreciated beyond ordinary wear and tear. In other words, if the owner surrendered the boat, or desired to substitute a bond for the same the amount of the surrender must equal the fair value for the boat at the time when the liability was incurred. The Passaic, (E. D. N. Y. 1911) 190 Fed. 644; The T. W. Wellington, (E. D. N. Y. 1916) 235 Fed. 798.

The vessel must be transferred as she was at the end of the voyage on which the liability accrued. The Americana, (N. D. Cal. 1915) 230 Fed. 853.

Injunction.—Power to grant an injunction exists under this section. The San Pedro, (1912) 223 U. S. 385, 32 S. Ct. 275, 56 U. S. (L. ed.) 473, Ann. Cas. (1913D) 1221, wherein the court said: "The view we take of the statutory injunction declared by section 4286, and of its application to cases where the vessel has been surrendered and a stipulation entered into as provided by admiralty rule 54, as a proceeding tantamount to a transfer of the ship as authorized by section 4286, is fully supported by the leading case of Providence, etc., Steamship Co. v. Hill Mfg. Co. (1883) 109 U. S. 578, 584, 599, 600 and 604, 3 S. Ct. 379, 617, 27 U. S. (L. ed.) 1038. That was a suit in a state court against the owner of a steamship to recover for goods lost by the burning of a steamer. While the suit was pending the owner filed his petition in the proper District Court for the benefit of the limited liability statute. The proceedings seem to have been conducted in accordance with admiralty rule 54, but in addition the petitioners made application, as permitted by that rule, for an order restraining the prosecution of 'all and any such suit or action by the owner in respect of claims subject to the provisions of the Act. The owner and defendant in the suit pending in the state court thereupon, by plea, set up the limited liability suit as a reason why the state court should proceed no further. This was overruled. Later the defendant therein pleaded the final decree in the liability suit as a bar to any decree in the state court against him, as owner. This, too, was disregarded and a decree rendered against the owner for the claim for damages caused by the burning of the steamer and the plaintiff's goods. This was affirmed in the Supreme Judicial Court of Massachusetts and brought here upon writ of error. After a consideration of the meaning and purpose of the Limited Liability Act of 1851 (March 3, 1851, 9 Stat. 635, c. 43) sections 4283, 4284 and 4285, Revised Statutes, and of admiralty rule 54, the court said (p. 594) : 'We have deemed it proper to examine thus fully the foundation on which these rules adopted in December, 1851, and in 1871, were based, because if those rules are valid and binding (as we deem them to be), it is hardly possible to read them in connection with the Act of 1851 without perceiving that after proceedings have been commenced in the proper district court in pursuance thereof, the prosecution pari passu of distinct suits in different courts, or even in the same court by separate claimants, against the shipowners, is, and must necessarily be, utterly repugnant to such proceedings and subversive of their object and purpose.' Later the court added (pp. 599, 600): 'Proceedings under the Act having been duly instituted in this court, it acquired full jurisdiction of the subject matter: and having taken such jurisdiction, and procured control of the vessel and freight (or their value), constituting the fund to be distributed and issued its monition to all parties to appear and present their claims, it became the duty of all courts before which any of such claims were prosecuted, upon being
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properly certified of the proceedings, to suspend further action upon said claims. . . . The operation of the Act in this behalf, cannot be regarded as confined to cases of actual transfer, (which is merely allowed as a sufficient compliance with the law), but must be regarded, when we consider its reason and equity and the whole scope of its provisions, as extending to cases in which what is required and done is tantamount to such transfer; as where the value of the owners’ interest is paid into court, or secured by stipulation and placed under its control, for the benefit of the parties interested.”

The provision that “all claims and proceedings against the owner shall cease” was held to be paramount to R. S. sec. 720 (re-enacted without change in section 265 of the Judicial Code, title JURISDICTION, vol. 5, p. 599), and not affected by it. In re Whitelaw, (N. D. Cal. 1896) 71 Fed. 733. And to the same effect, see in re Long Island North Shore Passenger, etc., Transp. Co., (S. D. N. Y. 1881), 5 Fed. 599.

Owners of vessels, complying with the statute in proceedings for the limitation of their liability are entitled to an injunction order restraining the prosecution of suits in a state court. The Amsterdam, (S. D. N. Y. 1883) 23 Fed. 112.

“The district court, having in its control the only fund to which claimants have a right to resort for payment of their claims, and being the only court competent to administer the admiralty rule for the limitation of the liability of the owners of the vessel, it has the authority and jurisdiction, in order to prevent that administration and its decrees from being nugatory, to issue an order restraining the further prosecution of the suits in the state courts. The Tolchester, (D. C. Md. 1890) 42 Fed. 180.

In the case of In re The Providence, etc., Steamship Co., (1872) 6 Ben. 258, 20 Fed. Cas. No. 11452, the owners of a vessel destroyed by fire filed a petition for the limitation of their liability and obtained an injunction restraining the prosecution of suits which had been commenced against them in state courts by owners of the cargo. See also The H. F. Dimock, (S. D. N. Y. 1892) 52 Fed. 598; In re Humboldt Lumber Manufacturers’ Ass’n, (N. D. Cal. 1894) 60 Fed. 428, affirmed (C. C. A. 9th Cir. 1896) 73 F. 299, 44 U. S. App. 434, 10 C. C. A. 481, 46 L. R. A. 264.

A recovery in personal against the owners of the vessel is restrained upon the surrender of the vessel in proceedings under the statute. The Catskill, (S. D. N. Y. 1890) 95 Fed. 700.

See further the note under the heading VII. Effect of proceedings on other actions under R. S. sec. 4283, supra, p. 350.

Sale by trustee.—The court has power to make an order directing the trustee to sell the vessel, where such sale is necessary to preserve the property from destruction, requires no present determination of questions that should be determined at a final hearing, and further does not affect any rights involved. The Mendota, (S. D. N. Y. 1882) 14 Fed. 358.

Costs.—Costs are within the discretion of a court of admiralty, and equity demands that where a party contests a claim for damages he ought to be mulcted only in the interest upon the funds, and in such costs as necessarily arise from that contest. Costs which but for such contest would be paid from the fund ought to remain chargeable against the fund. The Vernon, (E. D. Mich. 1884) 36 Fed. 113.

After the transfer authorized by this section has been made the owner is entitled to depart without delay. The payment into court of the appraisal value, or the giving of a stipulation in lieu thereof, takes in all respects the place of the transfer of the vessel and freight, so that after making such payment or giving such stipulation the owner is in the same manner entitled to depart without delay, except only by attending for the purpose of making good the stipulation at the proper time. Costs of issues not made by him, but accruing after he has paid in or secured the funds, cannot be taxed against him. The H. F. Dimock, (C. C. A. 1st Cir. 1896) 77 Fed. 226, 35 U. S. App. 647, 23 C. C. A. 193.

Mode of proceeding not exclusive.—The primary enactment providing for the limitation of liability is embodied in R. S. sec. 4283, supra, p. 356, and two modes for carrying out this law are there prescribed, one in R. S. sec. 4284, supra, p. 360, and the other in the text section. The failure of the shiowners to transfer interest in vessel and freight as provided for in this section, does not deprive them of the benefits of the preceding section. The Scotland, (1881) 106 U. S. 24, 29 U. S. (L. ed.) 1001.

Effect of other statutes.—This section was not repealed by the Act of Feb. 4, 1887, ch. 104, 24 Stat. L. 379, known as the Hepburn Act (title InterState Com-merce, vol. 4, p. 331). The Hoffmans, (S. D. N. Y. 1900) 171 Fed. 455.

Sec. 4286. [When charterer is deemed owner.] The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such
vessel within the meaning of the provisions of this Title relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof. [R. S.]


Liability of persons.—When the charterer does not man, victual, and navigate the vessel at his own expense his liability does not seem to be within the provision of this section. Smith v. Booth, (S. D. N. Y. 1901) 110 Fed. 650, affirmed (C. C. A. 2d Cir. 1909) 122 Fed. 626, 58 C. C. A. 479.

Owner pro hac vice.—One who sails a vessel on shares, hiring his own crew, paying and victualing them, paying half the port charges, retaining half the net freight after the charges are taken out, and paying for the general owners the other half, must be considered as the owner for the time being. Thorp v. Hammond, (1870) 12 Wall. 408, 20 U. S. (L. ed.) 419. See Somes v. White, (1876) 65 Me. 542, 20 Am. Rep. 718.

Control of vessel.—Where a charter-party transfers to the charterer the entire command, possession, and control of the vessel, the charterer is owner for the service stipulated for; but where a charter-party is merely an agreement for the use of the vessel, the general owner at the same time retaining command, possession, and control over her navigation, the charterer is a contractor for the specific service, and the responsibilities of the owner are not changed. Grimberg v. Columbia Packers' Ass'n, (1905) 47 Ore. 257, 83 Pac. 104, 114 A. S. R. 927, 8 Ann. Cas. 491.

Lien for supplies.—When the circumstances denote that the owner of the vessel is not the party for whose interest the supplies are furnished, and would not be at fault if they were not paid for, it would be inequitable that a merchant should have the right to give credit to another and assert a lien therefor, contrary to the stipulations and interests of the owner. The rule requiring the exercise of good faith is applicable in giving due construction and effect to the clause found at the end of section 4286, if that clause has a wider scope than the immediate subject matter with which the context deals. The Samuel Marshall, (E. D. Mich. 1892) 49 Fed. 754, affirmed (C. C. A. 6th Cir. 1893) 54 Fed. 396, 6 U. S. App. 399, 4 C. C. A. 385.

Sec. 4287. [Remedies reserved.] Nothing in the five preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel. [R. S.]

Act of March 3, 1851, ch. 43, 9 Stat. L. 635.

R. S. sec. 4288, relating to shipping of inflammable materials, is given under the title CARRIERS, vol. 2, p. 18.

See R. S. sec. 4289, given in the following paragraph of the text.

Purpose of section.—This section shows that it is the purpose of the preceding section to release the owner from some liability for the negligence and fraud of the master and other agents of the owner for which those persons are themselves liable and are to remain so. Craig v. Continental Ins. Co., (1891) 141 U. S. 838, 12 S. Ct. 97, 35 U. S. (L. ed.) 886. See Walker v. Western Transp. Co., (1885) 3 Wall. 150, 18 U. S. (L. ed.) 172; The City of New York, (S. D. N. Y. 1885) 25 Fed. 162.

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Sec. 4289. [Limitation of liability of owners to apply to all vessels.] The provisions of the seven preceding sections, and of section eighteen of an act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes," approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters. [R. S.]

This section was amended to read as above by the Act of June 19, 1886, ch. 421, § 4, 24 Stat. L. 80. The section originally read as follows: "SEC. 4289. The provisions of this Title relating to the limitation of the liability of the owners of vessels, shall not apply to the owners of any canal-boat, barge, or lighter, or to any vessel of any description whatsoever used in river or inland navigation." Act of March 3, 1851, ch. 43, § Stat. L. 635. The section as thus originally enacted was first amended by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 320, by substituting for the words "this title" the words "the seven preceding sections." The section 19 of the Act of June 28, 1884, ch. 121, mentioned in the text, is set out in the following paragraph of the text. "The seven preceding sections" mentioned in the text are R. S. secs. 4282-4287, given supra, pp. 334-366, and R. S. sec. 4288, given under CARRIERS, vol. 2, p. 18.

Constitutionality.—It is unnecessary to invoke the powers given to Congress to regulate commerce with foreign nations and among the several states in order to find authority to pass this Act. The Act was passed in amendment of the maritime law, and the power to make such amendments is coextensive with that law. The law of limited liability being part of the maritime law may be applied to navigable rivers above tide water, and to vessels engaged in the carrying trade above such river between points within the same state. In re Garnett, (1891) 141 U. S. 1, 11 S. Ct. 940, 35 U. S. (L. ed.) 651, 1, law.

If the navigable waters of a state, wholly within the state and with no exterior water connections, are yet utilized under common control, management, or arrangement in connection with railroads for continuous commerce, for purposes of such commerce, they would become public water of the United States and subject to congressional control under the commerce laws of the Constitution if not under the admiralty laws. The Katie, (S. D. Ga. 1889) 40 Fed. 480.

Operation of statute.—This statute is prospective in effect and not retroactive. Chappell v. Bradshaw, (C. C. Md. 1888) 35 Fed. 923.

Scope of statute—All vessels.—By this statute the provisions of the limited liability sections are made applicable to all vessels used on lakes, rivers, or in inland navigation, including canal-boats, barges, and lighters. The Columbia, (C. C. A. 9th Cir. 1896) 73 Fed. 226, 44 U. S. App. 326, 19 C. C. A. 436. See also In re The Annie Faxon, (D. C. Wash. 1895) 66 Fed. 679.

Ferry boats.—A New York corporation operating a ferry for the carriage of passengers across the East river between Manhattan and Brooklyn was held entitled to a limitation of its liability for the death of a passenger to the value of the boat on which he was such passenger and its freight. The Southside, (S. D. N. Y. 1907) 155 Fed. 364.

Scows.—A scow 110 feet long, employed in carrying mud in Boston harbor and adjacent waters, or other waters subject to the jurisdiction of admiralty courts, is a "vessel" for the purposes of admiralty jurisdiction and the maritime law, and her owner may maintain proceedings for limitation of liability on account of collision. In re Eastern Dredging Co., (D. C. Mass. 1905) 138 Fed. 942.

A scow engaged in carrying stone about the harbor of New York and unloading its cargoes, and similar cargoes from other scows, at places where sea walls are being built and riprap work is being done, although she has not carried a cargo for three years but is capable of doing so, is within the protection of this section. The Sunbeam, (C. C. A 2nd Cir. 1912) 105 Fed. 468, 115 C. C. A. 370.

Small schooner.—This statute was held to include a vessel of small burden plying between the city of Charleston and points on the coast of South Carolina lying on and adjacent to bays, creeks, and estuaries penetrating the coast. The Anna, (D. C. S. C. 1891) 47 Fed. 625.

Fishing vessels.—Fishing vessels are included in this statute. Whitcomb v. Emerson, (D. C. Mass. 1892) 50 Fed. 128.

Pile driver.—A scow or barge with a pile driver erected thereon and moved
about from place to place by tugs, was hold to be within the section. In re P. Sanford Ross, (E. D. N. Y. 1912) 196 Fed. 921, reversed (C. C. A. 2d Cir. 1913) 204 Fed. 248, 122 C. C. A. 516, on the question of privity or knowledge, without determining whether under all the circumstances the pile driver came within the limit of liability statutes.

Ship taken ashoor to be dismantled.—A steamer, which had been taken on shore by her owners for the purpose of being dismantled, and from which the masts and engines had been removed, so long as the dismantling process had not proceeded so far as to render her wholly incapable of being navigated as a tow or otherwise, continued to be a "vessel" within the meaning of this section, and her owners could maintain proceedings for a limitation of liability for damage done by her, where she floated and went adrift in a storm without their knowledge. The C. H. Northam, (D. C. Mass. 1909) 181 Fed. 983.

Dry docks as "vessels."—Dry docks even though floating and capable of being towed, are not "vessels" within the meaning of the statute. Berton v. Tietjen, etc., Dry Dock Co., (D. C. N. J. 1916) 219 Fed. 763, wherein a variety of water craft is discussed with reference to the term "vessel" as defined in R. S. sec. 3 (title Statutes).

See further the notes Vessels included under R. S. sec. 4293, supra, p. 339.


State Workmen's Compensation Act.—The federal limited liability statutes create no irreconcilable conflict with the Workmen's Compensation Act of California (St. 1913, p. 279), since giving them full force it would result only that the Accident Commission would be in duty bound to limit its award so that it would not exceed the ascertained value of the interest of the owner, and the California Workmen's Compensation Act will, therefore, be read as though the federal statutes were embodied in it. North Pac. Steamship Co. v. Industrial Acc. Commission, (Cal. 1917) 163 Pac. 199.

SEC. 18. [Liability of owners of vessels for debts limited.] That the individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel-bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels and freight pending: Provided, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners. [23 Stat. L. 57.]

This was from an Act of June 26, 1884, ch. 121, entitled "An Act to remove certain burdens on the American Merchant Marine, and encourage American foreign carrying trade, and for other purposes.

See R. S. sec. 4299, given in the preceding paragraph of the text.

Constitutionality.—This section is constitutional. The Steam Dredge No. 6, (S. D. N. Y. 1915) 222 Fed. 576.

"It is within the power of Congress to extend the admiralty jurisdiction to non-maritime torts. Counsel urges that Congress had no power to extend the admiralty jurisdiction to nonmaritime torts, and that the consideration should not be given that point as in the Richardson Case
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[(1911) 222 U. S. 96, 32 S. Ct. 27, 56 U. S. (L. ed.) 110], the question of the constitutionality of section 18 was not presented; but I do not think there is any doubt of constitutional power to extend the act to nonmaritime torts. I believe that a proper construction of article 3, § 8, U. S. Constitution, which provides that judicial power shall extend to all acts of admiralty and maritime jurisdiction, includes the right to Congress to vest a Court of Admiralty with jurisdiction of all injuries caused, without the privity or knowledge of the owner, by the negligence of the vessel or those having charge of her navigation." The Steam Dredge No. 6, (S. D. N. Y. 1915) 222 Fed. 576.

Construction and scope.—This section limits the owner's risk to his interest in the ship in respect to all claims arising out of the conduct of the master and the crew, whether the liability is strictly maritime or arises from a nonmaritime tort, but leaves him liable for his own fault, neglect and contracts. Richardson v. Harmon, (1911) 222 U. S. 96, 32 S. Ct. 27, 56 U. S. (L. ed.) 110, wherein the court, in construing the section, said: "We therefore conclude that the section was intended to add to the enumerated claims of the old law 'any and all debts and liabilities' not theretofore included. . . . Thus construed, the section harmonizes with the policy of limiting the owner's risk to his interest in the ship in respect of all claims arising out of the conduct of the master and crew, whether the liability be strictly maritime or from a tort nonmaritime." See also The Parallel, (W. D. Wash. 1915) 226 Fed. 966.

This statute amends R. S. sec. 4283 supra, p. 336, so as to do away with the restrictions upon the character of debts and liabilities against which the limitations may be secured. O'Brien v. Miller, (1897) 168 U. S. 287, 18 S. Ct. 140, 42 U. S. (L. ed.) 460; The Steam Dredge No. 6, (S. D. N. Y. 1915) 222 Fed. 576.

"This statute seems to have been intended as explanatory of the intent of Congress in this class of legislation. It declares that the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending. The language is somewhat vague, it is true; but it is possible that it was intended to remove all doubts of the application of the limited liability law to all cases of loss and injury caused without privity or knowledge of the owner. But it is unnecessary to decide this point in the present case." Butler v. Boston, etc., Steamship Co., (1889) 130 U. S. 527, 9 S. Ct. 612, 32 U. S. (L. ed.) 1017. See The Giles Loring, (D. C. Me. 1890) 48 Fed. 463; In re Meyer, (N. D. Cal. 1898) 74 Fed. 881.

"It will be seen upon comparing this section with the Act of 1851, embraced in sections 4282-4289, inclusive, in the Revised Statutes, that while the Act of 1851 related to losses occurring to freighters by reason of fire, collision, embezzlement, the Act of 1884 limits responsibility of all shipowners for any and all debts and liabilities. This Act, whether it be an amendment to the Act of 1851 or an independent statute, cannot be construed to repeal the last section of the Act of 1851 relating to the liability of owners of barges and lighters, because it refers only to the liability of shipowners and their vessels, which must mean ships; and there are no words in it which signify that it was intended to be a repealing statute. It appears to be another section intended to take its place at the end of the Act of 1851 as that Act is given in the Revised Statutes." Chappell v. Bradshaw, (C. C. Md. 1892) 35 Fed. 923.

Losses caused by owners' negligence.—This statute does not displace the liability of the shipowners for losses caused by their own negligent acts. It does not purport to repeal any pre-existing law, but is legislation in pari materia with the Act of 1851. The Republic, (C. C. A. 2d Cir. 1894) 61 Fed. 109, 20 U. S. App. 561. 9 C. C. A. 386.

Death claims.—Following Richardson v. Harmon, (1911) 222 U. S. 96, 32 S. Ct. 27, 56 U. S. (L. ed.) 110, the court held in The Rochester, (W. D. N. Y. 1916) 230 Fed. 519, that the owner of the steamship may limit its liability for death claims and that such claims are embraced by the words "any and all debts and liabilities" of this section.

Direct personal contracts.—This statute does not limit the liability of the owners of vessels upon their direct personal contracts outside of the ordinary business of the vessel, but only the liability cast upon them by law by reason of their ownership of the vessel through the contracts or torts of the master or others engaged in its navigation. Laverly v. Clausen, (S. D. N. Y. 1880) 40 Fed. 542. See also The Amos D. Carver, (S. D. N. Y. 1888) 35 Fed. 865; Force v. Providence Washington Ins. Co., (S. D. N. Y. 1888) 35 Fed. 767; Miller v. O'Brien, (S. D. N. Y. 1888) 33 Fed. 779; McPhail v. Williams, (D. C. Mass. 1890) 41 Fed. 61.

This section is to be construed in connection with the Act of 1851 (embodied in R. S. secs. 4282-4289, supra, pp. 334-367), and does not apply to personal contracts, so as to exempt a part owner from full liability for supplies purchased by his authority, or with his knowledge and consent. Rudolf v. Brown, (S. D. N. Y. 1905)

In Great Lakes Towing Co. v. Mill Transp. Co., (C. C. A. 6th Cir. 1907) 155 Fed. 11, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769, a towing company entered into a contract with the managing agent of petioner, which was the owner of certain vessels on the Great Lakes, by which it agreed to perform all towing and wrecking service required by such vessels during the season at certain stated prices. One of petitioner's vessels having stranded, the towing company was called on pursuant to said contract, and sent a tug with wrecking apparatus to the assistance of such vessel, where it spent several days in pumping and attempting to get her afloat, but unsuccessfully, and she was lost. It was held that the petitioner was not entitled to a limitation of liability for the services so rendered by the towing company under its contract, to the value of the salvage recovered from the wreck.

There is nothing in the statute prohibiting part owners to so contract as to become liable for the entire damage, whatever it may be. Kerry v. Pacific Marine Co., (1868) 121 Cal. 564, 54 Pac. 89, 66 A. S. R. 65.

Debts contracted for the ship—Generally.—This statute is to be treated as in pari materia with the Act of 1851 (embodied in R. S. secs. 4282-4289, supra, pp. 334-367). Like the Act of 1851, it limits the owner's liability to the value of such vessel and freight pending. In the case of debts contracted for the benefit of the ship and her owners which are known and are for a known or ascertainable amount, and of which the owners reap the benefit in the improvement of the ship and in the freights subsequently earned, the owners, having knowledge of such debts, adopt them as their own personal liabilities if the vessel is sent out upon subsequent voyages, and lose their right to limit their liability in respect to such beneficial contracts even if they were not at first personally liable therefor. Gokey v. Fort, (S. D. N. Y. 1890) 44 Fed. 966.

Coal.—The managing owner of a tug ordered coal for the use of the tug, bills for which were sent to him on the first of each month, and he made payment of the account from time to time. In an action against the owners to recover balance due, it was held that he was authorized to attend to the business of the vessel just as a ship's husband or master may be, but his acts were not the personal acts of the co-owners, and under the statute no more bound them beyond their due proportion of the indebtedness than would those of such husband or master. Warner v. Boyer, (E. D. Pa. 1896) 74 Fed. 873.

Wages.—When one of the owners becomes liable as an owner pro hac vice for wages of the master, the defense of limited liability is good as respects the other owner, but this defense under this statute does not extend to such wages, for which all are also personally liable; but as respects this liability the owner pro hac vice would be bound to indemnify the other owner. Douse v. Sargent, (S. D. N. Y. 1891) 48 Fed. 695.

Repairs.—Repairs were furnished upon the order of one of three owners, who was also the master, without the privy or knowledge of the other owners and not under any contract with them except so far as the master had implied authority to bind them as part owners for necessities. It was held that as the liability of the other two owners arose solely from their ownership of a two-thirds interest in the vessel, and not on account of their personal intervention, the liability of each was limited to one-third of the debt by virtue of this statute. Whitcomb v. Emerson, (D. C. Mass. 1892) 50 Fed. 128.


Liability of underwriters.—Underwriters to whom a vessel has been abandoned have each an interest in the property as owner to the extent of the insurance as compared with the aggregate insurance by all the underwriters, and each is liable upon that basis for all expenses, reasonable and proper, incurred after the disaster in order to save the vessel, not exceeding the value of the vessel and the freight pending; that is, within the limits of their own part. The underwriters are liable, not as partners, but each for itself, to the extent of its interest in the vessel; and the interest of each is determined by the proportion which the amount insured by it bears to the whole insurance of the vessel. Gilchrist v. Chicago Ins. Co., (C. C. A. 7th Cir. 1899) 104 Fed. 568, 44 C. C. A. 43.

Indebtedness for preceding voyages.—Vessel owners under this Act cannot avoid personal liability for indebtedness incurred on behalf of the vessel for an indefinite number of preceding voyages. The Act only covers liabilities incurred during the last voyage, allowing a reasonable time for knowledge of such liabilities within which to claim the benefit of the Act. The Puritan, (N. D. Ill. 1899) 84 Fed. 365.

R. S. sec. 4284 is supplementary to R. S. sec. 4493 (title STEAM VESSELS), is not repealed by this statute. The Annie Faxon, (C. C. A. 9th Cir. 1896) 75 Fed. 312, 44 U. S. App. 501, 21 C. C. A. 366.
LIMITATION OF VESSEL OWNERS' LIABILITY

An Act Relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.


[Sec. 1.] [Bills of lading—clauses relieving from liability for negligence in loading, delivery, etc., prohibited.] That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. [27 Stat. L. 445.]

This was the first section of the Act known as the "Harter Act," the "Carriers' Act," or the "Bill of Lading Act."

By section 7 of this Act, infra, p. 393, the provisions of the foregoing section 1 and section 4, infra, p. 392, were not to apply to the transportation of live animals.

Scope of section.—Foreign vessels.—The words "any vessel transporting merchandise or property from or between ports of the United States and foreign ports" include a foreign vessel transporting merchandise from a foreign port to a port of the United States. Knott v. Botany Worsted Mills, (1900) 170 U. S. 69, 21 S. Ct. 30, 45 U. S. (L. ed.) 90.

Vessels plying between domestic ports.—This section applies to any shipment "from ports of the United States," whether to a foreign or domestic port, and is broad enough to render void a clause of a bill of lading by which the shippers waive any lien upon the vessel for any breach thereof, where it is attempted to set up such clause as a defense to a libel in rem to recover for loss or damage to cargo arising from negligence of the carrier. The Tampico, (N. D. Cal. 1907) 161 Fed. 868.

Private carriers.—Under a contract between a lighterman company and a manufacturer, by which the company agreed to transport property of the manufacturer in New York harbor and vicinity, and for such purposes furnished it the full capacity of lighters or barges when such transportation was required, as between the parties the company was a private and not a public carrier, and a provision of the contract, by which in consideration of the making of a lower rate the shippers agreed to exempt the carrier from liability for loss or injury to cargoes from negligence, is not within the statute, but is valid and enforceable. The Maine, (S. D. N. Y. 1908) 161 Fed. 401.

Purpose of statute.—This statute was designed to modify the relations previously existing between vessels and their cargoes, and has no reference to relations between owners and charterers. Lake Steam Shipping Co. v. Bacon, (S. D. N. Y. 1904) 120 Fed. 819.

Liability of vessel—Proper care of cargo.—The action of the master of a vessel in permitting whale oil, which leaked from barrels, to remain in the bilges, with the object of saving it at the end of the voyage, did not pertain to the "management of the vessel," but injury to other cargo from such oil arose from "failure in proper care of the cargo." The Persians, (C. C. A. 2d Cir. 1911) 185 Fed. 396, 107 C. C. A. 416, reversing (S. D. N. Y. 1907) 150 Fed. 1019.

Negligence in stowage.—Bales of wool were taken on board a vessel and stowed on end with proper dunnage between decks, near the bow and forward of a temporary wooden bulkhead which was not tight. Sugar was stowed with proper dunnage between decks, aft of the wooden bulkhead. At that time the vessel was trimmed by the stern, and all drainage from the sugar flowing aft was carried off by the scuppers, which were sufficient for the purpose when the vessel was down by the stern or on even keel in calm weather. There was no provision for carrying off the drainage in case it ran forward. The vessel discharged her cargo at an intermediate port; when she left that port she was two feet down by the head. She continued in this trim until she took on additional cargo at the next port, where the error in trim was corrected, and she left that port loaded one foot by the stern. The wool was damaged by sugar drainage finding its way through a bulkhead and reaching the wool at the first intermediate port or between there
and the next, and not afterwards. After the vessel was again trimmed by the stern at the second port none of the drainage from the sugar found its way forward. It was held that the damage in question arose from negligence in loading or stowage of the cargo, and not from fault or error in the navigation or equipment of the ship. Knott v. Botany Worsted Mills (1900) 179 U. S. 69, 21 S. Ct. 30, 45 U. S. (L. ed.) 90.

Where stevedores, in loading a cargo of licorice root under the direction and control of the master, broke open a large number of the bales and stowed the root in unusual places, where it received injury, it was held that a notation, placed on the bill of lading at the insistence of the master, stating that the ship was not responsible for broken or cut bales, was void as the insertion in the bill of lading of a clause relieving the ship from liability for damages "arising from negligence, fault, or failure in proper loading stowage," within the meaning of the Act, Bethel v. Mellor, etc., Co., (E. D. Pa. 1904) 131 Fed. 129.

Where, during the unloading of a barge in the usual manner, which caused an uneven keel for a few hours, she sprang a leak, and the remaining cargo was damaged by water, it was held that such damage was not caused by fault or error in the management of the vessel, but from negligence, fault, or failure in proper loading for which the vessel is liable. Donaldson v. J. W. Perry Co., (C. C. A. 4th Cir. 1905) 138 Fed. 643, 71 C. C. A. 93.

During the voyage of a steamship across the Atlantic burlap bags containing walnuts, stowed with other cargo in the hold, which was without partitions, were torn, apparently by wooden cases containing other cargo which were thrown around by the pitching of the vessel, and the walnuts were lost or damaged. The voyage was rough, but not rougher than should reasonably have been anticipated at the season. It was held that the loss was not due to perils of the sea, within the exceptions in the bills of lading, but to negligent stowage, for which the vessel was liable; due care requiring that the bags should have been kept separate from the other cargo which was likely to injure them. The Trignac. (E. D. N. Y. 1909) 169 Fed. 682.

A steamedhip was held liable for damage to a cargo of olives shipped in casks, on the ground of negligent stowage, on evidence showing that cargo of such weight was stowed on top of the casks as to flatten the staves of same, causing the brine to leak out, and consequent damage to the olives. The Sovo Maru, (C. C. A. 9th Cir. 1910) 178 Fed. 921, 102 C. C. A. 428.

The mere fact that a large quantity of coconut oil had leaked from the casks during the voyage does not show improper stowage. The Oceana, (E. D. N. Y. 1909) 171 Fed. 172; The Neidenfels, (S. D. N. Y. 1909) 174 Fed. 293.

Where bottled mineral water was stored near bone meal which got hot and damaged the water it was held that the ship was liable under the Harter Act notwithstanding limitations of liability in the bill of lading, as the master was negligent. The Skipton Castle, (N. D. Cal. 1915) 223 Fed. 589.

Cargo stowed without dunnage.—A vessel is liable for damage to a cargo of coffee resulting from its having been by the master's orders stowed on the bottom of a hold without dunnage, and from a leaky water tank. Downgate Steamship Co. v. Arbuckle, (S. D. N. Y. 1907) 168 Fed. 172.

It is the duty of the owners to make due provisions to protect cargo from inundation resulting from such heavy weather as the vessel might reasonably be expected to experience, and they are liable for injury to cargo where it appears that sufficient dunnage was not laid to protect it from leakage through a leaky chain locker against which the sugar was stowed. The Palmas, (C. C. A. 1st Cir. 1901) 108 Fed. 87, 47 C. C. A. 230.

Employment of charterer's stevedores.—A provision of a charter-party that the master shall employ the charterer's stevedores at ports of loading, and discharge and pay them stated compensation, "the stevedores to be wholly under the direction and control of the master," does not affect the liability of the ship or owners for improper stowage. Bethel v. Mellor, etc., Co., (E. D. Pa. 1904) 131 Fed. 129.

A ship is responsible for proper stowage of her cargo, although the charter-party gave a representative of the charterer the right to select the stevedores for loading, which fact did not deprive the master of his authority to control the manner of stowage, nor affect the warranty of seaworthiness, which includes proper stowage. Knorr v. Pacific Crocking Co., (W. D. Wash. 1910) 181 Fed. 856.

Negligent failure to deliver because of improper stowage.—By this section the carrier shall not be relieved from liability from loss or damage arising from negligence in the proper stowage or proper delivery of the goods, and the owner of the vessel is liable for negligence in so stowing the goods that their delivery at an intermediate port is overlooked, resulting in their subsequent loss. Calderon v. Atlass Steamship Co., (1908) 170 U. S. 272, 18 S. Ct. 588, 42 U. S. (L. ed.) 1093.

When improper loading primary cause of damage.—The owner of a vessel cannot claim "due diligence" to have been used to make the ship seaworthy, under section three of this Act, where there was negligence of his employees before the vessel left.
port. The cargo should be so stowed that the vessel on leaving port is in a fit condition to encounter the ordinary sea perils likely to be met at that season of the year, and where unfitness arises from improper loading and inattention to the position of the heavy-weight cargo the driver must be considered the primary cause of all that may follow, and the owner is not relieved from liability even if the immediate cause of the damage was some indiscretion or negligent act in the "management of the ship" in an attempt to cure the list caused by such improper loading. The Oneida, (S. D. N. Y. 1901) 108 Fed. 886.

Grounding of vessel while loading.—A provision of a contract for the carriage of a cargo of flour on a barge by which the shipper assumed the risks of carriage did not relieve the barge owner from liability for a loss of flour by reason of its negligence or that of its agent in failing to properly care for the barge while being loaded. Stockton Milling Co. v. California Nav., etc., (N. D. Cal. 1908) 165 Fed. 355.

Hasty and inconsiderate unloading.—Damage to cargo from the sinking of a ship after arriving in port, due to hurried and imprudent unloading, which brought the center of gravity of the ship too high for safety, does not result from "faults or errors in navigation or in the management of said vessel," but arises from "negligence, fault, or failure in proper loading, storage, custody, care, or proper delivery" of merchandise. The Germanic, (1905) 106 U. S. 589, 25 S. Ct. 317, 49 U. S. (L. ed.) 610, affirming (C. C. A. 2d Cir. 1903) 124 Fed. 1, 59 C. C. A. 521, which modified (S. D. N. Y. 1901) 107 Fed. 294.

Failure to ventilate cargo.—Failure to properly ventilate a ship, with the result that the cargo is injured by dampness, is "negligence, fault, or failure in proper care of . . . merchandise or property committed" to the owner or master of the ship within the meaning of those words as used in this section, and is not a fault or error "in navigation or in the management of the ship" within section 3 of the Act, infra, p. 377. The Jean Bart, (D. C. Cal. 1911) 197 Fed. 1002.

Jettison of cargo made necessary by the unseaworthy condition of the ship, consequent entirely upon the mode of loading, stowing, and ballasting, falls under the provisions of this section. The Whittleburn, (S. D. N. Y. 1898) 89 Fed. 528.

Validity of exemptions.—Prior to this Act it was established that a common carrier by sea could not by any agreement in the bill of lading exempt himself from responsibility to the owner of the cargo for damages arising from the negligence of the master or crew of the vessel. But the responsibilities of the carrier, with respect to vessels transporting merchandise from or between ports of the United States and foreign ports, were substantially modified by this Act. The Jason, (1912) 225 U. S. 32, 32 S. Ct. 560, 56 U. S. (L. ed.) 969.

Construction of exemption.—Exemptions contained in bills of lading are never construed to cover the negligence or default of the carrier unless that is expressly stipulated for. The Toronto, (C. C. A. 2d Cir. 1909) 174 Fed. 632, 98 C. C. A. 356, affirming (S. D. N. Y. 1908) 168 Fed. 356.

Negligence of owner or servants.—Bills of lading cannot consistently, either with section 1 of the Harter Act or with public policy or general principles of maritime law stipulate for exemption from liability for losses resulting from the negligence of the owner or its servants. Gilchrist Transp. Co. v. Boston Ins. Co., (C. C. A. 8th Cir. 1915) 223 Fed. 716, 139 C. C. A. 246.

Where the owner's negligence has made the danger operative, the exception of "dangers of the sea" or "sea perils" in a bill of lading will not avail the owner, because he remains liable for that negligence as the efficient cause, or causa causans, producing the loss. The Manitoba, (S. D. N. Y. 1900) 104 Fed. 153.


Loss by theft.—General exemptions of loss of goods while at the quay, and as to loss by theft, are valid, but should be construed as restricted to cases where the carrier is not at fault for negligence or failure of due care. In an action for loss of goods on such a stipulation the jury should be instructed that the owner is entitled to the benefit of these exemptions unless upon the facts in evidence the jury should find that the negligence of the owner or agents contributed to or facilitated the theft. Steamship Co. v. Kelley, (C. C. A. 1st Cir. 1902) 115 Fed. 678, 53 C. C. A. 310.

Similarly, in The Ghaeez, (C. C. A. 2d Cir. 1909) 172 Fed. 368, 97 C. C. A. 66, it was held that an exemption in a bill of lading of liability for loss of cargo by theft did not relieve the vessel, where there was negligence on her part which contributed to or facilitated the theft. See also The Seneca, (S. D. N. Y. 1908) 163 Fed. 591.

Deviation.—The clause in a bill of lading—"with liberty to sail with or without pilots, to make deviation, and to call at any intermediate port or ports for any purpose"—only authorizes such departures from the voyage as are reasonable, necessary, and contemplated, and liberates may recover for damages arising from delay in delivery, by unreasonable deterioration in the beef and loss of market, where the delay was by reason of unreasonable, unnecessary, and arbitrary deviations. If the rules of construction required the adoption of the view that the owner of the
vessel might delay the delivery of goods at his pleasure, the proviso would be void under this Act. Swift v. Furness, (D. C. Mass. 1898) 87 Fed. 345.

Shortage in weight.—A ship is relieved from liability for a shortage in weight of a shipment of vegetable fibre in bales under a bill of lading containing the clause, "Not responsible for weight, nor quality, nor for loose bales," where it shows that all the bales shipped were delivered. The La Kroms, (E. D. Pa. 1905) 138 Fed. 936.

Use of lighters.—In loading a steamer with a cargo of corn in bulk, lighters were used to bring the corn across the harbor to the steamship where she was lying at her dock. One of the lighters, after being loaded, upset when 200 or 300 feet distant from the elevator, and her load of corn was lost, from which circumstance and no unusual occurrence of any sort arising, the presumption is that there was some unseaworthiness in the vessel. If the use of lighters is part of the loading, storing, custody, and care of the cargo, an exemption relieving the carrier from liability for fault or failure is forbidden by this section, and the failure to provide a fit lighter is a fault from which the vessel cannot contract for exemption. "Since the case of Bulkley v. Naumkeag Steam Cotton Co., (1860) 24 How. 396 [16 U. S. (L. ed.) 599], it has been conceded, under circumstances such as are presented in this case, that, for the purpose of that service, the lighter is the substitute of the ship, and that the goods are in fact, therefore, delivered into the custody and care of the ship and her owners from the time that they are placed on the lighter." Insurance Co. of North America v. North German Lloyd Co., (D. C. Md. 1900) 106 Fed. 973.

There can be no exemption by stipulations in the bills of lading for loss of goods by the lighters, to which the goods had been transferred, before it reached the wharf. The Seaboard, (S. D. N. Y. 1902) 119 Fed. 375.

Stipulation limiting time for making claim.—A stipulation in a bill of lading for goods carried by ship, that all claims for damages against the steamship company or its stockholders must be presented within thirty days, applies to a libel against the ship itself, as well as to claims in personam against the owners, and such stipulation is not unreasonable as applied to a loss which was known to the consignors more than three weeks before the expiration of the stipulated time, since the enforcement of the stipulation in such a case would not work a manifest injustice. The Queen of the Pacific, (1901) 180 U. S. 49, 21 S. Ct. 278, 45 U. S. (L. ed.) 419, reversing (C. C. A. 9th Cir. 1899) 94 Fed. 180, 36 C. C. A. 135. See also The Niceto, (S. D. N. Y. 1905) 134 Fed. 655.

Limitation of value of package.—It is competent for a steamship company as a carrier of goods to limit its liability in case of loss, even as against its own negligence, by a provision in the bills of lading that it is "not accountable for any sum exceeding $100 per package for goods of whatever description, unless the value of such be herein expressed and freight as may be agreed paid therefor," where such valuation is the basis on which freight is charged and was fully known to the shipper. Hohl v. Norddeutscher Lloyd, (C. C. A. 2d Cir. 1910) 175 Fed. 544, 99 C. C. A. 168, reversing (S. D. N. Y. 1909) 160 Fed. 990.

In Hart v. Pennsylvania R. Co., (1884) 112 U. S. 331, 5 S. Ct. 151, 28 U. S. (L. ed.) 717, it was held to be competent for carriers of passengers or goods, by specific regulations brought distinctly to the notice of the passenger or the shipper to agree upon a rate of freight with the property, to contract with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier and that such contracts will be upheld in the lawful means of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives.

In Calderon v. Atlas Steamship Co., (1898) 170 U. S. 272, 18 S. Ct. 598, 42 U. S. (L. ed.) 1053, it was held that where the negligence of the company is clearly proved, a stipulation in a bill of lading that the carrier "shall not be liable for" certain goods "which are above the value of $100 per package" does not mean that the carrier shall not be liable "beyond the sum or value of $100 per package," but that the carrier shall not be liable to any amount for goods exceeding in value $100 per package, and, having that meaning, is void under this Act. This decision, however, does not qualify the conclusions expressed in Hart v. Pennsylvania R. Co., supra. In the Calderon v. Atlas Steamship Co. case, the pertinent clause in the bill of lading read: "It is also mutually agreed that the carrier shall not be liable for gold, silver, or for goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made." It was held by the District Court, (S. D. N. Y. 1894) 64 Fed. 574 and affirmed by the Circuit Court of Appeals, (C. C. A. 2d Cir. 1905) 89 Fed. 574, 35 U. S. App. 587, 16 C. C. A. 332, that this clause should be construed as requiring the carrier to pay up to the limit ($100 per package) when no value was expressed, under the rule that a document of this sort, susceptible of two constructions, when prepared by one party, should be construed in favor of the other party. The Supreme Court, however, held that the language was not susceptible of two constructions, that there was no ambiguity about it, and that it provided that, where the goods were over the value stated.
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and there was no prior declaration of value, with special agreement, the carrier should pay nothing in case of loss. Such a provision was manifestly void.

In Hart v. Pennsylvania R. Co. (1884) 112 U. S. 151, 28 U. S. (L. ed.) 717, the court discussing many authorities decides that it is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier; that the limitation as to value has no tendency to exempt from liability for negligence; that it does not induce want of care, but exacts from the carrier the measure of care due to the value agreed on and the carrier is bound to respond in that value for negligence.

Exemption authorized by foreign law.—Where a provision in the contract of carriage exempting the carrier from liability for the act, neglect, or default of its servants, is authorized by the law of a foreign country where the contract was entered into, and by which the contract is to be governed, and the stipulation is against the public policy of this country, it cannot be enforced by its courts. This is clearly so where both parties to the contract are citizens of the United States, and the place of completion of the contract is within this country. The Kensington. (1902) 183 U. S. 263, 22 S. Ct. 102, 46 U. S. (L. ed.) 190 (C. C. A. 2d Cir. 1899) 94 Fed. 885, 36 C. C. A. 533.

A provision in a contract of affreightment exempting a carrier by sea from liability for loss of or damages to cargo "occasioned by negligence, default, or error of judgment of the pilot, master, or mariners," may be enforced in a court of the United States where the contract was made in a country by whose laws such stipulation was legal and no part of it was performed in the United States, and where it related to the transportation of property on a foreign vessel on a voyage which did not include a port of the United States. The Fri, (C. C. A. 2d Cir. 1907) 154 Fed. 335, 83 C. C. A. 295, reversing (E. D. N. Y. 1905) 140 Fed. 123, certiorari denied (1908) 210 U. S. 431, 28 S. Ct. 761, 52 U. S. (L. ed.) 1135.

Evidence.—In an action to recover for damage to cargo from leakage of the vessel, evidence that directions as to the manner of loading were given the agents of the vessel by libellant, which directions were not followed, was competent. Donaldson v. J. W. Perry Co., (C. C. A. 4th Cir. 1905) 138 Fed. 643, 71 C. C. A. 93.

Burden of proof.—Where a cargo is shipped in good order, and is damaged while in the ship, the rule is that prima facie, the injury is attributable to the fault of the carrier. This casts upon the carrier the burden of showing that it was not at fault, or that the injury was the result of an excepted peril. When, however, the injury is proven to be attributable to an excepted peril, the burden shifts to the shipper to show that the fault consists in negligence or inattention to duty on part of the carrier. Clark v. Russwell, (1851) 12 How. 272, 13 U. S. (L. ed.) 955.

When the damage is brought within the exceptions of the bill of lading, the ship is exonerated, unless the libellant shows that notwithstanding such exception the ship is liable because of some negligence. The Dolbadarn Castle, (C. C. A. 9th Cir. 1915) 222 Fed. 838, 138 C. C. A. 284, affirming (N. D. Cal. 1914) 212 Fed. 565.

Where a libel for injury to goods in shipment alleges that the injury consisted of breakage, the case is prima facie within an exception in the bill of lading against liability for loss or injury from breakage, and the burden rests on the libellant to prove that the breakage occurred through the negligence of the carrier. The Henry B. Hyde, (C. C. A. 9th Cir. 1898) 90 Fed. 114, 32 C. C. A. 534.

Where the damage to a cargo of jute was caused by "heat" or "heating," and the claimant relied upon the exceptions "rain," "heat" and "decay" in the bill of lading to excuse the failure of the ship to deliver all the jute received in good condition, the burden of proof was on the shipper to show that such "heat" or "heating" was caused by the negligence of the ship. The Good Hope, (C. C. A. 2d Cir. 1912) 197 Fed. 149, 116 C. C. A. 573, overruling on this point (S. D. N. Y. 1911) 190 Fed. 597, but affirming on the ground that although the burden of proof was on the libelants, it was fully sustained. See to the same effect The Portnevue, (S. D. N. Y. 1888) 35 Fed. 670; The Patria, (C. C. A. 2d Cir. 1904) 132 Fed. 971, 66 C. C. A. 397; The Polmina, (C. C. A. 2d Cir. 1905) 163 Fed. 853, 82 C. C. A. 440; The St. Quentin, (C. C. A. 2d Cir. 1908) 162 Fed. 883, 89 C. C. A. 573; The Barlow, (C. C. A. 2d Cir. 1909) 172 Fed. 220, 97 C. C. A. 24; The Königin Luise, (C. C. A. 2d Cir. 1911) 185 Fed. 478, 107 C. C. A. 578, The Koranna, (S. D. N. Y. 1914) 214 Fed. 172; The Glenlochy, (D. C. Ore. 1915) 226 Fed. 971.

There would appear to be nothing in the opinion of the Supreme Court, in answer to the questions certified in The Polmina, (1909) 212 U. S. 354, 29 S. Ct. 363, 53 U. S. (L. ed.) 546, 15 Ann. Cas. 748, which qualifies the foregoing decisions. In that case there was a disputed question of fact as to whether the damage was caused by salt water or by fresh water. When the facts came to be certified to the Supreme Court, the finding of the majority of the court below that it was caused by sea water was included and the Supreme Court held that an exception of "perils of the sea" could not avail a vessel which delivered its cargo damaged by sea water without any-
thing to indicate in any way how the sea water reached it. In other words, when goods received in good order on board a vessel under a contract to deliver them at the termination of the voyage in like good order and condition, are damaged on the voyage, the burden of proof is on the carrier to show that the damage was occasioned by a peril for which it is not responsible, and that merely proving that the damage was done by sea water does not establish that the damage was caused by a peril of the sea, within the exception of the bill of lading, and that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the sea water and the exception against said peril. See also The Citta Di Palermo, (E. D. N. Y. 1914) 226 Fed. 522, affirmed (C. C. A. 2d Cir. 1915) 226 Fed. 529, 141 C. C. A. 285, wherein it was held that proof of the fact alone that the vessel encountered very heavy weather during the voyage was not sufficient to support a finding that the damage was due to perils of the sea.

Sec. 2. [Covenants avoiding exercise of due diligence in equipping, etc., vessels prohibited.] That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants, to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. [27 Stat. L. 445.]

Purpose of section.—Section 3, infra, p. 377, must be read with this section to effectuate the purpose of the Act, and shows the intention upon the part of Congress to relax in certain respects the harshness of the previous rules of obligation upon shippers, providing the owner was using due diligence to make the vessel seaworthy in all respects, in which event neither the vessel nor the owner shall be liable, among other things, for faults in management, or for loss through inherent defect, quality, or vice of the thing carried. The Southwark, (1903) 191 U. S. 1, 24 S. Ct. 1, 48 U. S. (L. ed.) 65.

This section is the complement of section 3, which excuses the shipowner if he has exercised due diligence to make the vessel "in all respects seaworthy and properly manned, equipped, and supplied." The two sections are to be read together, both being intended to enforce the same rule of diligence in respect to the same subject matter. The Prussia, (C. C. A. 2d Cir. 1899) 93 Fed. 837, 32 C. C. A. 625.

Before the passage of this Act it was the settled law of this court that, in the absence of special contract, there was a warranty upon the part of the shipowner that the ship was seaworthy at the beginning of her voyage. The warranty was absolute and did not depend upon the knowledge or the diligence of his efforts to provide a seaworthy vessel. The Southwark, (1903) 191 U. S. 1, 24 S. Ct. 1, 48 U. S. (L. ed.) 65.

Application to passengers and baggage. — In The Kensington, (C. C. A. 2d Cir. 1899) 94 Fed. 885, 36 C. C. A. 533, the court said that the provisions of the second section of this Act as to bills of lading and shipping documents do not apply to passenger tickets. The Kensington, (1902) 183 U. S. 263, 22 S. Ct. 102, 46 U. S. (L. ed.) 190, in reversing the decree and remanding the case upon other grounds, said, "whether or not the Harter Act concerns the carriage of passengers and their baggage, it becomes unnecessary to invoke any opinion as to whether the provisions of the Act in question apply to such contracts."

A notice or memorandum printed on the back of a steamship ticket purporting to limit the liability of the carrier for loss of baggage, not referred to in the body of the ticket nor called to the attention of the purchaser, is simply a notice, and forms no part of the contract. La Bourgogne, (C. C. A. 2d Cir. 1906) 144 Fed. 781, 75 C. C. A. 647, affirmed (1908) 210 U. S. 95, 28 S. Ct. 664, 52 U. S. (L. ed.) 973.

Application to charter-party.—The provision of this section relates to contracts between carrier and shipper, and does not apply to a charter-party by which a ship is demised. Golcar Steamship Co. v. Tweedle Trading Co., (S. D. N. Y. 1906) 146 Fed. 563.

General duty to furnish seaworthy ship. —The provisions of this section do not deal with the general duty of the owner to furnish a seaworthy ship, but solely with his power to exempt himself from doing so by contract when the particular conditions exacted by the statute obtain. "Because
the owner may, when he has used due diligence to furnish a seaworthy ship, contract against the obligation of seaworthiness, it does not at all follow that when he has made no contract to so exempt himself he nevertheless is relieved from furnishing a seaworthy ship, and is subjected only to the duty of using due diligence. To make it unlawful to insert in a contract a provision exempting from seaworthiness where due diligence has not been used, cannot by any sound rule of construction be treated as implying that where due diligence has been used, and there is no contract exempting the owner, his obligation to furnish a seaworthy vessel has ceased to exist." The Carib Prince, (1898) 170 U. S. 655, 18 S. Ct. 753, 42 U. S. (L. ed.) 1181.

Due diligence.—The fact of a vessel having obtained the surveyor's certificate is not evidence of due diligence of having made the vessel seaworthy. The Abbazia, (S. D. N. Y. 1901) 127 Fed. 498.

This section recognizes the obligation to use due diligence to provide a seaworthy vessel and carefully to handle, stow, care for, and deliver the cargo, and makes it unlawful to insert a clause in the bill of lading whereby these obligations are avoided or weakened. The Germanic, (C. C. A. 2d Cir. 1903) 124 Fed. 1, 59 C. C. A. 581.

Where it appears that a refrigerating apparatus had been constructed by builders of requisite capacity, and after it had become a part of the equipment of the steamship had been tested by competent experts in the most thorough manner and found to be perfect, and was new and had not been used long enough to impair its efficiency, a libelant cannot recover upon the theory that the owners of the vessel were negligent in providing defective refrigerating apparatus for the purposes of transportation. The Prussia, (C. C. A. 2d Cir. 1890) 93 Fed. 837, 35 C. C. A. 625.

Latent defects.—A bill of lading containing a clause especially addressed to restricting the liability of the carrier in respect of the transportation of dressed meat, by which the parties agreed that the carrier should not be responsible for any loss or damage to it arising from defects or insufficiencies in any part of the refrigerating apparatus, whether arising before or after the shipment, would not extend to exempt the carrier for loss or damage caused by his own negligence, but protects him against such as arises in consequence of a latent defect in the apparatus, existing without his knowledge or negligence. The Prussia, (C. C. A. 2d Cir. 1890) 93 Fed. 837, 35 C. C. A. 625. But see The Carib Prince, (1898) 170 U. S. 655, 18 S. Ct. 753, 42 U. S. (L. ed.) 1181, under section 3, infra, this page.

Master of intemperate habits.—The owners are liable for injury to cargo resulting from collision when the evidence shows that the master employed was of such intemperate habits and so addicted to intoxication as to render him wholly unfit for his position. The Guildhall, (S. D. N. Y. 1893) 58 Fed. 796.

Leakage of sea water through valve.—A ship cannot by bill of lading exempt herself from liability for damage to cargo from sea water, as a peril of the sea, where such water entered because of the obstruction of a valve, due to the failure to exercise due diligence in the equipment of the ship at the beginning of the voyage. The Brilliant, (E. D. N. Y. 1905) 138 Fed. 743, affirmed (C. C. A. 2d Cir. 1908) 159 Fed. 1022, 66 C. C. A. 171.

Substituted delivery.—The provision in this section, inhibiting the insertion of any words whereby the obligation of the master "to carefully handle and stow the cargo and care for and properly deliver same shall in any wise be lessened, weakened or avoided" does not prohibit a provision in the bill of lading for substituted delivery in accordance with long established custom. Portuguese Prince, (S. D. N. Y. 1913) 209 Fed. 905, wherein the court said: "The ordinary form of words in a bill of lading, authorizing a substituted delivery long antedated the Harter Act and a substituted delivery, whether by contract or usage, has long been known to the law. The draftsman of the Harter Act is presumed to have known that there was more than one kind of delivery, or more than one method of making delivery. The obligation of the statute is not to deliver in any peculiar manner, or any one manner, or any special manner, but only to properly deliver."

S.C. 3. [Limitation of liability for negligent navigation, dangers of the sea, acts of God, etc.] That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the [sic] vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from
dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. [27 Stat. L. 445.]

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I. IN GENERAL

Purpose of statute.—The purpose of the Act is, according to the interpretation given to it by the Supreme Court, to enable the owner to stipulate in contravention of the implied warranty, providing he has used due diligence, proper care, and reasonable foresight to make his vessel seaworthy and fit for the voyage undertaken. The Indrapura, (D. C. Ore. 1910) 178 Fed. 591.

Construction of statute.—The trend of judicial decision has been to construe this Act strictly. The law has been stated as follows: "The greatest amount of litigation under the act has centered around the third section. This section does not release the owner from the duty of furnishing a seaworthy vessel at the beginning of the voyage or affect his liability for damages to the cargo arising from unseaworthiness, but only exempts him from liability for damage arising from the risks therein designated when due diligence has been used to make the vessel seaworthy." Benner Line v. Pendleton, (C. C. A. 2d Cir. 1914) 217 Fed. 497, 133 C. C. A. 349.

This statute should be construed strictly so as not to extend the carrier’s exemption from liability in doubtful and uncertain cases. The Germania, (C. C. A. 2d Cir. 1903) 124 Fed. 1, 59 C. C. A. 521.

In determining the effect of this statute in restricting the operation of general and well-settled principles, the proper course is to treat these principles as still existing and to limit the relief from their operation afforded by the statute to that called for by the language itself. The Irrawaddy, (1898) 171 U. S. 187, 18 S. Ct. 831, 43 U. S. (L. ed.) 130.


Stipulations in a bill of lading exempting the vessel from liability for loss or injury to cargo are to be construed as operating prospectively, and not as relieving her from liability for unseaworthiness at the beginning of the voyage, unless so expressed in clear and explicit language. The Indrapura, (D. C. Ore. 1910) 178 Fed. 591.

Effect of section as imposing new liability.—Where the evidence showed that a ship founded not because of any fault in navigation or from damage caused by the sea, but solely because of the fact that she was not seaworthy, this Act was held to have no application, the court declaring that this Act does not undertake to impose any new liability on vessel owners for sending an unseaworthy ship to sea, that liability being governed by the general rules of the maritime law. Benner Line v. Pendleton, (S. D. N. Y. 1913) 210 Fed. 47.

Scope of section —Causes for exemption.—The causes for exemption are five: 1. Fault in the navigation of the vessel; 2. Fault in the management; 3. Error in her navigation; 4. Error in her management; 5. "Danger of the seas or other navigable waters." The Manitoba, (S. D. N. Y. 1900) 104 Fed. 145.


Transportation between domestic ports.—This section governs the transportation contracts of domestic vessels between domestic ports, notwithstanding that sections 1, 2, and 4 refer solely to shipping between ports of the United States and foreign ports. The E. A. Shores, Jr., (E. D. Wis. 1898) 73 Fed. 342. See also The Nettie Quill, (S. D. Ala. 1903) 124 Fed. 667.

Vessels engaged in commerce on the Bay of San Francisco and between different ports on said bay are included in this section. The language of the statute
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cannot be construed otherwise than as meaning that the section shall apply to all vessels transporting merchandise to and from any port of the United States situated upon any navigable waters, inland or otherwise, over which the federal government has jurisdiction. In re Piper Aden Goodall Co., (N. D. Cal. 1898) 86 Fed. 670.

Contracts with charterers.— This statute does not interfere with the liberty of contract in regard to the proper fitting of the vessel for the voyage, or with any contract parties may make as respects the responsibility for the sufficiency of special fittings, or as regards other matters not within the prohibition of the Act. Hine v. New York, etc., Co., (S. D. N. Y. 1895) 88 Fed. 920. See also The George Dumnis, (E. D. N. Y. 1898) 88 Fed. 537.


Application to passengers.— Injuries to passengers, and claims for loss or damage to their personal baggage not shipped as merchandise and not paying freight, are not within the exceptions of the first clause of this section. The Rosedale, (S. D. N. Y. 1898) 88 Fed. 324, affirmed (C. C. A. 2d Cir. 1899) 92 Fed. 1021. 35 C. C. A. 167. See also The Kendusking, (1902) 183 U. S. 265, 22 S. Ct. 102. 46 U. S. (L. ed.) 190, as to the baggage of a passenger; Moses v. Hamburg American Packet Co., (S. D. N. Y. 1898) 88 Fed. 329; In re California Nav., etc., Co., (N. D. Cal. 1901) 110 Fed. 678.

Right to subject security funds.— When freight has been shipped on a vessel in all respects seaworthy and properly manned, equipped, and supplied, and such freight is lost because of a fault or error in navigation or in the management of the vessel upon which it is carried, the shipper is not entitled to look for damages to the vessel or owner, nor to any fund in court representing such vessel and freight pending. In re California Nav., etc., Co., (N. D. Cal. 1901) 110 Fed. 678.

Combination of negligent acts.— Where a disaster is due to a combination of negligent acts, liability is established by the proof of one of these acts, and the party so charged will not be exculpated by showing that other faults for which he is not responsible contributed to produce the result. The Germanic, (C. C. A. 2d Cir. 1903) 124 Fed. 1. 59 C. C. A. 521.

Owner's liability.— Where the owner's negligence has made the danger operative, the exception of "danger of the sea" or "sea perils in a bill of lading will not avail the owner, because he remains liable for that negligence as the efficient cause, or causa causans, producing the loss. The Manitoba, (S. D. N. Y. 1900) 104 Fed. 145.

Though the acts of the master in attempting to cure a list of the vessel may be regarded as the immediate cause of loss, and is an act of "management of the ship," the owner is not relieved from responsibility where it appears that the essential factor in producing the damage was the unstable and unseaworthy condition of the ship, caused by improper stowage and distribution of the cargo, rendering the vessel unstable and top-heavy. The Oneida, (S. D. N. Y. 1901) 108 Fed. 886.

Owner's liability to employees.— The liability of the ship and owners to employees as respects the sufficiency of equipment and appliances is not that of warranty as it is in regard to goods, but only for the exercise of due diligence, and the ship and carpenter cannot recover for injuries sustained by the breaking of a ladder when the ladder was apparently a firm and sound one and on examination would not disclose the defect of the rung. The Concord, (S. D. N. Y. 1893) 58 Fed. 913.

Loss of goods in loading— delivery to vessel in open sea.— Where, in loading a cargo of mahogany logs, the ship was obliged to lie three miles off shore in the open sea, the logs being delivered in rafts, which were made fast to the ship, and bills of lading then given for the same, the vessel is not liable for losses which broke away from the rafts and were lost before they were loaded, when reasonable diligence was exercised in the loading, and the loss arose either from unusual weather conditions, making a case of perils of the sea within the exceptions in the bills of lading, or because they were insufficiently secured in the rafts through the negligence of the shipper. Munson Steamship Line v. Steiger, (C. C. A. 2d Cir. 1905) 136 Fed. 772, 69 C. C. A. 492.

"Dangers of the sea."— The phrase "dangers of the sea" has a settled meaning, and cannot be held to include a danger caused by a slight swell in the harbor caused by a passing steamer. Nord-Deutscher Lloyd v. Insurance Co. of North America, (C. C. A. 4th Cir. 1901) 110 Fed. 420, 40 C. C. A. 171.

If the jettison of cargo or damage therefrom is rendered necessary by or is due to any fault or breach of contract on the part of the owner or master of the vessel, the loss must be attributed to that cause, rather than to the sea peril, although that may enter into the case. Corses v. J. D. Spreekela, etc., Co., (C. C. A. 9th Cir. 1905) 141 Fed. 260, 72 C. C. A. 378.

Damage to cargo caused by sea water which entered through a hatch during a voyage across the Atlantic by a new steamer held not due to the unseaworthiness of the vessel, any defect in the hatch covers, but to perils of the sea, for which the vessel and owners were not lia-
"Inherent defect, quality, or vice of thing carried."—A canal boat brought a cargo of hay from Quebec to New York, where it arrived in good condition. It was loaded by the consignor, and was to be unloaded by the tenants, who had become owners of the bills of lading. On arriving in New York the boat and cargo were seized by tenants under process from the state court in a suit against the consignor, and held on demurrage for some thirty days, when the suit was dismissed, and the cargo was unloaded. During such time the hay was piled up, and the hay and the hold became musty. The vessel was seaworthy, having no more leakage than was usual in that class of boats, and it was held that the injury arose from an "inherent defect, quality, or vice of the thing carried." The M. C. Currie, (S. D. N. Y. 1904) 132 Fed. 125.

Damage to a cargo of sugar shipped in bage from a Cuban port to New York held to have been due to the sweating of the cargo and ship, for which the vessel was not liable, and not to any lack of care in stowing. The Nicoet, (S. D. N. Y. 1905) 134 Fed. 655.

Adverse through leakage of wood oil shipped from China to New York in ordinary barrels held not to have been due to improper stowage but to the insufficiency of the packages, for which the carrier was not liable under the terms of the bill of lading, it being shown that such oil has a tendency to shrink the barrel and cause leakage unless they are specially prepared. The Claverburn, (S. D. N. Y. 1906) 147 Fed. 850.

Collision.—Liability of the vessel to other vessels with which it may come in contact was not intended to be affected by the statute. The whole object of the Act was to modify the relations previously existing between the vessel and her cargo. The Delaware, (1896) 161 U. S. 459, 16 S. Ct. 516, 40 U. S. (L. ed.) 771. See also The Viola, (S. D. N. Y. 1893) 59 Fed. 632; The Berkshire, (D. C. R. I. 1893) 59 Fed. 1007; The Viola, (S. D. N. Y. 1894) 60 Fed. 206.

This Act concerns only the relations between the vessel and her cargo and has no relation to actions for death caused by collision with another boat. Monongahela Consol. Coal, etc., Co. v. Hurst, (C. C. A. 8th Cir. 1912) 200 Fed. 711, 119 C. C. A. 127.

In a case of collision by mutual fault, resulting in the total loss of one vessel and her cargo, the provision of the statute which exempts the owner of a seaworthy vessel from responsibility for loss of or damage to cargo occurring through faults or errors of navigation or management, does not prevent the other vessel, which alone is sued by the cargo owners for the
full amount of their loss, from recouping one-half the amount awarded from the half damages awarded to the owners of the lost vessel. The Chattoochee, (1890) 173 U. S. 540, 19 S. Ct. 491, 43 U. S. (L. ed.) 801, affirming (C. C. A. 1st Cir. 1896) 74 Fed. 899, 33 U. S. App. 510, 21 C. C. A. 162.

This statute is not to be construed as affecting the operation of the equitable rule which postpones the claims of exempts whose fault contributed to the common loss as against the claims of innocent cargo owners. The George W. Roby, (C. C. A. 6th Cir. 1901) 111 Fed. 601, 49 C. C. A. 481.

Personal injuries.—The liability of a ship for personal injuries to passengers and crew for deviation is not within the provision of the Act. The Hamilton, (1907) 207 U. S. 398, 28 S. Ct. 133, 52 U. S. (L. ed.) 284.

This statute is limited to the regulation of the Hability of the vessel, her owners, and master to the shipper, and has no application to torts committed against other persons or their property. Homer Ramsdell Transp. Co. v. Compagnie Generale Transatlantique, (S. D. N. Y. 1894) 63 Fed. 845.

Injuries to passengers, and claims for loss or damage to their personal baggage not shipped as merchandise and not paying freight are not within the application of the first clause of the third section of this Act. The Rosedale, (S. D. N. Y. 1898) 88 Fed. 324, affirmed (C. C. A. 2d Cir. 1899) 92 Fed. 1021, 35 C. C. A. 167.

Liability for deviation.—Deviation is a term of art, belonging in the main to the law of marine insurance and to be interpreted by that law; but the rule as to deviation is applicable to a shipper as well as to an insurer, and any deviation from the course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding from one port to another, and properly attended by no subsequent loss of or injury to either ship or cargo on the shipowner, without any reference to the question whether it had any bearing on the particular loss complained of. The Citta Di Messina, (S. D. N. Y. 1909) 109 Fed. 472.

Liability in respect to the cargo is protected under this statute even if the bill of lading contained no stipulation allowing such deviation for salvage purposes. The Chinese Prince, (E. D. S. C. 1894) 61 Fed. 697. See also The Wells City, (C. C. A. 2d Cir. 1894) 61 Fed. 587, 26 U. S. App. 74, 16 C. C. A. 123, as to clause in bill of lading giving the vessel liberty “to tow and assist vessels in all situations.” Since the enactment of this statute the vessel is authorized to deviate for the purpose of salvage without incurring any responsibility to cargo for so doing, so that less consideration than formerly is now to be given to the value of the cargo of the salvaging vessel. The Florence, (S. D. N. Y. 1895) 65 Fed. 245, 17 C. C. A. 172.

Every vessel transporting merchandise and passengers has the right to deviate in its course so far as may be necessary to save life and property, but as soon as this duty is performed her right of deviation ceases, and it becomes her duty to pursue her regular voyage and fulfill her contracts by carrying her cargo and her passengers to their port of destination. In re Meyer, (N. D. Cal. 1896) 74 Fed. 881.

Delay of a vessel, even on the route prescribed by a policy or bill of lading, may amount to deviation. The Citta Di Messina, (S. D. N. Y. 1909) 109 Fed. 472.

Negligence in towing.—This Act has no application to neglect in towing when tug and tow belong to distinct owners, having with each other only the relations arising under an ordinary contract for safe towing. The Murrell, (D. C. Mass. 1911) 206 Fed. 626, affirmed, Baltimore & Barges Co. v. Eastern Coal Co., (C. C. A. 1st Cir. 1912) 195 Fed. 483, 115 C. C. A. 393.

Salvage.—The value of the cargo at risk is not an element in determining what perils a salvaging vessel is obliged to encounter. The Erenza, (E. D. Pa. 1903) 124 Fed. 659.

Reduction in freight.—Where a cargo owner is allowed as damages against the vessel for loss of cargo its full value at the port of delivery, he is not entitled to a reduction in freight on account of the loss. Carolina Portland Cement Co. v. Anderson, (C. C. A. 5th Cir. 1911) 186 Fed. 146, 109 C. C. A. 257.

General average.—If a vessel, seaworthy at the beginning of the voyage, was afterwards stranded by the negligence of her master, the shipowner, who has exercised due diligence to make his vessel in all respects seaworthy, properly equipped, and supplied, has no right to general average contribution for sacrifices made and suffered by him subsequent to the stranding, in successful efforts to save the vessel, freight, and cargo. The Irrawaddy, (1898) 171 U. S. 187, 18 S. Ct. 831, 43 L. S. (L. ed.) 130.

This section is not to be construed so broadly as to entitle a vessel owner to collect a general average contribution from the cargo owners on account of expenditures incurred for the salvage of vessel and cargo after stranding through faults and negligence in navigation, and a provision in the bills of lading giving it such right is invalid. The Jason, (C. C. A. 2d Cir. 1910) 178 Fed. 414, 101 C. C. A. 628, affirmed (S. D. N. Y. 1908) 162 Fed. 56.

"While the shipowner, freed from liability by the statute, may not invoke an action for general average adjustment to
obtain payment of his own losses, the cargo owner may do so; but as the statutes prevent his recovering any damages based upon the shipowner’s alleged negligence, the cargo owner may not, in the adjustment, invoke the doctrine of contributory negligence, and derive any benefit from such alleged negligence. In such case the usual rule of reciprocity of right and obligation exists, and the adjustment should be made as if there was no negligence in the case, there being none in fact on the part of the owners.” The Strathdrom, (E. D. N. Y. 1899) 94 Fed. 206.

Where the owner of a vessel has been recruited to the provisions of the Act by exercising due diligence to make his vessel seaworthy and properly manned, equipped, and supplied, although she was stranded through a fault in navigation, he is entitled to have expenditures made by him for salvage of the vessel and cargo taken into a general average adjustment in a suit brought by cargo owners to enforce a general average contribution from the vessel on account of cargo jettisoned in his protection against liability, although not entitled to an affirmative decree for the recovery of any balance due him on such adjustment. The Jason, (C. C. A. 2d Cir. 1910) 178 Fed. 414, 101 C. C. A. 628, affirming (S. D. N. Y. 1908) 102 Fed. 56. The cargo owner cannot, under the guise of an action for contribution in general average, recover, upon the basis of the shipowner’s constructive negligence, the portion of the damages which, upon the same alleged grounds, he could not recover in a direct action. The Strathdrom, (E. D. N. Y. 1899) 94 Fed. 206.

The rule that the owner is exempted from liability for a negligent stranding and may recover in general average for his own indemnity has no application where the owners have failed to supply the master with proper charts for the voyage, or where by particular instruction they have contributed to the imprudent navigation that resulted to the disaster. In such cases the owners themselves are in fault, and under the general rule are therefore precluded from having a general average charge for their own indemnity. Trinidad Shipping, etc., Co. v. Frame, (S. D. N. Y. 1908) 98 Fed. 528.

Although the Act relieves a shipowner from liability for the negligence of his servants in the navigation and management of the vessel, it does not, either expressly or by implication, render valid a contract which entitles him to share in a general average made necessary by such negligence, and a stipulation therefor in a bill of lading is void. New York, etc., Mail Steamship Co. v. Ansonia Clock Co., (S. D. N. Y. 1905) 139 Fed. 894.

Sacrifice of cargo subsequent to stranding.—In The Jason, (1912) 223 U. S. 32, 32 U. S. Ct. 560, 56 U. S. (L. ed.) 980, it was held that cargo-owners under the circumstances stated therein had a right to contribution from the shipowners for sacrifices of cargo made subsequent to the stranding of the vessel, for the common benefit and safety of ship, cargo and freight. But it was also held that they could not recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose.

Interest.—Interest at six per cent. per annum was allowed from the date of the decree of the District Court. The Manitoba, (1887) 122 U. S. 97, 7 S. Ct. 1158, 30 U. S. (L. ed.) 1095.

Costs.—In admiralty as in equity the prevailing party is generally entitled to costs; but they do not necessarily follow the decree, and are always, within the sound discretion of the court, to be allowed, withheld, or divided according to the equities of the case. The E. A. Shores, Jr., (E. D. Va. 1897) 79 Fed. 145. In a proceeding for limitation of liability, where there is an appraisal, and a stipulation for value given, the petitioner is entitled to a single docket fee, and may deduct from the fund the expenses of administration, but this may not include the cost of procuring the stipulation, nor the expense of giving the same, nor of the appraisal; each person claiming damages, and recovering the same, is entitled to a separate proctor’s fee, payable herein by the stipulators for costs, and not out of the fund. In re Excelsior Coal Co., (F. D. N. Y. 1905) 136 Fed. 271, affirmed (C. C. A. 2d Cir. 1905) 142 Fed. 724, 74 C. C. A. 56.

II. PROPERLY MANNED AND EQUIPPED

Competency of master.—Where the evidence shows that the master had been duly licensed by the United States inspector of steam vessels, it will be presumed that he was fully qualified notwithstanding it is not affirmatively shown that he was a licensed pilot, as required by R. S. sec. 4401 (title STEAM VESSELS). In re Meyer, (N. D. Cal. 1896) 74 Fed. 881.

“Crew”—An inspector’s certificate stated that the complement of the crew should be the master (and pilot), two mates, two engineers, and twelve crew. It was held that the “twelve crew” did not mean twelve sailors. In re Meyer, (N. D. Cal. 1896) 74 Fed. 881.

Chinese sailors.—In In re Pacific Mail Steamship Co., (N. D. Cal. 1898) 126 Fed. 1020, it was held that a steamship was insufficiently manned where it appeared that the crew was mostly composed of Chinese but were competent sailors and could only receive orders through a
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Chinese boatswain, and the evidence showed that there was no difficulty in communicating orders to the crew in this way. Reversed (C. C. A. 9th Cir. 1904) 130 Fed. 76, 64 C. C. A. 410, 69 L. R. A. 71, on the ground that it is the duty of the owners to provide a crew not merely competent for the ordinary duties of an uneventful voyage, but for any exigency that is likely to happen, and that calls for instant action to save the lives of passengers and crew.

Failure to maintain watch at night on vessel at pier.— Where the owner of a vessel, while in her home port, permitted all of her crew to leave for the night, except the fireman, cook, and a deck hand, and permitted them to sleep without maintaining a proper watch, and the fires to be banked so that no steam was available to work the pumps in case of an emergency, he was guilty of negligence, rendering the vessel liable for loss of cargo by the sinking of the vessel from injuries caused by an unknown person. The Valentine, (E. D. N. Y. 1904) 131 Fed. 559.

Foghorn.—The failure to provide an efficient mechanical fog horn is an omission in the proper equipment of the vessel. The Niagara, (C. C. A. 2d Cir. 1898) 84 Fed. 902, 55 U. S. App. 445, 28 C. C. A. 628.

III. DUE DILIGENCE

In general.—The law permits the owner to relieve himself from the rigidity of the warranty of seaworthiness, but offers nothing which lessens his obligation to exercise due diligence in all respects at the inception of the voyage. The obligation of due diligence to make the ship seaworthy is in all respects the same as before the statute, which does not establish any new rule of diligence but provides that if he furnishes seaworthy ships he is then to be relieved of responsibility for errors and faults of management when the ships are at sea and beyond the eye and control of their owner. Nord-Deutscher Lloyd v. Insurance Co. of North America, (C. C. A. 4th Cir. 1901) 110 Fed. 420, 49 C. C. A. 1. See also Grubman v. The Ontario, (C. C. A. 2d Cir. 1902) 115 Fed. 769, 53 C. C. A. 199, in which case it was found that the giving way of two rivets was caused by the violent pitching and straining of the vessel during heavy weather.

The employment of men of experience and skill to overhaul the vessel, make what repairs were found to be needed, supply and equip her for the voyage, and stow the cargo, will justify a finding that the owners exercised due diligence to make the vessel seaworthy and properly manned, equipped, and supplied in the absence of evidence of neglect or mistake on the part of the owners or their employees. The John Grey, (D. C. Wash. 1900) 99 Fed. 51.

The owner cannot claim "due diligence" to have been used to make the ship seaworthy when there is negligence of his employees, whether of the deck force, the ship's force, before the vessel leaves port. The Oneida, (S. D. N. Y. 1901) 108 Fed. 886.

When the evidence shows not only the bad condition of the schooner's deck, but leaks through the deck, besides what water might have been taken in around the coamings and the waterways, there is no such evidence of due diligence on the part of the owner nor of those who represented him in the inspection and repair of the ship before sailing as to exempt the ship under the statute. The Mary L. Peters, (S. D. N. Y. 1901) 109 Fed. 919, affirmed (C. C. A. 2d Cir. 1898) 79 Fed. 998, 26 U. S. App. 784, 25 C. C. A. 681.

Negligence of agents.—Owners are chargeable with any neglect of their agents appointed to inspect vessels. The Flamborough, (S. D. N. Y. 1895) 89 Fed. 470.

Stranded vessel.—While the Hamburg relieved the owner of a stranded vessel from liability if he brings himself within the provisons of the Act, it does not relieve him, after such stranding, from the exercise of a reasonable degree of skill and diligence, under all the circumstances of the case, in preserving and caring for the shipper's goods. Baltimore, etc., R. Co. v. Hudgins, (1914) 116 Va. 27, 81 S. E. 48.

Failure to close port holes.—A shipowner does not exercise due diligence within the meaning of the Act by merely furnishing proper structure and equipment, for the diligence required is diligence to make the ship in all respects seaworthy, and that means due diligence on the part of all the owner's servants in the use of the equipment before the commencement of the voyage and until it is actually commenced. The failure to close port holes before commencing the voyage necessarily creates unseaworthiness. International Nav. Co. v. Farr, etc., Mfg. Co., (1901) 181 U. S. 218, 21 S. Ct. 501, 45 U. S. (L. ed.) 830.

Leaving the port holes open on sailing in consequence of insufficient care during loading, must be held, as between ship and shipper, to be the real, substantial, and efficient cause of the damage for which ship and owner are liable. The Manitoba, (S. D. N. Y. 1900) 104 Fed. 158.

Worn plates.—When a vessel twenty-seven years old is proven to have been so worn in her plates, and unserviceable, the inspection could not have been such as due diligence required. The Flamborough, (S. D. N. Y. 1895) 89 Fed. 470.

Surveyors' certificates as evidence of diligence.—The fact of having obtained a surveyors certificate was not of importance. The diligence required of vessels to en-
able them to claim the benefit of the statute is due diligence with respect to the vessel, not in obtaining certificates. The Abbazia, (S. D. N. Y. 1904) 127 Fed. 485. Affirmative proof of due diligence—Neither inference nor presumption can supply the place of affirmative proof of the due diligence required by this Act. But this principle does not oblige the court to insist on affirmative proof of what is admitted. The Murrell, (D. C. Mass. 1911) 200 Fed. 826.

IV. SEAWORTHY VESSEL

In general—Due diligence to make a vessel in all respects seaworthy within the meaning of this section is not required merely on the part of the owner himself, nor in respect to construction only, but it is also required on the part of those to whom the owner has, or that the oil, and in respect to inspection, maintenance, and repair, as well as construction. The Ninfà, (D. C. Ore. 1907) 156 Fed. 312.

To the same effect was the case of The R. P. Fitzgerald, (C. C. A. 6th Cir. 1914) 212 Fed. 678, 129 C. C. A. 214. In that case it appeared a cargo of grain was damaged by a leakage of oil from a tank of kerosene in a lamp room situated directly over the cargo. Holding that the owner could not be said to have exercised due diligence in making the vessel seaworthy for such a cargo as to exempt him from liability under this Act the court said: "The third section of the Harter Act is an act of grace, giving the owner exemption from acts of carelessness in management, such as improper cleaning of the oil can, if only he shows his vessel to have been seaworthy at the inception of the voyage, and of course him from liability which he otherwise would be subjected for such negligence, if, in spite of the negligence and notwithstanding the injury resulting therefrom, his vessel is seaworthy as against such acts, or he has used reasonable diligence to make it so. The owner is not responsible for internal dangers such as the negligent handling of the oil can, but he is responsible for not providing, at the beginning of the voyage, a ship adequate to meet them. The rule is not, as claimed by counsel for respondent, that the owner is not bound to anticipate that his servants in handling or keeping the oil may leak from a defective can; but his foresight must be so comprehensive as to provide at the beginning of the voyage a ship seaworthy as against the consequences of negligence, accident, or leakage, or other errors or faults in management reasonably to be anticipated. In determining whether or not the claimant discharged in full the duty which it owed to the libelant in providing a seaworthy vessel and in caring for the cargo, the measure of that duty must be considered with reference to the conditions under which it was to be performed. Conduct reasonably prudent under one set of circumstances may be grossly negligent under another. A ship may be seaworthy for one kind of a cargo and not seaworthy for another, or may be fully equipped for one voyage and wholly unfit for another. The Southwark, (1903) 191 U. S. 1, 24 S. Ct. 1, 48 U. S. (L. ed.) 65. A vessel might be fit for a voyage from Antwerp to Egermann and substantially seaworthy in equipment for a voyage from Antwerp to San Francisco; so 'due care' of a cargo of lumber would fall far short of the care required for a cargo of fresh fruit or dressed beef. The duty of the carrier is discharged only by the taking of precautions and the exercise of care, reasonably adequate for the protection of the cargo against perils which are known to exist or which by the exercise of reasonable foresight may be anticipated. Presumably the carrier's charges for transportation bear some relation both to the nature of the goods transported and the perils necessarily incident to their transportation and safe delivery." The Jean Bart, (D. C. Cal. 1911) 197 Fed. 1002.

The exemption of the owner or charterer from loss resulting "from faults or errors in navigation, or in the management of the vessel," and for certain other designated in no way implies that because the owner is thus exempted when he has been duly diligent, thereby the law has also relieved him from the duty of furnishing a seaworthy vessel. The Carib Prince, (1898) 170 U. S. 655, 18 S. Ct. 755, 42 U. S. (L. ed.) 1181.

This statute has not altered the obligation on which he, or the carrier to furnish a seaworthy ship at the inception of the voyage. The owner must show, since the passage of the Act as before, more than due diligence. He must show that the ship was in fact seaworthy. Insurance Co. of North America v. North German Lloyd Co., (D. C. Md. 1906) 106 Fed. 973.

The exemption from liability provided for in this section is not applicable to a ship unseaworthy at the inception of the voyage, although it appears that her owner exercised due diligence to make her in all respects seaworthy. The C. W. Elphicke, (C. C. A. 2d Cir. 1905) 122 Fed. 439, 69 C. C. A. 421.

Whether the vessel was seaworthy or not is to be determined by the test whether she was reasonably fit for the contemplated voyage. If she was, it matters not that she was not impregnable to the assaults of the elements. If a vessel is reasonably sufficient for the voyage, and is lost by the peril of the sea, her owner is not responsible as a carrier for the cargo lost, upon proof that a stouter ves-
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sel would have outrived the storm. In this case it was held that the fact that a rivet was not long enough, when battened down, to completely fill the counter-sink, did not, under the circumstances of the case, render the vessel unseaworthy. The Sandfield, (C. C. A. 2d Cir. 1898) 92 Fed. 663, 34 C. C. A. 612.

Cargo was damaged by sea water admitted through a manhole door of a ballast tank. The tank was filled with sea water after the voyage was begun, and through the negligence of the engineers the valve was left open for seven and a half hours, though two hours were sufficient to fill the tank, so that during several hours after the tank was filled the manhole joint was subjected to the pressure of the sea. The ship's carpenter, who made the manhole joint which gave way and caused the damage, testified that he had made a good tight joint three weeks before loading and sailing, and within that time it was tested on several occasions by filling the tank. It was held that the vessel was reasonably fit to carry the cargo, and that she would have carried it safely had not the gross carelessness of her officers permitted the infusion of sea water. American Sugar Refining Co. v. Rickinson, (C. C. A. 2d Cir. 1903) 124 Fed. 188, 59 C. C. A. 604.

Private carrier.—The obligation to furnish a seaworthy vessel is not affected by the fact that the owner is a private carrier. Braker v. F. W. Jarvis Co., (S. D. N. Y. 1908) 166 Fed. 987.

Voyage charter.—There is no difference between a time charter and a voyage charter in respect to the liability of the vessel to the charterer for unseaworthiness. The Commerical Trading Co., (C. C. A. 2d Cir. 1906) 143 Fed. 854, 74 C. C. A. 606, cecirorari de- nied (1906) 202 U. S. 622, 20 S. Ct. 767, 50 U. S. (L. ed.) 1175.

Seaworthiness defined.—The term "seaworthy," as now construed, has relation to the fitness of the vessel for the particular service and duties of the port of loading and discharge. The Oxford, (C. C. A. 9th Cir. 1906) 156 Fed. 216.

Liability for unseaworthiness.—This section, as construed by the Supreme Court, does not exempt the vessel or owner from liability for the consequences of unseaworthiness, even though due diligence was exercised to make her seaworthy. The Ninfa, (D. C. Ore. 1907) 50 Fed. 512.

Implied warranty of seaworthiness.—In every contract for the carriage of goods by sea, in the absence of agreement otherwise, there is an absolute implied warranty by the carrier that the ship is seaworthy at the time of the beginning of her voyage, and reasonably fit to encounter the ordinary perils that may be expected, and her liability for loss or injury to cargo from a breach of such warranty is not affected by the statute. The Indrapura, (D. C. Ore. 1910) 178 Fed. 591.

Losses before commencement of voyage. —The Act applies to the vessel only after the voyage has commenced, and cannot be invoked by an owner to relieve him from liability for cargo lost while the vessel was loading, through the negligence of those in charge in permitting her to settle on the bottom and list until the deck cargo fell overboard. Steamship Wellesley Co. v. Hooper, (C. C. A. 9th Cir. 1911) 185 Fed. 733, 108 C. C. A. 71.

Latent defects.—According to the doctrine of The Carib Prince, (1898) 170 U. S. 655, 18 S. Ct. 753, 42 U. S. (L. ed.) 1181 (under section 2, supra, p. 576), a stipulation in a contract of affreightment exempting the vessel from liability for loss or damage occasioned by any latent defects in the hull of the vessel, does not extend to such as were in existence at the time of the commencement of the voyage, and the provisions of this section do not relieve the vessel notwithstanding it is satisfactorily proven that due diligence was thus exercised by the owner. The Sandfield, (C. C. A. 2d Cir. 1898) 92 Fed. 663, 34 C. C. A. 612.

Where a bill of lading contains no exception of liability for loss or damage from latent defects of the ship, her machinery or appliances, the owners are not entitled to the benefit of the Harter Act. The Indrapura, (C. C. A. 9th Cir. 1911) 190 Fed. 711, 112 C. C. A. 351.

Injury due to stopping for repairs. —Injury to a cargo of oats shipped from Chicago to Buffalo, by stopping the vessel to repair a leak, is not a latent defect. The Ninfa, (C. C. A. 9th Cir. 1911) 185 Fed. 733, 108 C. C. A. 71.

Seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that the vessel must be able to transport the cargo which it is held out as fit to carry or it is not seaworthy in that respect. The furnishing of the refrigerating apparatus in good order and repair for the purpose of safely carrying perishable cargoes, such as dressed beef, is within the obligation...

Asphalt is "lawful cargo," under a charter which includes the West Indies; and it is the duty of the owner, in order to render the vessel seaworthy, to fit her for the proper carriage of such cargo by lining, where her construction is such as to require it. Dene Shipping Co. v. Tweedie Trading Co., (C. C. A. 2d Cir. 1905) 142 Fed. 864, 74 C. C. A. 606, certiorari denied (1906) 202 U. S. 622, 26 S. Ct. 767, 50 U. S. (L. ed.) 1175.

In The William Power, (E. D. N. Y. 1904) 131 Fed. 136, damage to a cargo of hay from water was held, under the evidence, to have been due to leakage, owing to the inability of the vessel to carry the cargo for which she was chartered without straining, which rendered her unseaworthy.

Manner of stowing cargo.—Construing this clause with sections 1 and 2, supra, pp. 371, 378, it seems plain that the carrier is entitled to negligence in the loading, stowing, custody, care, handling, and delivery of the cargo, and that neither the carrier nor the vessel is liable for faults or errors in the navigation or in the management of the vessel, but in order to avail himself of this exemption he must use due diligence to provide a seaworthy vessel, properly manned and equipped. The Germanic, (C. C. A. 2d Cir. 1903) 124 Fed. 1, 59 C. C. A. 521.

The requirement of seaworthiness at the beginning of a voyage includes not only seaworthiness in hull and equipment, but also in the stowage of the cargo. Corsoa v. J. D. Spreckels, etc., Co., (C. C. A. 9th Cir. 1905) 141 Fed. 260, 72 C. C. A. 378; The Medea, (C. C. A. 9th Cir. 1910) 179 Fed. 781, 103 C. C. A. 273, reversing (N. D. Cal. 1909) 173 Fed. 498.

It is important, when from her improper loading she is rendered unfit to encounter the ordinary perils of navigation which could reasonably have been anticipated on the projected voyage. Steamship Wellesley Co. v. Hooper, (C. C. A. 9th Cir. 1911) 183 Fed. 733, 108 C. C. A. 71.

A ship is responsible for the proper stowage of her cargo, although the charter-party gives the charterer the option of appointing the stevedores, to be paid by the owners, where it also provides that they shall be under the direction of the master and the owners responsible for all risks of loading and stowage. Corsoa v. J. D. Spreckels, etc., Co., (C. C. A. 9th Cir. 1905) 141 Fed. 260, 72 C. C. A. 278.

It is no excuse to the master that the charterers did the loading, insisted upon the master taking the deckload or that surveyors certified that the ship could do so safely, since it is the absolute duty of the master to see that the cargo is not stowed in such a manner as to render the vessel unseaworthy when she starts on the voyage. Allen v. U. S. Shipping Co., (C. C. A. 2d Cir. 1914) 213 Fed. 18, 129 C. C. A. 607.

It cannot be said that a vessel is in a seaworthy condition which has, at the inception of her voyage, little, if any, positive metacentric height, a list of eight or nine degrees, her cargo weight so distributed that her instability must increase as she proceeds, and the coal and water so stowed below the center of gravity as would increase the tendency to become top heavy as they were consumed. The Oneida, (C. C. A. 2d Cir. 1904) 128 Fed. 857, 63 C. C. A. 239.

Questions pertaining to the proper distribution of heavy and light cargo, or proper ballast and stowage in order to make the ship sufficiently easy and safe where the cargo is light, are not questions that devolve upon the shipper to determine, or in any way responsible for their solution. The responsibility is upon the carrier alone. When there was no such extraordinary weather or sea as might not have been reasonably anticipated, or any such weather as naturally to cause shifting and destruction of cargo in a well-loaded and ballasted ship, the primary cause of loss must be ascribed to the deficiencies in the ship's condition in that regard at the time of sailing as respects the needed loading and ballasting for the carriage of light cargo (drums of glycerine). The Frey, (S. D. N. Y. 1899) 92 Fed. 867.

There was evidence that a ship having a light cargo, four feet higher in the water than an ordinary heavy cargo, in coming around Cape Horn had for twenty days very heavy seas, and shipped considerable water, with aft gales, which caused a good deal of rolling and straining so as to start the vessel back to working, which resulted in taking in considerable water. The surveyors of the insurers of cargo inspected the vessel and she was rated in the highest class; it was held that the evidence justified the conclusion not merely that the owners used all diligence to make the ship seaworthy within the terms of the statute, but that the ship was seaworthy at the time of sailing, having reference to the cargo and the contemplated voyage. The Sintram, (S. D. N. Y. 1894) 64 Fed. 884.

"Teas and skins" were stowed in the same hold; the ventilator holes in the decks were plugged to provide for an expected storm; it was held that the method of stowage was bad. "The evidence shows that shipments have been made of skins in the same hold with tea without injury, but still the risk was the ship's, and even if the closing of the hole on account of storm, or anticipated storm, resulted in the
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...damage, the ship can find no exonerator in such fact because the negligent stowage was the proximate cause of the loss." The Holton, (S. D. N. Y. 1900) 122 Fed. 96.

Liquids and cargoes—Injury to a cargo of coffee shipped with a cargo of liquid in bulk, in a vessel which was designed to carry liquid cargoes in bulk as well as dry and perishable cargoes, cannot be charged to the unseaworthiness of the vessel, when the cause of the damage was negligence in the use of the means of safety provided by the owners. In planning a ship to carry liquids in bulk and dry cargo, valves in the offset may be relied upon to prevent the incursion of water or other liquid into the dry tanks so long as such pipe lines and valves are reasonably adapted to the double service to which the ship is designed, and a use of them is so simple, easy, and certain as to require only ordinary diligence for the protection of dry cargo. The ship cannot be held unseaworthy in construction or in stowage merely because damage may arise from inadvertent opening of the valves. The Mexican Prince, (S. D. N. Y. 1897) 82 Fed. 484, affirmed (C. C. A. 2d Cir. 1899) 91 Fed. 1003, 34 C. C. A. 168. See The Mexican Prince, (S. D. N. Y. 1895) 70 Fed. 246.

On a libel for damage to a shipment of green goatkins, evidence held to justify a finding that the injury was caused by brine leaking from citron barrels negligently stowed near the skins. Lazarus v. Barber, (C. C. A. 2d Cir. 1905) 136 Fed. 534, 68 C. C. A. 310.

As to whether battle were stowed in a proper mode, see The Tjomo, (S. D. Ala. 1902) 115 Fed. 919.

Overloading.—A barge which sank at a dock, after loading a cargo of bricks, held liable for the damage to the cargo on the ground of unseaworthiness due to overloading. The S. S. Boren, (S. D. N. Y. 1904) 132 Fed. 887.

Weakness from long use.—A barge held liable in damages for dumping a large part of her cargo of copper ore which she was discharging from a steamship, and for injury to the ship, on the ground of unseaworthiness, due to weakness from long use in the same business, which caused her to careen after she had taken on her load, although the weather was calm and the water smooth. The Willie, (S. D. N. Y. 1904) 134 Fed. 750.


A lighter was held to be seaworthy when it did not have sufficient stability to stand up while the weather was clear, the wind light, and the water smooth except from a slight swell caused by a passing steamer. Nord-Deutscher Lloyd v. Insurance Co. of North America, (C. C. A. 4th Cir. 1901) 110 Fed. 420, 49 C. C. A. 1.

Failure to inspect vessel.—Failure to prove that the suction pipe was properly inspected within a year will not deprive the shipowner of protection where it is shown that after the commencement of the voyage it was in good condition. The Inlandri, (C. C. A. 2d Cir. 1910) 177 Fed. 914, 101 C. C. A. 194.

Failure to close steam valves.—Where it appears that steam valves were not properly closed before the steamer sailed, whereby steam was admitted to the hold and the cargo was injured, it was held that the vessel was unseaworthy and that the owners were not exempt from liability. The Manitou, (S. D. N. Y. 1902) 116 Fed. 60.

Failure to protect valves in ballast tank.—Failure to protect a valve in the pipe by which water could be run into a ballast tank, also usable for cargo, so that a stick got into the valve, in consequence of which water leaked through the valve into the tank and damaged cargo stored therein, was a failure to exercise due diligence in equipment to make the ship seaworthy at the beginning of the voyage, and which rendered her liable for the damage. The Brilliant, (S. D. N. Y. 1905) 138 Fed. 743, affirmed (C. C. A. 2d Cir. 1908) 159 Fed. 1022, 86 C. C. A. 671.

Closing hatches.—A new steel steamer of the highest class was structurally perfect and seaworthy in all respects save one, and that was in covering of the hatches. The coamings were three feet in height and so constructed that it was impossible for water to stand on the hatches. The covers were made with straight edges, designed to fit tightly without calking, and two canvases of the best-known hatch covering were spread over them and securely battened down. Two days after leaving port the vessel was caught in a hurricane which disabled her steering gear, carried off everything movable, and produced a general straining and leakage of the ship, necessitating repairs costing $14,000. It was held that the vessel was seaworthy and that the damage to the cargo was due to the storm. The Hyades, (C. C. A. 2d Cir. 1903) 124 Fed. 58, 50 C. C. A. 424.
"It is manifest that a vessel, commencing her voyage with hatches so improperly or negligently covered that water in large quantities can find its way through them, is not seaworthy, especially when the voyage is undertaken at a season of the year when it is to be anticipated that the vessel will encounter heavy seas and that her decks will be constantly flooded." The C. W. Eiphicke, (C. C. A. 2d Cir. 1903) 122 Fed. 439, 56 C. C. A. 491.

Open ports.—If a ship starts on a voyage with a port negligently left open, causing damage to cargo, her owners are liable for failing to provide a ship seaworthy at the beginning of the voyage, and are not protected by this section 3, on the ground that the fault was one in navigation or the management of the vessel, although proper appliances for closing the ports were furnished; and this rule is especially applicable where the ports were so located as to be submerged when the vessel was fully loaded. The Tenedos, (S. D. N. Y. 1909) 157 Fed. 453, affirmed (C. C. A. 2d Cir. 1907) 151 Fed. 1022, 82 C. C. A. 671.

Deviation in compass.—Slight deviation in a compass was held not sufficient evidence of unseaworthiness when there were two compasses, and all the direct testimony tended to show their substantial accuracy. The E. A. Shores, Jr., (E. D. Wis. 1896) 73 Fed. 342.

Defective boilers and foul hull.—In an action to recover the value of cargo burned for fuel on account of the supply of coal having become exhausted by reason of delay in the voyage, it appeared that the detention was caused by leaks in the boilers which were old and had become generally thin and weak, and the delay was also caused by the unusually foul condition of the vessel's bottom, which was covered with grass and slime below the load line, it being held that the unseaworthiness of the vessel was the cause of the delay and that the vessel was liable for the burned cargo. The Abbazia, (S. D. N. Y. 1904) 127 Fed. 495.

Defective pipe from engine room to trimming tank.—The placing of the filling pipe extending from the engine room of a steamer to a trimming tank in the forepeak upon the floor of the intermediate hold, boxed in, and extending through the collision bulkhead, held not a faulty construction which rendered the vessel unseaworthy as to cargo carried in such hold, where the evidence showed that many contemporary vessels were so constructed and rated A1 by Lloyd's. But the omission to fit such pipe with a valve or stopcock within the forepeak, or where it passed from the hold, to prevent the flooding of the hold in case of a break in the pipe, rendered her as to such cargo, and liable for its injury from the flooding of the hold in consequence of the breaking of the pipe through some fault of construction. The Indrapura, (D. C. Ore. 1910) 176 Fed. 591.

Sudden leaks and defective pumps.—Proof that a vessel within a few hours after leaving port, and before encountering any peril of the sea, sprang a leak from defective butts in her bottom, and that, in addition, her steam pump was not in good working order, and broke down when put in use, raises a presumption that she was unseaworthy at the beginning of the voyage, which is not rebutted by evidence merely of previous diligence, and, in the absence of a stipulation therefor in the bill of lading, the owner is not exempted from liability for damage to cargo caused by such leakage. Carolina Portland Cement Co. v. Anderson, (C. C. A. 5th Cir. 1911) 186 Fed. 145, 108 C. C. A. 257.

Sudden and heavy leaks when a few days out of port, when merely rolling in a calm, are inconsistent with seaworthiness; that is, a vessel in good fitness for the voyage. The Millie R. Bohannon, (S. D. N. Y. 1894) 64 Fed. 883.

Sudden leak while loading.—Where a barge, being on uneven keel for a few hours, due to unloading in the usual manner, sprang a leak and the remaining cargo was damaged by water, such damage was not caused by fault or error in the management of the vessel, but from negligence, fault, or failure in proper loading within section 1, for which the vessel was liable. Donaldson v. J. W. Perry Co., (C. C. A. 4th Cir. 1905) 138 Fed. 646, 71 C. C. A. 93.

Defective feed pipe.—A cargo of grain carried by a steamer from a Lake Superior port to Buffalo was found on arrival to have been damaged by water escaping from a crack in the main feed pipe running through the cargo space between the boiler and engine, the damage was not unusual, and the vessel had an A1 rating, but had been built for eleven years, during which time the pipe had not been renewed, and had not been thoroughly inspected for more than a year, being covered with asbestos and inclosed in a box, which had not been removed in that time. Rough weather was encountered on the voyage, but not worse than was to be expected at the season. It was held that the evidence was not sufficient to sustain the burden of proof resting on the vessel to show that the damage resulted from a danger of navigation within the exception of the bill of lading, rather than from a defect in the pipe which rendered her unseaworthy at the beginning of the voyage. The Rappahannock, (C. C. A. 2d Cir. 1911) 184 Fed. 291, 107 C. C. A. 74, reversing (W. D. N. Y. 1906) 173 Fed. 829.

The minute or ounce sounding pipe for each dry tank for the detection of
water in the bottom cannot be held to have contributed to the injury to the cargo where it appears that the pipe line and pumps were more than equivalent and the surrounding pipes were not required either by reasonable prudence or by any existing regulations. The Proctor, (S. D. N. Y. 1897) 82 Fed. 484, affirmed (C. C. A. 2d Cir. 1899) 91 Fed. 1003, 34 C. C. A. 168.

Crack in cement lining.—When there was not sufficient evidence to show that a crack in the cement lining of an iron vessel was caused by some accident after sailing, it was held necessary for the shipowner to show such an inspection before sailing as would comply with the requirements that reasonable means or due diligence be taken or exercised. The Alvena, (C. C. A. 2d Cir. 1897) 79 Fed. 970, 51 U. S. App. 100, 25 C. C. A. 261.

Cracked beams.—The evidence showed that two beams of the main hatch had been cracked at some time previous to the voyage, and that repairs had been made and the beams strengthened by nailing slabs or planks across the cracks. The classification of the vessel had been kept up on repeated surveys and had not expired at the time the voyage was made. The evidence was held sufficient to afford presumptive evidence of seaworthiness at the time of leaving the first port and that the extraordinary weather soon after experienced, together with her subsequent voyage, was sufficient to account for the widening and increase of the cracks in the beams and for the sinking of the deck. The Guadeloupe, (S. D. N. Y. 1899) 92 Fed. 670.

Effect on appeal of findings below.—The concurrent findings of the two lower courts that a vessel was inspected at the beginning of the voyage, and found to be seaworthy and fit to carry the cargo which she had undertaken to transport, will ordinarily not be disturbed by the federal Supreme Court on appeal. The Wildcroft, (1906) 201 U. S. 878, 26 S. Ct. 467, 50 U. S. (L. ed.) 794.

V. NAVIGATION OR MANAGEMENT OF SHIP


The words “navigation” and “management” of a vessel include the control during the voyage of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroads of the seas. When portholes were furnished both with the usual glass covers and with the usual iron shutters or deadlights, and the vessel began her voyage, the weather being fair, with the iron covers left open for the purpose of lighting the compartment, it was held that if there was any neglect in not closing the iron covers of the ports for protection during rough weather it was a fault or error in navigation or in the management of the ship when no cargo was stowed against the ports so as to prevent or embarrass access to them in case change of weather should make it necessary or proper to close the iron shutters. The Silvia, (1808) 171 U. S. 462, 19 S. Ct. 7, 43 U. S. (L. ed.) 241.

In a contract of hire, if the loss arose from dangers of the river or resulted from faults or errors in the navigation or in the management of the steamboat, the steamboat and her owners were not to be responsible for the damage or loss. The Nettie Quill, (S. D. Ala. 1903) 124 Fed. 667.

When the vessel was in condition to encounter the ordinary perils of the voyage, it was sufficient to make her seaworthy, and the owners are not liable because of the loss through the mistake or carelessness of the captain in attempting to enter a bay on an ebb tide, whereby, owing to the shallow water, the vessel became stranded. In re Meyer, (N. D. Cal. 1896) 74 Fed. 851.

Exemption applicable only after voyage has commenced.—This section applies to a vessel only after the voyage has commenced, and cannot be invoked by an owner to relieve him from liability for loss of cargo through the carelessness and sinking of a vessel at the pier before she was fully loaded, due to the negligence of a watchman in failing to adjust her lines to permit her to drop with the tide. Ralli v. New York, etc., Steamship Co., (C. C. A. 2d Cir. 1907) 154 Fed. 286, 83 C. C. A. 280; Gilchrist Transp. Co. v. Boston Ins. Co., (C. C. A. 6th Cir. 1915) 223 Fed. 716, 739, 139 C. C. A. 248.

Leaving port in disregard of storm signals.—The navigation and management of a vessel includes the determination of the time and manner of leaving port, which is the prerogative of the master; and under said section, where a vessel was seaworthy and in all respects properly manned, equipped, and supplied, the owners are not liable for a loss or damage to cargo due to a peril of the seas, even though the exposure to such peril was through the fault of the master in failing to ascertain or heed the warnings of the weather bureau before starting on the voyage. Hanson v. Haywood Bros., etc., Co., (C. C. A. 7th Cir. 1907) 152 Fed. 401, 81 C. C. A. 527.

Acts for benefit of ship.—Tipping a vessel by the head while discharging cargo, for the purpose of examining her propeller, and having nothing to do with the discharge of the cargo, was an act of management of the ship. The Indrani, (C. C. A. 2d Cir. 1910) 177 Fed. 914, 101 C. C. A. 194.
Improper handling of cargo.—The condition of instability brought about by the improper handling, care, and custody of the cargo is not a fault in the management of the vessel. The Germanic, (C. C. A. 2d Cir. 1903) 124 Fed. 1, 59 C. C. A. 521.

Jettison.—Jettison of cargo made necessary by the unsavorous condition of the ship, consequent entirely upon the mode of loading, stowing, and ballasting, is not a fault in the management of the ship. The Whittleburn, (S. D. N. Y. 1898) 89 Fed. 524.

Failure of master to protect cargo.—When a vessel has encountered such severe weather as to render her decks unsavory with respect to the protection of the cargo, the failure of the master to make for a near port for the purpose of making repairs was not a fault or error in navigation or in the management of the vessel, but simply the failure of the master to proper care for the protection of the cargo in his custody. The Musselcrag, (N. D. C. 1903) 125 Fed. 736. The owner of a scow chartered by the day, with a man in charge, is liable to the charterer for loss of her cargo of stone by her careening while she lay in an exposed position at the end of a pier where she was left by a tug, through the neglect of her master to haul her into the slip, where she would have been protected, which he could have done without difficulty. Rodgers v. Bouker Contracting Co., (S. D. N. Y. 1904) 134 Fed. 702.

Allowing leaking oil to remain in bilges.—The action of the master of a vessel in permitting whale oil; which leaked from barrels, to remain in the bilges, with the object of saving it at the end of the voyage, did not pertain to the “management of the vessel.” The Persiana, (C. C. A. 2d Cir. 1911) 185 Fed. 396. 107 C. C. A. 416, reversing (S. D. N. Y. 1907) 156 Fed. 1019.

Failure to close ventilators, etc., in rough weather.—“If there was any negligence in the management of the ship on the voyage in failing to cover the ventilators, or remove them and stop the tubes in rough weather, or in failing to keep the scuppers clear, the owner is exempted from liability by the Harter Act (Act Feb. 13, 1893, ch. 105, 27 Stat. L. 445) having used due diligence to make the ship seaworthy at the outset of the voyage.” The Hudson, (S. D. N. Y. 1909) 172 Fed. 1005.

Failure to keep lookout.—When the ship has a competent crew the failure to keep a lookout is part of the management of the ship for which the owners are not responsible to shippers of cargo. The Rosedale, (S. D. N. Y. 1898) 88 Fed. 324, affirmed (C. C. A. 2d Cir. 1899) 92 Fed. 1, 35 C. C. A. 524.

Failure to close sea valve.—Damage to a cargo of molasses, through its dilution by sea water while being pumped out at the port of destination, held to have been due to a sea valve connecting with one of the pumps having been left partially open, which was a fault in the management of the vessel, it being affirmatively shown that the valve was in good condition and that it was properly closed when the cargo was loaded and at the commencement of the voyage. Sun Co. v. Healy, (C. C. A. 2d Cir. 1908) 163 Fed. 48, 89 C. C. A. 300.

Failure to use pumps.—The failure to make use of the pumps is a fault of the management of the vessel, with the result that the ship is exempted from liability by the provisions of this section. The Merida, (C. C. A. 2d Cir. 1901) 107 Fed. 146, 46 C. C. A. 203. See also The Ontario, (S. D. N. Y. 1900) 106 Fed. 324, affirmed Grubman v. The Ontario, (C. C. A. 2d Cir. 1902) 115 Fed. 769, 53 C. C. A. 139.

Taking in fresh water.—Where the cargo was injured while the ship was lying at the wharf discharging her cargo, while filling the engine-room tank with fresh water from the river for ship’s purposes, by the water finding its way into the hold because the valves were improperly left open, it was held that the damage or loss resulted from fault or error in management. The Wildcroft, (E. D. Pa. 1903) 124 Fed. 631.

Omission to open sluices during a storm is an error in the management of the vessel. The Sandfield, (C. C. A. 2d Cir. 1898) 92 Fed. 663. 34 C. C. A. 612.

Position and method of anchoring.—For negligence of a local pilot in respect to the position assigned by him to the ship at anchor, and in not ordering over both anchors, instead of one only, the owners cannot be held responsible for injury to cargo in consequence of the grounding of the vessel upon a sand bank after dragging her anchor. The Etona, (S. D. N. Y. 1894) 64 Fed. 880.

Injury to cargo while unloading.—Damage to cargo from the sinking of a ship after arriving in port, due to hurried and imprudent loading, which brought the center of gravity of the ship too high for safety, does not result from “faults or errors in navigation or in the management of said vessel.” The Germanic, (1905) 196 U. S. 589, 25 S. Ct. 317, 49 U. S. (L. ed.) 610, affirming (C. C. A. 2d Cir. 1903) 124 Fed. 1, 59 C. C. A. 521.

Injury to cargo while lying at dock during winter.—Where it was shown that the vessel was in all respects seaworthy and properly manned, equipped, and supplied when the cargo was received, it was held that any injury to the cargo after the arrival at the dock, and while the vessel was moored and dismantled for the winter, arose from fault in the manage-
LIMITATION OF VESSEL OWNERS’ LIABILITY

ment of the vessel. The Richard Win-
slow, (E. D. Wis. 1895) 67 Fed. 259.

Repauper.—The extent of repairs neces-
sary at a port of distress is a matter per-
taining to the management of the ship.
The Guadeloupe, (S. D. N. Y. 1899) 92
Fed. 670.

A ship bound from Antwerp to San
Francisco with a cargo of cement encoun-
tered such rough weather in attempting
to round Cape Horn and was subjected

to such strain that her deck seams opened
and a part of the cargo was damaged
by water. She finally abandoned the at-
tempt and completed the voyage by way
of the Cape of Good Hope and Australia.
At the time of her change of course she
was 370 miles distant from Port Stanley,
where she could have been repaired; but
she did not put in for repairs, and before
she reached Australia the cargo received
further damage by reason of the open
seams. Held, that the change of course
and also the determination of the master
to proceed without putting in for repairs
were matters pertaining to the naviga-
tion and management of the vessel, and
not to the custody, care, or proper deliv-
ery of the cargo, and that, assuming the

VII. BURDEN OF PROOF

Seaworthy vessel.—The burden of proof
is upon the carrier to show that he has
exercised due diligence to provide a vessel
seaworthy and in a fit condition to receive
and transport the cargo intended to be
transported. The Southwark, (1903) 191
U. S. 1, 24 S. Ct. 1, 48 U. S. (L. ed.) 65;
The River Meander, (S. D. N. Y. 1913)
209 Fed. 931.

The burden is upon the owner to show
that the vessel was in a fit condition to
transport the cargo. The Oneida, (C. C.
A. 2d Cir. 1904) 128 Fed. 687, 63 C. C. A.
239.

The burden of proving that a vessel was
seaworthy at the time of beginning the
voyage, or that due diligence had been
used to make her so, rests upon the ship-
owner claiming the benefit of the exempt-
ion against errors of management or
navigation, whether or not there is any
evidence to the contrary. The Wildcroft,
(1906) 201 U. S. 378, 26 S. Ct. 487, 50
U. S. (L. ed.) 794; Bradley v. Lehigh
Val. R. Co., (C. C. A. 2d Cir. 1907) 153
Fed. 350, 82 C. C. A. 426, affirming (S. D.
N. Y. 1906) 145 Fed. 569; The Ninf,la,
(D. C. Ore. 1907) 156 Fed. 512.

Where disaster overtakes a vessel at the
beginning of her voyage, without
stress of weather or other adequate cause
appearing, the presumption is that she
was seaworthy when the voyage de-
menced, and the burden rests on the
owner, to avoid liability for cargo lost
or injured, to overcome such presumption
by showing affirmatively that the ship
was seaworthy. Steamship Welsley Co.
vs. Hooper, (C. C. A. 9th Cir. 1911) 185

"The burden was clearly upon the de-
fendant to prove that it had exercised
"due diligence to make the vessel in all
respects seaworthy and properly manned,
equipped, and supplied" at the time of
the commencement of the voyage." Levy
v. Gibson Line of Steamers, (1908) 150
Ga. 581, 61 S. E. 484.

Cause of damage in general.—Where
the evidence shows that a ship received
goods on board in good condition, and de-
ivered them damaged, it has the burden
of proving that the damage was due to a
risk excepted in the bill of lading, al-
though, if it is manifestly so, as from
breakage or decay, which are excepted
generally, the ship need not show the
cause of the breakage or decay, but the
cargo owner can only recover by proof of
negligence. The Patria, (C. C. A. 2d Cir.
1904) 132 Fed. 971, 85 C. C. A. 397,
affirming (S. D. N. Y. 1903) 125 Fed.
425.

A ship has the burden of explaining the
cause of damage to cargo shown to have
been received in good condition, to relieve
itself from liability for such damage. The
935.

A decree dismissing a libel to recover
for damage to cargo affirmed where the
evidence left it uncertain whether the
damage was caused by sea water or by
sweat and heat, and the bill of lading
exempted the vessel from liability for
injury caused by perils of the sea or from
sweat or decay. The Fomina, (C. C. A.
2d Cir. 1907) 153 Fed. 364, 82 C. C. A.
440.

Loading of vessel.—The burden of proof
is upon the owner to show that diligence
was exercised in the loading of the vessel,
with due regard to the exceptional model
of the vessel and of what she could safely
bear. The Colima, (S. D. N. Y. 1897)
82 Fed. 805.

But this rule does not obtain when the
damage is brought within the exceptions
of the bill of lading. In such case the
ship is exonerated unless the libellant
show that, notwithstanding such excep-
tions, the ship is liable because of the
negligence of improper storage. The Del-
bardom Castle, (N. D. Cal. 1914) 212
Fed. 565.

"The established rule is that where
the evidence shows that the damage was
occasioned by one of the causes for
which the vessel was exempted from liabil-
in the absence of some fault, such as negli-
gent stowage, the burden is upon the libelant to show that it might have been prevented by reasonable skill and diligence on the part of those employed by the vessel. * * * Lazarus v. Barber, (C. C. A. 2d Cir. 1905) 136 Fed. 534, 69 C. C. A. 310.

Peril of navigation.—The burden of proving that a loss was caused by a peril of navigation is upon the owner of the vessel, and when it is established by clear proof, leaving no reasonable doubt for controversy, he cannot be held liable because of the alleged incompetency of the master, the incapacity of the vessel to answer her helm or the improper stowage of the cargo. Stern v. Fernandez, (C. C. A. 9th Cir. 1915) 229 Fed. 42, 137 C. C. A. 580.

The burden rests upon a lake carrier who, having agreed to deliver in good condition, "the dangers of navigation excepted," delivers cargo water-damaged, to show that the damage was caused by a danger of navigation. The Rappahannock, (C. C. A. 2d Cir. 1911) 184 Fed. 291, 107 C. C. A. 74, reefering (W. D. N. Y. 1919) 173 Fed. 829.

Damage by sea water.—A carrier by water is charged with the burden of proving that damage to a cargo from sea water was occasioned by the perils of the sea within an exception in the bill of lading against dangers and accidents of the seas. The Folmina, (1909) 212 U. S. 354, 29 S. Ct. 363, 53 U. S. (L. ed.) 546, 15 Ann. Cas. 748. On certificate from the Circuit Court of Appeals, (C. C. A. 2d Cir. 1907) 153 Fed. 364, 82 C. C. A. 440.

Damage from excepted risk.—A vessel owner who receives goods in good condition, as evidenced by the bill of lading, and delivers them damaged, has the burden of proof to establish that the damage arose from an excepted risk. The Presque Isle, (W. D. N. Y. 1905) 140 Fed. 292.

Negligence of vessel.—Whenever damages which are attributable to causes excepted in the bill of lading are sustained in the transportation of the merchandise, the burden of proof is upon the libelant to show that the loss occurred through the negligence of the carrying vessel, as she is not permitted to exempt herself from the consequences of her negligence or lack of diligence and care in the transportation of the property. The Korranna, (S. D. N. Y. 1914) 214 Fed. 172.

Competency of master.—Gross negligence of the master at a critical time raises so strong a presumption of fact that the master was not competent as to throw the burden on the defendants to establish the proposition that they used due diligence with reference to his selection. The Cygnet, (C. C. A. 1st Cir. 1903) 126 Fed. 742, 61 C. C. A. 348.

SEC. 4. [Bill of lading to be issued—contents.] That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. [37 Stat. L. 445.]

By section 7 of this Act, infra, p. 393, the provisions of the foregoing section 4 and section 1 of this Act, supra, p. 371, were not to apply to the transportation of live animals.

Passenger ticket.—A passenger ticket does not fall within the words "bill of lading or shipping document," used in this section and secs. 1 and 2, supra, pp. 371, 376. The Kensington, (1902) 183 U. S. 263, 22 S. Ct. 102, 48 U. S. (L. ed.) 190.

False bill of lading.—The provision of the statute that a bill of lading should be prima facie evidence of the receipt of the merchandise therein described adds nothing to the general rule of law previously existing, and the rule previously established in the federal courts that a false bill of lading is not binding on the owner or the ship still remains the law; but if a false bill of lading is given the person giving it is liable to a fine not exceeding $2,000, and the amount of that fine is made a lien on the vessel under section 5, infra. The Isola Di Procida, (S. D. N. Y. 1902) 124 Fed. 942.

Effect of charter party.—A master is not relieved from the duty of issuing a bill of lading by a provision in the charter party that the charterer should submit one. Hansen v. American Trading Co., (C. C. A. 1st Cir. 1913) 208 Fed. 884, 126 C. C. A. 44.
SEC. 5. [Penalty for violation — lien — recovery — proceeds.] That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States. [27 Stat. L. 446.]

Test case.—An action cannot be maintained under this section by one who was not owner of the property shipped, but was a mere figurehead or dummy in the transaction, and the action is brought for the purpose of making a test case at the instigation of an organization of lumber exporters with a view to exacting such bill of lading as the masters thought they would be entitled to under the statute. The Minnehaha, (S. D. N. Y. 1902) 114 Fed. 672.

Violation as indictable offense.—The provisions of this section make it a criminal statute; and one violating either of such provisions is subject to indictment and prosecution therefor. U. S. v. Cobb, (D. C. Md. 1906) 163 Fed. 791.

Indictment — authority to sign bill of lading in defendant's name.—An indictment for issuing a bill of lading containing provisions in violation of the Act, which avers that such bill was issued by defendant, and sets out a copy of such bill, from which it appears that defendant's name was signed thereto "per" another, need not allege that the bill of lading was so signed by defendant's authority, which is a matter of proof. U. S. v. Cobb, (D. C. Md. 1906) 163 Fed. 791.

SEC. 6. [Existing laws not repealed.] That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives. [27 Stat. L. 446.]

R. S. secs. 4281-4283 mentioned in the text are given supra, pp. 330-336.

Relation to section 3.—This section is not repugnant to section 3, supra, p. 377, because R. S. sec. 4283, supra, p. 336, does not at all define and was not intended to define the condition under which a legal claim arises against the shipowner for any damage or loss therein referred to. It only provides in effect that whenever legal claims do arise against him for loss or damage his liability shall not exceed the value of the ship and freight. To enlarge or to diminish by statute the cases in which legal claims for damage shall be held to arise is not, therefore, "to modify or repeal" R. S. sec. 4283. The Viola, (S. D. N. Y. 1893) 59 Fed. 632.

SEC. 7. [Certain sections not applicable to transportation of live animals.] Sections one and four of this act shall not apply to the transportation of live animals. [27 Stat. L. 446.]

Sections 1 and 4 of this Act mentioned in the text are given supra, pp. 371, 392.

For further provisions relating to the transportation of animals, see ANIMALS, vol. 1, p. 371.

SEC. 8. [Effect.] That this act shall take effect from and after the first day of July, eighteen hundred and ninety-three. [27 Stat. L. 446.]
LIMITATIONS
See Criminal Law; Fines, Penalties and Forfeitures; Indians; Internal Revenue.

LIVE STOCK CONTAGIOUS DISEASES ACT
See Animals

LIVE STOCK TRANSPORTATION ACT
See Animals

LOCOMOTIVE BOILER ACT
See Railroads

LODGE ACTS
Consular Reorganization, see Diplomatic and Consular Service. Philippine Organic Act, see Philippine Islands.
LOG BOOKS


CROSS-REFERENCES

Entries in Log Books Respecting Seamen, Provisions, and Offenses, see ARTICLES FOR THE GOVERNMENT OF THE NAVY; SEAMEN.

Sec. 4290. [Entries in log book.] Every vessel making voyages from a port in the United States to any foreign port, or, being of the burden of seventy-five tons or upward, from a port on the Atlantic to a port on the Pacific, or vice versa, shall have an official log-book; and every master of such vessel shall make, or cause to be made therein, entries of the following matters, that is to say:

First. Every legal conviction of any member of his crew, and the punishment inflicted.

Second. Every offense committed by any member of his crew for which it is intended to prosecute, or to enforce a forfeiture, together with such statement concerning the reading over such entry, and concerning the reply, if any, made to the charge, as is required by the provisions of section forty-five hundred and ninety-seven.

Third. Every offense for which punishment is inflicted on board, and the punishment inflicted.

Fourth. A statement of the conduct, character, and qualifications of each of his crew; or a statement that he declines to give an opinion of such particulars.

Fifth. Every case of illness or injury happening to any member of the crew, with the nature thereof, and the medical treatment.

Sixth. Every case of death happening on board, with the cause thereof.

Seventh. Every birth happening on board, with the sex of the infant, and the names of the parents.

Eighth. Every marriage taking place on board, with the names and ages of the parties.

Ninth. The name of every seaman or apprentice who ceases to be a member of the crew otherwise than by death, with the place, time, manner, and cause thereof.

Tenth. The wages due to any seaman or apprentice who dies during the voyage, and the gross amount of all deductions to be made therefrom.

Eleventh. The sale of the effects of any seaman or apprentice who dies during the voyage, including a statement of each article sold, and the sum received for it.

Twelfth. In every case of collision in which it is practicable so to do, the master shall, immediately after the occurrence, cause a statement thereof,
Sec. 4291. [Mode of making entries.] Every entry hereby required to be made in the official log-book shall be signed by the master and by the mate, or some other one of the crew, and every entry in the official log-

and of the circumstances under which the same occurred, to be entered in the official log book. Such entry shall be made in the manner prescribed in section forty-two hundred and ninety-one, and failure to make such entry shall subject the offender to the penalties prescribed by section forty-two hundred and ninety-two. [R. S.]

This section was amended to read as above by the Acts of Feb. 27, 1877, ch. 69, 19 Stat. L. 291, and Feb. 14, 1900, ch. 19, § 1, 31 Stat. L. 29. The first amendment consisted in substituting the words "ninety-seven" in the "Second" paragraph for the word "thirty" appearing in such paragraph as originally enacted. The second amendment consisted in the addition of paragraph "Twelfth." Section 2 of the latter Act provided "That this Act shall take effect sixty days after its passage."
For R. S. sec. 4597 mentioned in the "Second" paragraph of the text see SEAMEN.

Entry requisite to prosecution.—An entry in a log book of an alleged offense by a seaman, as soon as possible after the occurrence, must be made if the master intends to prosecute the seaman for its commission. U. S. r. Brown, (1876) 3 Sawyer 602, 24 Fed. Cas. No. 14,672. See R. S. sec. 4597 (title SEAMEN).

Effect of failure to enter.—From the failure to enter in the log book that the lights of the other vessel were not properly set, it should be inferred that the lights of that vessel were properly set and burning at the time of the collision. The Richmond, (E. D. Va. 1902) 114 Fed. 208. And to the same effect, see Pennell v. U. S., (D. C. Me. 1908) 162 Fed. 64, and The Etruria, (C. C. A. 2d Cir. 1906) 147 Fed. 216, 77 C. C. A. 442, wherein the court held that the absence of any entry in the log was a "suspicious circumstance." Where the entries in the log are intentionally meager, vague and perfunctory, or where leaves probably containing entries relating to transactions in litigation are removed, the legitimate inference is that if the true facts were entered in the log, they would be unfavorable to the vessel. The Sicilian Prince, (S. D. N. Y. 1904) 128 Fed. 133, affirmed (C. C. A. 2d Cir. 1905) 144 Fed. 951, 75 C. C. A. 677.

Bunge v. The Victorian, (D. C. Wash. 1898) 88 Fed. 797, reviewing R. S. secs. 4290 to 4292 and secs. 4596 and 4597 (title SEAMEN), it was held that there was no statute in force requiring the production of an official log book containing evidence of desertion of any of the crew from a steamship while on a voyage from Puget Sound to British Columbia or Alaska.

Admissibility of log book in evidence.—The log book is in no just sense proof per se of the facts therein stated, except in certain cases provided for by statute. It is not evidence under oath. It does not import legal verity. It cannot be admitted per se, if objected to, as evidence of the facts stated therein. U. S. c. Gilbert, (1834) 2 Sumn. 19, 25 Fed. Cas. No. 15,504.

Orordinarily the entries in the log books are not receivable in support of the party who makes them, but where they are called for and made use of by the other party for the purpose of cross-examining the opposing witnesses and the testimony so adduced is more intelligible by a reference to the books, they should be received. The Kentucky, (S. D. N. Y. 1906) 149 Fed. 500.

The admissibility or competency of evidence in a legal proceeding pertains to the remedy and is governed by the lex fori, and therefore a clause in the British Shipping Act of 1854, making certain entries in the official log book competent evidence in all courts does not make them so in the courts of any other country. The City of Carlisle, (D. C. Ore. 1889) 39 Fed. 807.

Weight of log book as evidence—Generally.—Facts stated in the log book must, as against the ship, be taken to be true, where it is made and signed by those chiefly having knowledge of the facts, unless a mistake is clearly shown. Bunge v. The Steamship Utopia, (S. D. N. Y. 1880) 1 Fed. 892.

The log, being intended to be a correct record of the facts contained therein, an individual with full knowledge and opportunity of ascertaining the truth must be accepted as the truth if it tells against the party making it. The Newfoundland, (D. C. S. C 1898) 89 Fed. 510, reversed on the ground of inadequacy of proof (1899) 176 U. S. 97, 20 S. Ct. 274, 44 U. S. (L. ed.) 386.

Captain's memorandum.—The captain's entries in his memorandum book, a month afterward, from previous pencil memoranda, are not entitled to the weight of evidence of a log book with proper contemporaneous entries. Brink v. Lyons, (S. D. N. Y. 1883) 18 Fed. 605.
book shall be made as soon as possible after the occurrence to which it relates, and, if not made on the same day as the occurrence to which it relates, shall be made and dated so as to show the date of the occurrence, and of the entry respecting it; and in no case shall any entry therein, in respect of any occurrence happening previously to the arrival of the vessel at her final port, be made more than twenty-four hours after such arrival. [R. S.]


Sec. 4292. [Penalty for omitting entries.] If in any case the official log-book is not kept in the manner hereby required, or if any entry hereby directed to be made in any such log-book is not made at the time and in the manner hereby directed, the master shall, for each such offense, be liable to a penalty of not more than twenty-five dollars; and every person who makes, or procures to be made, or assists in making, any entry in any official log-book in respect of any occurrence happening previously to the arrival of the vessel at her final port of discharge, more than twenty-four hours after such arrival, shall, for each offense, be liable to a penalty of not more than one hundred and fifty dollars. [R. S.]


LONGEVITY PAY ACT

See NAVY

LOST PROPERTY ACT

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LOTTERIES.

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MEDALS

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Striking Medals at Mints, see COINAGE, MINTS AND ASSAY OFFICES.
For Naval Service, see NAVY.
Decorations of Foreign Governments Conferred on Officers of United States, see PUBLIC OFFICERS AND EMPLOYEES.
For Saving Life on Railroads, see RAILROADS.
For Army Service, see WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

An Act to authorize medals commemorating the one hundredth anniversary of the first meeting of the Continental Congress and of the Declaration of Independence.


[Medals commemorating the one hundredth anniversary of independence.] That medals with appropriate devices, emblems and inscriptions, commemorative of the Centennial Anniversary of the Declaration of Independence be prepared at the Mint at Philadelphia for the Centennial Board of Finance subject to the provisions of the fifty-second section of the Coinage act of eighteen hundred and seventy-three, upon the payment of a sum not less than the cost thereof, and all the provisions whether penal or otherwise of said coinage act against the counterfeiting or imitating of coins of the United States shall apply to the medals struck and issued under the provisions of this act. [18 Stat. L. 76.]
[400]
[Counterfeiting Columbian medals, diplomas, etc.] And every person who within the United States or any Territory thereof, without lawful authority, makes, or willingly aids or assists in making, or causes or procures to be made, any dies, hub, plate, or mold, either in steel or of plaster, or any other substance whatsoever, in the likeness or similitude as to the design, or inscription thereon, of any die, hub, plate, or mold, designated for the striking of the medals and diplomas of award for the World's Columbian Exposition, as provided in section three of the act approved August fifth, eighteen hundred and ninety-two, or conceals or shall have in his possession, any such die, hub, plate, or mold hereinbefore mentioned, with intent to fraudulently or unlawfully use the same for counterfeiting the medals and diplomas hereinbefore mentioned, or who shall fraudulently or unlawfully have in his possession or cause to be circulated any duplicate or counterfeit medal or diploma not authorized by the Secretary of the Treasury, shall upon conviction thereof be punished by a fine of not more than five thousand dollars, and be imprisoned at hard labor not more than ten years or both at the discretion of the court. [27 Stat. L. 587.]

This is from the Sundry Civil Appropriation Act of March 3, 1893, ch. 208. The medals and diplomas intended to be protected by the text were authorized by the Act of Aug. 5, 1892, ch. 381, § 3, 27 Stat. L. 389, mentioned in the text.

Counterfeiting, generally, see PENAL LAWS.

Authority of Treasury Department over World's Columbian Exposition medals.—After the exhibitors shall have received the medals and diplomas awarded them, the Treasury Department has not any further authority over them, and has not any authority to say what use shall or shall not be made of them, or to restrict the making or using of facsimiles of them by exhibitors to whom they have been awarded. See (1896) 21 Op. Atty.-Gen. 330.

Joint Resolution Authorizing the issue of duplicate medals where the originals have been lost or destroyed.

[Res. of April 15, 1904, No. 23, 33 Stat. L. 588.]

[Issue of duplicate medals.] That in any case where the president of the United States has heretofore, under any Act or resolution of Congress, caused any medal to be made and presented to any officer or person in the United States on account of distinguished or meritorious services, on a proper showing made by such person to the satisfaction of the President that such medal has been lost or destroyed through no fault of the beneficiary, and that diligent search has been made therefor, the President is hereby authorized to cause to be prepared and delivered to such person a duplicate of such medal, the cost of which shall be paid out of any money in the Treasury not otherwise appropriated. [33 Stat. L. 588.]

MEDALS OF HONOR ACT

See RAILROADS

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See Labor

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See Seamen

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Sec. 1309. [Officers, professors, and instructors.] The United States Military Academy at West Point, in the State of New York, shall be constituted as follows: There shall be one superintendent; one commandant of cadets; one senior instructor in the tactics of artillery; one senior instructor in the tactics of cavalry; one senior instructor in the tactics of infantry; one professor and one assistant professor of civil and military engineering; one professor and one assistant professor of natural and experimental philosophy; one professor and one assistant professor of mathematics; * * * one professor and one assistant professor of chemistry, mineralogy, and geology; one professor and one assistant professor of drawing; one professor and one assistant professor of the French language; one professor and one assistant professor of the Spanish language; one adjutant; one master of the sword; and one teacher of music. [R. S.]


The omitted part of this section was as follows: — "one chaplain, who shall also be professor of history, geography, and ethics, and one assistant professor of the same." It was repealed by an Act of Feb. 18, 1896, ch. 22, 29 Stat. L. 8, other provisions of which, relating to the appointment, etc., of a chaplain, are given infra, p. 416.
The provisions of the text relating to the professors of the French and of the Spanish language were superseded by the provisions of the Act of June 23, 1879, ch. 35, § 4, infra, p. 414. An associate professor of modern languages was authorized by the Act of March 3, 1903, ch. 985, infra, p. 420. The Military Academy Appropriation Act of March 4, 1915, ch. 146, 38 Stat. L. 1131, provided for two civilian instructors in French and two civilian instructors in Spanish, to be employed under rules to be prescribed by the Secretary of War. Similar provisions have appeared in prior Military Academy Appropriation Acts.

The selection, appointment, rank, and duties of the superintendent and the commandant of cadets were regulated by R. S. secs. 1310–1313, given in the following paragraphs of the text.

A professor of law was authorized by the Act June 1, 1880, ch. 115, infra, p. 414, and an assistant professor of law was authorized by the Act of Jan. 16, 1895, ch. 29, infra, p. 416.

An associate professor of mathematics was authorized by the first paragraph of the Act of March 1, 1893, ch. 186, infra, p. 415, and further provisions relating to said associate professor of mathematics were made by the Act of March 3, 1905, ch. 1404, infra, p. 420.

A professor of English and history was authorized to be appointed by the Act of April 19, 1910, ch. 174, infra, p. 423. Additional assistant professors of English and history were authorized by the Act of March 3, 1911, ch. 207, infra, p. 423, and the Act of Aug. 9, 1912, ch. 275, infra, p. 424.

A professor of ordnance and science of gunnery was authorized by the Act of March 2, 1907, ch. 2508, infra, p. 421, and an assistant professor for the department of ordnance and gunnery was authorized by the Act of March 3, 1911, ch. 207, infra, p. 423.

A professor of military hygiene was, authorized by the Act of April 19, 1910, ch. 174, infra, p. 423.

The duties of the master of the sword were prescribed by R. S. sec. 1338, given as amended infra, p. 412, and his rank and pay were prescribed by an Act of March 3, 1905, ch. 1404, infra, p. 420. The Military Academy Appropriation Act of March 4, 1915, ch. 146, 38 Stat. L. 1131, provided, as did similar acts for preceding years: “For two expert civilian instructors in fencing, broadsword exercises, and other military gymnastics, as may be required to perfect this part of the training of cadets.”

The teacher of music, for which provision was made in this section, was required to be the leader of the band by R. S. sec. 1111, infra, p. 412.

Abolishing professorship by executive order.—In (1878) 16 Op. Atty.-Gen. 17, the Secretary of War was advised that the professorship of the Spanish language in the Military Academy, being established by statute, could not be abolished by an executive order.

Sec. 1310. [Local rank of superintendent and commandant.] The superintendent and the commandant of cadets, while serving as such, shall have, respectively, the local rank of colonel and lieutenant-colonel of engineers. [R. S.]


An officer of the army holding the rank of major-general may be assigned to the place of superintendent of the Military Academy. (1876) 15 Op. Atty.-Gen. 110.

Sec. 1311. [Superintendent.] The superintendent and, in his absence, the next in rank, shall have the immediate government and military command of the Academy, and shall be commandant of the military post of West Point. [R. S.]


Sec. 1312. [Commandant of cadets.] The commandant of the cadets shall have the immediate command of the battalion of cadets, and shall be instructor in the tactics of artillery, cavalry, and infantry. [R. S.]

Sec. 1313. [Appointment of officers and professors.] The superintendent, the commandant of cadets, and the professors shall be appointed by the President. The assistant professors, acting assistant professors, and the adjutant shall be officers of the Army, detailed and assigned to such duties by the Secretary of War, or cadets, assigned by the superintendent, under the direction of the Secretary of War. [R. S.]


See the note to R. S. sec. 1309, supra, p. 406.

An officer of the army holding the rank of major-general may be assigned to the place of superintendent of the Military Academy. (1876) 15 Op. Atty.-Gen. 110.

Sec. 1314. [Selection of officers.] The superintendent and commandant of cadets may be selected, and all other officers on duty at the Academy may be detailed from any arm of the service; but the academic staff as such shall not be entitled to any command in the Army separate from the Academy. [R. S.]


Sec. 1315. [Cadets, number and appointment.] The corps of cadets shall consist of one from each congressional district, one from each Territory, one from the District of Columbia, and ten from the United States at large. They shall be appointed by the President, and shall, with the exception of the ten cadets appointed at large, be actual residents of the congressional or territorial districts, or of the District of Columbia, respectively, from which they purport to be appointed. [R. S.]


While this section must be considered as superseded by a provision of the Act of June 6, 1900, ch. 702, § 4, infra, p. 417, which latter Act was itself superseded by a more recent Act, as indicated by the note thereto, yet this section was specifically amended by the Act of Aug. 9, 1912, ch. 275, § 1, infra, p. 424, and for that reason is retained in the text.

R. S. Sec. 1316. This section was as follows:

"Sec. 1316. No person who has served in any capacity in the military or naval service of the so-called Confederate States, or of either of the States in insurrection during the late rebellion shall be appointed a cadet."


It may be regarded as temporary and obsolete.

Sec. 1317. [Appointment in advance.] Cadets shall be appointed one year in advance of the time of their admission to the Academy, except in cases where, by reason of death or other cause, a vacancy occurs which cannot be provided for by such appointment in advance; but no pay or other allowance shall be given to any appointee until he shall have been regularly admitted, as herein provided; and all appointments shall be conditional, until such provisions shall have been complied with. [R. S.]


Sec. 1318. [Age of appointees.] Appointees shall be admitted to the Academy only between the ages of seventeen and twenty-two years, except in the following case: Any person who has served honorably and faithfully not less than one year, in either the volunteer or regular service of the
United States, in the late war for the suppression of the rebellion, and
who possesses the other qualifications required by law, may be admitted
between the ages of seventeen and twenty-four years. [R. S.]


Sec. 1319. [Examination and qualification.] Appointees shall be exam-
ined under regulations to be framed by the Secretary of War before they
shall be admitted to the Academy and shall be required to be well versed
in such subjects as he may, from time to time, prescribe. [R. S.]

This section was amended to read as above by the Military Academy Appropriation
The section originally read as follows:

"Sec. 1319. Appointees shall be examined under regulations to be prescribed from
time to time by the Secretary of War, before they shall be admitted to the Academy,
and shall be required to be well versed in reading, writing, and arithmetic, and to
have a knowledge of the elements of English grammar, of descriptive geography, par-
L. 359.

Sec. 1320. [Oath.] Each cadet shall, previous to his admission to the
Academy, take and subscribe an oath or affirmation in the following form:

"I, A B, do solemnly swear that I will support the Constitution of the
United States, and bear true allegiance to the National Government; that
I will maintain and defend the sovereignty of the United States, para-
mount to any and all allegiance, sovereignty, or fealty I may owe to any
State, county, or country whatsoever; and that I will at all times obey the
legal orders of my superior officers, and the rules and articles governing
the armies of the United States."

And any cadet or candidate for admission who shall refuse to take this
oath shall be dismissed from the service. [R. S.]

L. 59.

Sec. 1321. [Engagement for service.] Each cadet shall sign articles,
with the consent of his parents or guardian if he be a minor, and if any
he have, by which he shall engage to serve eight years unless sooner
discharged. [R. S.]

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By the provisions of the Act of May 28, 1908, ch. 214, infra, p. 421, the requirements
of this section were modified in the case of Filipinos undergoing instruction.

Sec. 1322. [Cadet battalion.] The corps of cadets shall be arranged
into companies, according to the directions of the superintendent, each of
which shall be commanded by an officer of the Army, for the purpose of
military instruction. To each company shall be added four musicians.
The corps shall be taught and trained in all the duties of a private soldier,
non-commissioned officer, and officer, shall be encamped at least three
months in each year, and shall be taught and trained in all the duties
incident to a regular camp. [R. S.]

L. 92.
The Military Academy Appropriation Act of March 4, 1915, ch. 146, 38 Stat. L. 1128, provided, as did similar Appropriation Acts for previous years, for two battalion commanders.

Assignment to other than military duties.—As to the power of the President to assign the cadets to duties other than those connected with the service, see Gratiot v. U. S., (1841) 15 Pet. 336, 10 U. S. (L. ed.) 159; Gratiot v. U. S., (1846) 4 How. 80, 11 U. S. (L. ed.) 884.

Sec. 1323. [Where to do duty.] Cadets shall be subject at all times to do duty in such places and on such service as the President may direct. [R. S.]

Act of March 16, 1862, ch. 9, 2 Stat. L. 137.

Sec. 1324. [No studies on Sunday.] The Secretary of War shall so arrange the course of studies at the Academy, that the cadets shall not be required to pursue their studies on Sunday. [R. S.]


Sec. 1325. [Found deficient.] No cadet who is reported as deficient, in either conduct or studies, and recommended to be discharged from the Academy, shall, unless upon recommendation of the academic board, be returned or re-appointed, or appointed to any place in the Army before his class shall have left the Academy and received their commissions. [R. S.]


It is within the power of Congress to enact the provision forbidding the reappointment of a cadet who has been discharged from the academy on the report and recommendation of the academic board for deficiency in conduct or studies, unless such reappointment is made upon the recommendation of the board. (1881) 17 Op. Atty.-Gen. 67.

The President may exercise the authority to summarily expel a cadet from the academy under this section. Hartigan v. U. S., (1903) 28 Ct. Cl. 346.

Revoking order of discharge.—When an order discharging a cadet has been fully executed it is beyond the power of revocation. (1881) 17 Op. Atty.-Gen. 67.

Sec. 1326. [Courts-martial for trial of cadets.] The superintendent of the Military Academy shall have power to convene general courts-martial for the trial of cadets, and to execute the sentences of such courts, except the sentences of suspension and discharge, subject to the same limitations and conditions now existing as to other general courts-martial. [R. S.]


Trial of cadet accused of hazing, by general court-martial, see the provisions of the Act March 2, 1901, ch. 384, given as amended infra, p. 418.

The President may summarily execute the sentences of suspension and dismis-


Sec. 1327. [Board of visitors.] There shall be appointed every year, in the following manner, a board of visitors, to attend the annual examination of the Academy: Seven persons shall be appointed by the President, and two Senators and three members of the House of Representatives shall be designated as visitors, by the Vice-President, or President pro tempore of the Senate, and the Speaker of the House of Representatives, respectively, at the session of Congress next preceding such examination. [R. S.]

Sec. 1328. [Duties of visitors.] It shall be the duty of the board of visitors to inquire into the actual state of the discipline, instruction, police administration, fiscal affairs, and other concerns of the Academy. The visitors appointed by the President shall report thereon to the Secretary of War, for the information of Congress, at the commencement of the session next succeeding such examination, and the Senators and Representatives designated as visitors shall report to Congress, within twenty days after the meeting of the session next succeeding the time of their appointment, their action as such visitors, with their views and recommendations concerning the Academy. [R. S.]


The provisions of this section were in part superseded and repealed by those of the Act of May 28, 1908, ch. 214, given as amended infra. p. 421.

Sec. 1329. [Compensation.] No compensation shall be made to the members of said board beyond the payment of their expenses for board and lodging while at the Academy, and an allowance, not exceeding eight cents a mile, for traveling by the shortest mail-route from their respective homes to the Academy, and thence to their homes. [R. S.]


The provisions of this section were in part superseded and repealed by those of the Act of May 28, 1908, ch. 214, given as amended infra. p. 421. The last cited Act also superseded a provision of the Act of June 11, 1878, ch. 181, 20 Stat. L. 110, as follows: "That hereafter the expenses allowed by section thirteen hundred and twenty-nine of the Revised Statutes shall be paid as follows: each member of the Board of Visitors shall receive not exceeding eight cents per mile for each mile traveled by the most direct route from his residence to West Point and return, and shall in addition receive five dollars per day for expenses during each day of his service at West Point."

The same provision, with the exception of the omission of the word "hereafter," was contained in the Act of March 3, 1877, ch. 109, 19 Stat. L. 382.

"Hereafter" as used in Act of June 11, 1878.—It appeared from the context of the Act of June 11, 1878, and otherwise that "thereafter" was changed to "hereafter" by a clerical error, and all changes mentioned were referred to the date July 1, 1882. (1878) 16 Op. Atty.-Gen. 40.

Sec. 1330. [Leaves of absence.] Leave of absence may be granted by the superintendent, under regulations prescribed by the Secretary of War, to the professors, assistant professors, instructors, and other officers of the Academy, for the entire period of the suspension of the ordinary academic studies, without deduction from pay or allowances. [R. S.]


Further provisions as to leave of absence to the superintendent were made by the Act of Aug. 9, 1912, ch. 275. infra. p. 424.

Sec. 1331. [Supervision of Academy.] The supervision and charge of the Academy shall be in the War Department, under such officer or officers as the Secretary of War may assign to that duty. [R. S.]


R. S. Sec. 1332 provided for the furnishing of congressional documents to the library of the Academy. See Public Documents.
Sec. 1333. [Professors of Military Academy, retirement.] The professors of the Military Academy at West Point are placed on the same footing, as to retirement from active service, as officers of the Army.


For provisions relating to the retirement of officers of the army, see War Department and Military Establishment.

Sec. 1334. [Superintendent and commandant at Military Academy, pay of.] The superintendent of the Military Academy shall have the pay of a colonel, and the commandant of cadets shall have the pay of a lieutenant-colonel.


Pay of officers of army, see War Department and Military Establishment.

Sec. 1335. [Adjutant, pay of.] The adjutant of the Military Academy shall have the pay of an adjutant of a cavalry regiment.


See the note to the preceding R. S. sec. 1334.

Sec. 1336. [Pay of professors.] Each of the professors of the Military Academy whose service as professor at the Academy exceeds ten years shall have the pay and allowances of colonel, and all other professors shall have the pay and allowances of lieutenant-colonels; and the instructors of ordnance and science of gunnery and of practical engineering shall have the pay and allowances of major; and hereafter there shall be allowed and paid to the said professors ten per centum of their current yearly pay for each and every term of five years' service in the Army and at the Academy: Provided, That such addition shall in no case exceed forty per centum of said yearly pay; and said professors are hereby placed upon the same footing, as regards restrictions upon pay and retirement from active service, as officers of the Army.

The words "as professor" following the word "service" were added to the section by Act of June 23, 1879, ch. 35, § 4. 21 Stat. L. 34.
For a reference to the various Acts relating to professors and associate professors, see the note to R. S. sec. 1309, supra, p. 405.
Appropriations for the pay of professors and assistant professors are made in the various Military Academy Appropriation Acts. The current appropriations were made by the Act of March 4, 1915, ch. 146, 38 Stat. L. 1128.

Sec. 1337. [Assistant professors and instructors.] Each assistant professor and each senior assistant instructor of cavalry, artillery, and infantry tactics, shall receive the pay of a captain.


This section was amended by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 244, by striking out, after the word "tactics," the words "and the instructor of practical military engineering," appearing in the section as originally enacted.
See the note to the preceding R. S. sec. 1336.
"Emoluments."—The Act of April 29, 1912, provided that "assistant professors," at the Military Academy should receive "the pay and emoluments of captains, and no other pay and emolument while performing these duties." The word "emolument:" was construed to include every allowance or perquisite annexed to an office, for the benefit of an officer, and by way of compensation for services and to entitle assistant professors to the quarters of captains. (1859) 9 Op. Atty.-Gen. 284.

Sec. 1338. [Master of the sword—duties—termination of office on vacancy.] The master of the sword shall hereafter act as instructor of military gymnastics and physical culture at the Military Academy, and shall have the relative rank and shall be entitled to the pay, allowances, and emoluments of a first lieutenant, mounted: Provided, however, That whenever a vacancy shall occur in the office of master of the sword and instructor of military gymnastics and physical culture the said office shall cease and determine, and the duties thereunto pertaining shall thereafter be performed by an officer of the line of the Army to be selected for that purpose by the Secretary of War. [R. S.]

This section was amended to read as above by the Act of March 2, 1901, ch. 804, 31 Stat. L. 910. The section was originally as follows:

"Sec. 1338. The master of the sword at the Military Academy shall receive pay at the rate of fifteen hundred dollars a year, with fuel and quarters."


This section was in part superseded by the Act of March 3, 1905, ch. 1404, infra, p. 490, which prescribed the rank and pay of the master of the sword.

See the note to R. S. sec. 1300, supra, p. 463.

R. S. Sec. 1339. This section was as follows:

"Sec. 1339. Cadets of the Military Academy shall receive five hundred dollars a year and one ration a day."


A subsequent provision of the Act of June 30, 1882, ch. 265, 22 Stat. L. 123, prescribed that "No cadet shall receive more than the rate of five hundred and forty dollars a year." Both of these were superseded by a provision of the Act of June 28, 1902, ch. 1300, infra, p. 419, fixing the pay of cadets at five hundred dollars per year and this was in turn superseded by a provision of the Act of May 11, 1908, ch. 163, infra, p. 421, fixing the pay of cadets at six hundred dollars per year.

Sec. 1340. [Librarian and assistant.] The librarian and assistant librarian at the Military Academy shall each receive one hundred and twenty dollars a year additional pay. [R. S.]


The Military Academy Appropriation Act of March 9, 1915, ch. 146, 38 Stat. L. 1131, contained, as did similar Acts of previous years, an appropriation under the head of "Pay of Civilians" for one librarian and one librarian’s assistant.

Sec. 1341. [Non-commissioned officer, etc.] The non-commissioned officer in charge of mechanics and other labor at the Military Academy, the soldier acting as clerk in the adjutant’s office, and the four enlisted men in the philosophical and chemical departments and lithographic office, shall receive fifty dollars a year additional pay. [R. S.]


Sec. 1111. [Band.] The Military Academy band shall hereafter consist of one teacher of music, who shall be the leader of the band, one enlisted band sergeant and assistant leader, and of forty enlisted musicians. The teacher of music shall receive the pay of a second lieutenant, not
mounted; the enlisted band sergeant and assistant leader shall receive six hundred dollars per year; and of the enlisted musicians of the band, twelve shall each receive thirty-four dollars per month, twelve shall each receive twenty-five dollars per month, and the remaining sixteen shall each receive seventeen dollars per month, and each of the aforesaid enlisted men shall also be entitled to the clothing, fuel, rations and other allowances of musicians of cavalry; and the said teacher of music, the band sergeant and assistant leader and the enlisted musicians of the band shall be entitled to the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service as are, or may hereafter become, applicable to other officers or enlisted men of the Army. [R. S.]

The section originally read as follows:

"Sec. 1111. There shall be retained or enlisted in the Army one band, which shall consist of one band-leader, and not more than twenty-four musicians, and shall ordinarily be stationed at the Military Academy."


It was amended by making more comprehensive provisions as to the composition of the band, and the pay, rations, etc., of the members thereof by an Act of March 2, 1901, ch. 504, 31 Stat. L. 912. Said amendatory Act also expressly repealed R. S. sec. 1278, relating to the pay of the leader of the band, and also sections 2 and 3 of the Act of March 3, 1877, ch. 109, 19 Stat. L. 383, relating to the composition of the band, pay, etc. The Act last mentioned superseded the Act of March 3, 1875, ch. 131, secs. 8, 10, 18 Stat. L. 419, relating to the same subject.

The section was again amended by an Act of March 3, 1905, ch. 1404, 33 Stat. L. 853, to read as given in the text.

The provisions of the text relating to the pay of the various members of the band were superseded by the Act of May 28, 1908, ch. 214, infra, p. 421.

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[Vacancies, how filled.] * * * That the President of the United States be authorized to fill any vacancy occurring at said academy by reason of death, or other cause, of any person appointed by him. [18 Stat. L. 467.]

The provisions of this and the following paragraph of the text are from the Military Academy Appropriation Act of March 3, 1875, ch. 135.

[Pay of assistant instructors of tactics.] * * * That the assistant instructors of tactics commanding cadet companies at West Point shall receive the same pay and allowances as assistant professors in the other branches of study. * * * [18 Stat. L. 467.]

See the note to the preceding paragraph of the text. See also the note to R. S. sec. 1309, supra, p. 405.

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[Quartermaster and commissary for cadets to be detailed — supplies furnished at cost.] * * * That the Secretary of War be hereby directed to detail a competent officer to act as quartermaster and commissary for the battalion of cadets, by whom all purchases and issues of supplies of all kinds for the cadets, and all provisions for the mess, shall be made, and that all supplies of all kinds and descriptions shall be furnished to the cadets at actual cost, without any commission or advance over said cost;
and such officer so assigned shall perform all the duties of purveying and
supervision for the mess, as now done by the purveyor, without other com-
pensation. [19 Stat. L. 126.]

This is from the Military Academy Appropriation Act of Aug. 7, 1876, ch. 255.
A provision of the Military Academy Appropriation Act of March 3, 1875, ch. 135,
18 Stat. L. 467, was as follows:
"For * * * text-books, books of reference, * * * printing and binding text-
books prepared for the special instruction of the cadets, * * * Provided, That said
books shall be sold to the cadets at cost price, and the amount received therefor covered
into the Treasury."
The detail of a commissary-sergeant to act as assistant to the commissary of cadets
was authorized by the Act of June 30, 1882, ch. 255, infra, p. 414.

SEC. 4. [One professor of modern languages in place of professors of
French and Spanish.] That when a vacancy occurs in the office of pro-
fessor of the French language or in the office of professor of the Spanish
language the Military Academy, both these offices shall cease, and the
remaining one of the two professors shall be professor of modern languages;
and thereafter there shall be in the Military Academy one, and only one,
professor of modern languages. [21 Stat. L. 34.]

This is from the Army Appropriation Act of June 23, 1879, ch. 35.
See the note to R. S. sec. 1309, supra, p. 405.

[Professor of law.] * * * For department of law: * * * Provided, That the Secretary of War may, in his discretion, assign any officer
of the Army as professor of law. [21 Stat. L. 153.]

This is from the Military Academy Appropriation Act of June 1, 1880, ch. 115. It
was repeated in the Act of June 30, 1882, ch. 255, 22 Stat. L. 125.
An assistant professor of law was authorized by the Act of Jan. 16, 1895, ch. 29,
infra, p. 416.
See the note to R. S. sec. 1309, supra, p. 405.

[Assistant to commissary.] * * * And the Secretary of War is
hereby authorized to detail a commissary-sergeant to act as assistant to the
commissary of cadets. [22 Stat. L. 123.]

This is from the Military Academy Appropriation Act of June 30, 1882, ch. 255.
The Act of Aug. 7, 1876, ch. 255, supra, p. 413, authorized the detail of an officer to
Act as commissary of cadets.

[Rent of hotel on academy grounds — how to be expended.] * * * Also, that all funds arising from the rent of the hotel on Academy grounds,
and other incidental sources, from and after this date be, and are hereby,
made a special contingent fund, to be expended under the supervision of
the Superintendent of the Academy, and that he be required to account
for the same annually, accompanied by proper vouchers to the Secretary of War. [25 Stat. L. 112.]

This is from the Military Academy Appropriation Act of May 1, 1888, ch. 212. See the second paragraph of the Act of March 1, 1893, ch. 188, infra, p. 415.

[Artillery detachment to become army service men in quartermaster's department.] * * * That the enlisted men known as the artillery detachment at West Point shall be mustered out of the service as artillery-men and immediately re-enlisted as Army service men in the Quartermaster's Department, continuing to perform the same duties and to have the same pay, allowances, rights and privileges, and subject to the rules, regulations and laws in the same manner as if their service had been continuous in the artillery, and their said service shall be considered and declared to be continuous in the Army. [26 Stat. L. 167.]

This is from the Military Academy Appropriation Act of June 20, 1890, ch. 437. See the Act of Feb. 10, 1897, ch. 214, infra, p. 416.

SEC. 6. [Memorial Hall.] That the memorial hall to be erected under the provisions of this Act shall be a receptacle of statues, busts, mural tablets, and portraits of distinguished and deceased officers, and graduates of the Military Academy, of paintings of battle scenes, trophies of war, and such other objects as may tend to give elevation to the military profession; and to prevent the introduction of unworthy subjects into this hall the selection of each shall be made by not less than two-thirds of the members of the entire academic board of the United States Military Academy, the vote being taken by ayes and nays and to be so recorded. [27 Stat. L. 263.]

This is a part of an Act of July 23, 1892, ch. 237, entitled "An Act to accept a bequest made by General George W. Cullum for the erection of a memorial hall at West Point, New York, and to carry the terms and conditions of the same into execution."
The other sections of this Act accepted the bequest mentioned in the title, provided for a Board of Trustees for the Memorial Hall, and the erection of a suitable building.

[Associate professor of mathematics.] * * * There shall be appointed at the Military Academy from the Army, in addition to the professors authorized by the existing laws, an associate professor of mathematics. [27 Stat. L. 515.]

The provisions of this and the following paragraph of the text are from the Military Academy Appropriation Act of March 1, 1893, ch. 186.

A further provision of this paragraph reads as follows: "who shall receive the pay and allowances of a captain mounted, and when his service as associate professor of mathematics at the Academy exceeds ten years, he shall receive the pay and allowances of major; and hereafter these shall be allowed and paid to the said associate professor of mathematics ten per centum of his current yearly pay for each and every term of five years' service in the Army and at the Academy: Provided, That such addition shall in no case exceed forty per centum of said yearly pay; and said associate professor of mathematics is hereby placed upon the same footing as regards restrictions upon pay and retirement from active service as officers of the Army."

This was superseded by a provision of the Act of March 3, 1905, ch. 1404, infra, p. 420.

See the notes to R. S. sec. 1309, supra, p. 495.
Proceeds of sale of gas. — That all proceeds of sales of gas be paid into the post fund. [27 Stat. L. 520.]

See the note to the preceding paragraph of the text.

No graduate to be professor, etc., within two years. — and hereafter no graduate of the Military Academy shall be assigned or detailed to serve at said Academy as a professor, instructor, or assistant to either within two years after his graduation, and so much of the Act of June thirtieth, eighteen hundred and eighty-two, as requires a longer service than two years for said assignments or details is hereby repealed. [28 Stat. L. 151.]

This is from the Military Academy Appropriation Act of July 26, 1894, ch. 167. The provision of the Act of June 30, 1882, ch. 255, 22 Stat. L. 123, above referred to, was the same, except that it read "within four years after his graduation."

Assistant professor of law. — and hereafter there may be assigned to the department of law one assistant professor. [28 Stat. L. 630.]

This is from the Military Academy Appropriation Act of Jan. 16, 1895, ch. 29. A professor of law was authorized by the Act of June 1, 1880, ch. 116, supra, p. 414. See the note to R. S. sec. 1309, supra, p. 405.

An Act To amend section thirteen hundred and nine, Revised Statutes, providing a chaplain for the Military Academy.


Chaplain — appointment, duties, and pay. — That the duties of Chaplain at the Military Academy shall hereafter be performed by a clergyman to be appointed by the President for a term of four years, and the said chaplain shall be eligible for re-appointment for an additional term or terms and shall, while so serving, receive the same pay and allowances as are now allowed to a captain mounted. [29 Stat. L. 8.]

The part of this Act omitted from the text was as follows: "That so much of section thirteen hundred and nine of the Revised Statutes of the United States as provides for the appointment at the United States Military Academy at West Point of 'one chaplain, who shall also be professor of history, geography, and ethics, and one assistant professor of the same,' is hereby repealed, Provided."

R. S. sec. 1309, thus repealed in part, is given supra, p. 405. See the note thereto.

Detachments of enlisted men — limitation. — That the detachments of enlisted men at the Military Academy, heretofore designated as the general army service (Quarterman’s Department), and the cavalry detachment, shall be fixed at such numbers, not exceeding two hundred and fifteen enlisted men in both detachments, as in the opinion of the Secretary
of War the necessities of the public service may from time to time require; but the number of enlisted men of the Army shall not be increased on account of this proviso or the two preceding paragraphs of this Act. [29 Stat. L. 519.]

This is from the Military Academy Appropriation Act of Feb. 10, 1897, ch. 214. See the Act of June 20, 1890, ch. 437, supra, p. 416, and the Act of Aug. 9, 1912, ch. 275, infra, p. 434.


An Act To authorize the Secretary of War to exercise a discretion in certain cases.

[Act of July 8, 1898, ch. 636, 30 Stat. L. 722.]

[Building for religious worship.] That the Secretary of War, in his discretion, may authorize the erection of a building for religious worship by any denomination, sect, or religion on the West Point Military Reservation: Provided, That the erection of such building will not interfere with the uses of said reservation for military purposes. Said building shall be erected without any expense whatever to the Government of the United States, and shall be removed from the reservation, or its location changed by the denomination, sect, or religious body erecting the same whenever, in the opinion of the Secretary of War, public or military necessity shall require it, and without compensation for such building or any other expense whatever to the Government. [30 Stat. L. 722.]

Sec. 4. [Number of cadets — appointment.] That the corps of cadets shall consist of one from each Congressional district, one from each Territory, one from the District of Columbia, two from each State at large, and thirty from the United States at large. They shall be appointed by the President, and shall, with the exception of the thirty cadets appointed from the United States at large, be actual residents of the Congressional or Territorial districts, or of the District of Columbia, or of the States, respectively, from which they purport to be appointed. [31 Stat. L. 656.]

This is from the Military Academy Appropriation Act of June 6, 1900, ch. 792. The above provisions supersede R. S. sec. 1315, given supra, p. 407, and other provisions as follows:

Act of June 11, 1878, ch. 181, § 4, 20 Stat. L. 111, providing that the cadets at large should not exceed ten.

Act of March 2 1899, ch. 352, § 10, 30 Stat. L. 979, which was the same as the section in the text except that it provided for the appointment of "twenty from the United States at large" and made no provision for the appointment from each State at large.

The provisions of the text were superseded by the Act of May 4, 1916, which provided as follows: "That the Corps of Cadets at the United States Military Academy shall hereafter consist of two for each congressional district, two from each Territory, four from the District of Columbia, two from natives of Porto Rico, four from each State at large, and eighty from the United States at large twenty of whom shall be selected from among the honor graduates of educational institutions having officers of the Regular Army detailed as professors of military science and tactics under existing law or any law hereafter enacted for the detail of officers of the Regular Army to such
institutions, and which institutions are designated as 'honor schools' upon the determination of their relative standing at the last preceding annual inspection regularly made by the War Department. They shall be appointed by the President and shall, with the exception of the eighty appointed from the United States at large, be actual residents of the congressional or Territorial district, or of the District of Columbia, or of the island of Porto Rico, or of the States, respectively, from which they purport to be appointed: Provided, That so much of the Act of Congress approved March fourth, nineteen hundred and fifteen (Thirty-eighth Statutes at Large, page eleven hundred and twenty-eight), as provides for the admission of a successor to any cadet who shall have finished three years of his course at the academy be, and the same is hereby, repealed: Provided further, That the appointment of each member of the present Corps of Cadets is validated and confirmed." See Pamph. Supp. No. 7, p. 16, Fed. Stat. Ann.; 1918 Supp. Fed. Stat. Ann.

Residence of father.—Minors whose fathers are living and residing within the United States are, by reason of their minority, ineligible to appointment as cadets to the Military Academy from any other congressional districts than those in which their fathers reside. (1869) 13 Op. Atty.-Gen. 130.

Relation of rules and articles of war to cadets.—An early opinion of the Attorney-General reaches the following conclusions concerning cadets and the relation of Rules and Articles of War to them. The cadets of the Military Academy at West Point appertain by law to the Corps of Engineers, are therefore a part of the land force of the United States, and as such are subject to the Rules and Articles of War. The undergraduate cadets are not commissioned officers, and therefore are not competent to sit on a court martial, and are triable by a regimental or garrison court martial. But they are not the "non-commissioned" officers of the Acts of Congress and the General Regulations, which expression means "sergeants and corporals," and is inapplicable to the cadets. They are inchoate officers of the army, and subject by statute and regulation to no discipline incompatible with that character. The undergraduate cadets, and privates, are not subject to the Articles of War as respects their relation to one another, but only as respects their relation to commissioned officers of the army on duty as such in the academy. The graduated cadets, assigned to service as supernumerary officers, are brevet second lieutenants, and as such commissioned officers, and therefore subject to all the duties, and entitled to exercise all the powers, of that grade, including the legal capacity to sit on courts martial as commissioned officers, and be tried only as such according to the Articles of War. (1855) 7 Op. Atty.-Gen. 323. See also (1819) 1 Op. Atty.-Gen. 278; (1821) 1 Op. Atty.-Gen. 469.

[Hazing — prevention — penalty.] That the superintendent of the United States Military Academy, subject to the approval of the Secretary of War, shall make appropriate regulations for putting a stop to the practice of hazing, such regulations to prescribe dismissal, suspension, or other adequate punishments for infractions of the same, and to embody a clear definition of hazing.

That any cadet who shall be charged with offenses under such regulations which would involve his dismissal from the academy shall be granted, upon his written request, a trial by a general court-martial, and any cadet dismissed from the academy for hazing shall not thereafter be reappointed to the corps of cadets nor be eligible for appointment as a commissioned officer in the Army or Navy or Marine Corps until two years after the graduation of the class of which he was a member. [31 Stat. L. 911, as amended by 36 Stat. L. 323.]

The provisions of the foregoing paragraph and of the following paragraph of the text are from the Military Academy Appropriation Act of March 2, 1901; ch. 504.

As originally enacted this paragraph was as follows: "That the Superintendent of the Military Academy shall make such rules, to be approved by the Secretary of War, as will effectually prevent the practice of hazing; and any cadet found guilty of participating in or encouraging or countenancing such practice shall be summarily expelled from the Academy and shall not thereafter be reappointed to the corps of cadets or be
eligible for appointment as a commissioned officer in the Army or Navy or Marine Corps, until two years after the graduation of the class of which he was a member.

As originally enacted it superseded a provision of an Act of March 31, 1884, ch. 19, 23 Stat. L. 7. "That hereafter any cadet dismissed for hazing shall not be eligible to reappointment."

It was amended to read as given in the text by a provision of the Military Academy Appropriation of April 19, 1910, ch. 174, which amending Act contained a further provision as follows:

"That all Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed."

"The regulations of the United States Military Academy upon the subject of hazing having been modified, the Secretary of War is hereby authorized to dispose of any cases which are now pending, and in which final action has not yet been taken, under the provisions of the said regulations as modified."

[Extra-duty pay to overseer of waterworks.] * * * That from the foregoing appropriations for waterworks, or from any appropriation that may hereafter be made for waterworks, a sum not to exceed seventy-five cents per day may be paid as extra-duty pay to the overseer, when such overseer is a soldier detailed for that duty. [31 Stat. L. 920.]

See the note to the preceding paragraph of the text.

[Rank of professors and associate professor.] * * * That the professors and the associate professor of the United States Military Academy shall have the actual rank in the United States Army now assigned to them by assimilation in the regulations of the Military Academy prescribed by the President of the United States, and that they shall exercise command only in the academic department of the United States Military Academy. [32 Stat. L. 409.]

The provisions of this and the three paragraphs of the text following are from the Military Academy Appropriation Act of June 28, 1902, ch. 1300.

A provision that the academic staff as such should not be entitled to any command in the army separate from the academy was made by R. S. sec. 1314, supra, p. 407.

For reference to the various Acts relating to the professors and associate professors, see the notes to R. S. sec. 1309, supra, p. 405.

Rank of civilian professor.—This Act was designed to give rank to civilian professors to enforce military discipline at the academy, but does not change the character of the office by the addition of actual rank in the army. Huse v. U. S., (1907) 43 Ct. Cl. 19.

[Cadets — rations and commutation.] * * * That hereafter the pay of cadets shall be fixed at five hundred dollars per annum and one ration per day, or commutation therefor, such commutation to be thirty cents per day, to be paid from the appropriation for the subsistence of the Army. [32 Stat. L. 409.]

See the note to the preceding paragraph of the text.

The pay of cadets was fixed at six hundred dollars per year by a provision of the Act of May 11, 1908, ch. 163, infra, p. 421.

See R. S. sec. 1350 noted as superseded, supra, p. 412, and the notes thereto.

[Traveling expenses of candidates.] * * * That hereafter the actual and necessary traveling expenses of candidates while proceeding from their homes to the Military Academy for qualification as cadets shall, if admitted,
be credited to their accounts and paid after admission from the appropriation for the transportation of the Army and its supplies. [32 Stat. L. 409.]

See the note to the first paragraph of this Act, supra, p. 419.

[Number of cadets at large.] • • • That the number of cadets authorized to be appointed by the President from the United States at large shall not at any one time exceed forty. [32 Stat. L. 410.]

See the note to the first paragraph of the Act, supra, p. 419.

The number of cadets has been increased to eighty. See the note to the Act of June 6, 1900, ch. 792, § 4, supra, p. 417.

[Cadets — appointment from Porto Rico.] • • • That in addition to the Corps of Cadets now authorized by law, there shall be one from Porto Rico, who shall be a native of said Island, to be appointed by the President of the United States. [32 Stat. L. 1011.]

The provisions of this and the following paragraph of the text are from the Military Academy Appropriation Act of March 3, 1903, ch. 995.

The number of natives to be appointed from Porto Rico has been increased to two. See the note to the Act of June 6, 1900, ch. 792, § 4, supra, p. 417.

[Associate professor of modern languages.] • • • That the Secretary of War shall assign an officer of the Army to the Military Academy as associate professor of modern languages, and that such officer, while so serving, shall receive the pay and allowances of a major. [32 Stat. L. 1012.]

See the note to the preceding paragraph of the text.

For reference to the various Acts relating to professors and associate professors, see the note to R. S. sec. 1309, supra, p. 405.

[Associate professor of mathematics.] • • • That hereafter the associate professor of mathematics shall have pay and allowances of a major, and the position shall be filled by the detail of an officer from the Army at large. [33 Stat. L. 850.]

This and the following paragraph of the text are from the Military Academy Appropriation Act of March 3, 1905, ch. 1404.

The associate professor of mathematics was authorized by the Act of March 1, 1893, ch. 186, supra, p. 415.

See the notes to R. S. sec. 1309, supra, p. 405.

[Master of the sword — rank.] • • • That the master of the sword shall have the relative rank and shall be entitled to the pay, allowances, and emoluments of a captain mounted. [33 Stat. L. 850.]

See the note to the preceding paragraph of the text.

The duties of the master of the sword were prescribed by R. S. 1338, supra, p. 412.

See the note to R. S. sec. 1309, supra, p. 405.
[Cadets—time for admission.] * * * That cadets appointed to the Military Academy at West Point, New York, for admission after the year nineteen hundred and seven, may be admitted on the first day of March in place of the first day of June. [34 Stat. L. 1063.]

The provisions of this and the following paragraph of the text are from the Military Academy Appropriation Act of March 2, 1907, ch. 2508.

[Professor of ordnance and science of gunnery.] * * * For pay of one professor of ordnance and science of gunnery (lieutenant-colonel), in addition to pay as major: Provided, That the position shall be filled by the detail of an officer of the Army, who, while so serving, shall have the title and status of other professors. [34 Stat. L. 1063.]

See the note to the preceding paragraph of the text.

An assistant professor for the department of ordnance and gunnery was authorized by the Act of March 3, 1911, ch. 207, infra, p. 423. See the notes to R. S. sec. 1309, supra, p. 405.

[Cadets—pay.] * * * And the pay of cadets at the Military Academy shall hereafter be six hundred dollars a year. [35 Stat. L. 108.]

This is from the Army Appropriation Act of May 11, 1908, ch. 163.

This provision superseded R. S. sec. 1339, noted supra, p. 412, and a part of the Act of June 28, 1902, ch. 1300, supra, p. 419.

[Cadets—rations or commutation therefor.] * * * That hereafter cadets shall be entitled to rations, or commutation therefor, as hitherto allowed under the Act approved June twenty-eighth, nineteen hundred and two, entitled "An Act making appropriations for the support of the Military Academy for the fiscal year ending June thirtieth, nineteen hundred and three, and for other purposes." [35 Stat. L. 430.]

The provisions of this and the three following paragraphs of the text are from the Military Academy Appropriation Act of May 28, 1908, ch. 214.

The provision of the Act of June 28, 1902, ch. 1300, to which reference is made in the text is given, supra, p. 419.

[Band—pay—continuous service—competition with civilian musicians.] * * * For pay of the Military Academy band, field musicians, * * *

For pay of military band, one band sergeant and assistant leader, nine hundred dollars;

Twelve enlisted musicians, at forty-five dollars per month, six thousand four hundred and eighty dollars;

Twelve enlisted musicians, at thirty-six dollars per month, five thousand one hundred and eighty-four dollars;

Sixteen enlisted musicians, at thirty dollars per month, five thousand seven hundred and sixty dollars; * * *

For pay of field musicians: One sergeant, six hundred dollars;

One corporal, two hundred and fifty-two dollars;

Twenty-two privates, at one hundred and eighty dollars each, three thousand nine hundred and sixty dollars; * * *
6 FED. STAT. ANN. (2d Ed.)

Hereafter the monthly pay during the first enlistment of enlisted men of the band and field musicians of the United States Military Academy shall be as hereinbefore stated, and the continuous service pay of all grades shall be the same as provided in the Act approved May eleventh, nineteen hundred and eight, entitled "An Act making appropriation for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and nine: Provided, That the band or members thereof and the field musicians of the Military Academy shall not receive remuneration for furnishing music outside the limits of the military reservation when the furnishing of such music places them in competition with local civilian musicians. [35 Stat. L. 431.]"

See the note to the preceding paragraph of the text. The provisions in the text supersede in part those of R. S. sec. 1111, supra, p. 412. For the Act of May 11, 1908, ch. 163, 35 Stat. L. 108, mentioned in the text, see WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

[Board of visitors — appointment — duties — expenses.] * * * That hereafter the Board of Visitors to the Military Academy shall consist of five members of the Committee on Military Affairs of the Senate and seven members of the Committee on Military Affairs of the House of Representatives, to be appointed by the respective chairmen thereof; the members so appointed shall visit the Military Academy annually at such time as the chairmen of said committees shall appoint, and the members from each of said committees may visit said academy together or separately as the said committees may elect during the session of Congress; and the superintendent of the academy and the members of the Board of Visitors shall be notified of such date by the chairmen of the said committees. The expenses of the members of the board shall be their actual expenses while engaged upon their duties as members of said board not to exceed five dollars per day and their actual expenses of travel by the shortest mail routes: Provided further, That so much of sections thirteen hundred and twenty-seven, thirteen hundred and twenty-eight, and thirteen hundred and twenty-nine, Revised Statutes of the United States, as is inconsistent with the provisions of this Act is hereby repealed. [35 Stat. L. 436, as amended by 37 Stat. L. 257.]

See the notes to the first paragraph of this Act, given supra, p. 421. As originally enacted this provision of the Act of May 28, 1908, ch. 214, was identical with a subsequent provision of the Act of March 4, 1909, ch. 300, 35 Stat. L. 1033, and was as follows:

"That hereafter the Board of Visitors to the Military Academy shall consist of five members of the Committee on Military Affairs of the Senate and seven members of the Committee on Military Affairs of the House of Representatives, to be appointed by the respective chairmen thereof, who shall annually visit the Military Academy on such date or dates as may be fixed by the chairmen of the said committees; and the superintendent of the academy and the members of the Board of Visitors shall be notified of such date by the chairmen of the said committees, acting jointly, at least fifteen days before the meeting. The expenses of the members of the board shall be their actual expenses while engaged upon their duties as members of said board, and their actual expenses for travel by the shortest mail routes: Provided further, That so much of sections thirteen hundred and twenty-seven, thirteen hundred and twenty-eight, and thirteen hundred and twenty-nine, Revised Statutes of the United States, as is inconsistent with the provisions of this Act, is hereby repealed."

It was amended and re-enacted to read as given in the text by a provision of an Act of April 9, 1912, ch. 275. R. S. secs. 1327, 1328, 1329, in part repealed by the text, are given supra, pp. 409, 410.
[Four Filipinos received for instruction.] * * * The Secretary of War is hereby authorized to permit not exceeding four Filipinos, to be designated, one for each class, by the Philippine Commission, to receive instruction at the United States Military Academy at West Point: Provided, That the Filipinos undergoing instruction, as herein authorized, shall receive the same pay, allowances, and emoluments as are authorized by law for cadets at the Military Academy appointed from the United States, to be paid out of the same appropriations: And provided further, That said Filipinos undergoing instruction on graduation shall be eligible only to commissions in the Philippine Scouts. And the provisions of section thirteen hundred and twenty-one, Revised Statutes, are modified in the case of the Filipinos undergoing instruction, so as to require them to engage to serve for eight years, unless sooner discharged, in the Philippine Scouts. [35 Stat. L. 441.]

See the note to the first paragraph of this Act given supra, p. 421.


[Professor of English and history.] * * * That the head of the department of English and history shall hereafter have the same status as the professors at the head of the other departments of instruction at the Military Academy, and the President of the United States is hereby authorized, by and with the consent of the Senate, to appoint a civilian in the department of English and history, United States Military Academy, a professor at the Military Academy, with the rank, pay, allowances, title, and status of the other professors: Provided further, That the provisions of law relating to retirement for disability in line of duty shall not apply in the case of this professor until after he shall have served fifteen years at the Military Academy. [36 Stat. L. 312.]

The provisions of this and the following paragraph of the text are from the Military Academy Appropriation Act of April 19, 1910, ch. 174.

Additional assistant professors of English and history were authorized by the Act of March 3, 1911, ch. 207, given in the second following paragraph of the text, and the Act of Aug. 9, 1912, ch. 275, infra, p. 424.

See the notes to R. S. sec. 1309, supra, p. 405.

[Professor of military hygiene.] * * * Hereafter any officer detailed from the Medical Corps of the army as senior medical officer of the post at the Military Academy, whose rank shall not be below that of lieutenant-colonel, shall be the professor of military hygiene. [36 Stat. L. 312.]

See the note to the preceding paragraph of the text.
See also the note to R. S. sec. 1309, supra, 405.

[Assistant professors for English, history, and department of ordnance and gunnery.] * * * For pay of nine assistant professors (captains), two of whom are hereby authorized hereafter for the department of English and history and the department of ordnance and gunnery, one for each
department, respectively, in addition to pay as first lieutenants, three thousand six hundred dollars. [36 Stat. L. 1016.]

This and the following paragraph of the text are from the Military Academy Appropriation Act of March 3, 1911, ch. 207.

For prior provisions relating to the professors and assistant professors of English and history, see the Act of April 19, 1910, ch. 174, supra, p. 423, and the Act of Aug. 9, 1912, ch. 275, infra, p. 424.

Earlier provisions relating to a professor of science and gunnery were made by the Act of March 2, 1907, ch. 2508, supra, p. 421.

See the notes to R. S. sec. 1309, supra, p. 405.

[Custodian of gymnasium.] * * * For pay of one custodian of gymnasium, who shall hereafter be selected and appointed by the Superintendent of the Military Academy under Schedule A, classified positions excepted from examination under rule two, clause three, civil-service rules, who shall be qualified to act as trainer for the various cadet athletic teams, one thousand two hundred dollars. [36 Stat. L. 1019.]

See the note to the preceding paragraph of the text.
See also the note to R. S. sec. 1309, supra, p. 406.

[Cadets — number.] * * * That section thirteen hundred and fifteen of the Revised Statutes of the United States, fixing the membership of the Corps of Cadets at the United States Military Academy, is hereby amended by changing the clause "one from the District of Columbia" so as to read "two from the District of Columbia." [37 Stat. L. 252.]

The provisions of the foregoing and the following seven paragraphs of the text are from the Military Academy Appropriation Act of Aug. 9, 1912, ch. 275.
R. S. sec. 1315, amended by the text is noted supra, p. 407.
The number of cadets from the District of Columbia has been increased to four. See the note to the Act of June 6, 1900, ch. 792, § 4, supra, p. 417.

[Cadets — time and place for physical examination.] * * * That hereafter any candidate designated as principal or alternate for appointment as cadet may present himself at any time for physical examination at West Point, New York, or other prescribed places, as may be designated by the Secretary of War. [37 Stat. L. 252.]

See the note to the preceding paragraph of the text.

[Mileage to graduates.] * * * That hereafter a graduate of the Military Academy shall receive mileage as authorized by law for officers of the Army from his home to the station which he first joins for duty. [37 Stat. L. 252.]

See the note to the first paragraph of this Act, supra, this page.

[Assistant professors of English and history.] * * * That hereafter two assistant professors shall be authorized in the department of English and history, one for English and one for history. [37 Stat. L. 252.]

See the note to the first paragraph of this Act, supra, this page.

Earlier provisions relating to professors of English and history were made by the Act of April 19, 1910, ch. 174, supra, p. 423, and the Act of March 3, 1911, ch. 207, supra, p. 423.

See the note to R. S. sec. 1309, supra, 405.
[Engineer detachment — pay — rating — no increase of army.] * * *

Hereafter there shall be maintained at the United States Military Academy an engineer detachment, which shall consist of one first sergeant, one quartermaster sergeant, eight sergeants, ten corporals, two cooks, two musicians, thirty-eight first-class privates, and thirty-eight second-class privates;

For pay of such engineer detachment, twenty-four thousand dollars; additional pay for length of service, six thousand four hundred and eight dollars: Provided, That the enlisted men of said detachment shall receive the same pay and allowances as are now or may be hereafter authorized for corresponding grades in the battalions of engineers: Provided further, That nothing herein shall be so construed as to authorize an increase in the total number of enlisted men of the Army now authorized by law. [37 Stat. L. 254.]

See the note to the first paragraph of this Act, supra, p. 424.

The provisions of the text superseded those of the Act of March 3, 1911, ch. 207, 36 Stat. L. 1019, relating to the pay, etc., of the acting first sergeant of the Military Academy detachment of engineers.

[Sale of unserviceable material, etc.—use of proceeds.] * * * That when any instrument, apparatus, implements, or materials which have been heretofore or may hereafter be purchased or acquired for the use of any department of instruction or for the maintenance and operation of the waterworks are no longer needed or are no longer serviceable they may be sold in such manner as the superintendent may direct and the proceeds credited to the appropriation for the department or the waterworks for which they were purchased or acquired. [37 Stat. L. 260.]

See the note to the first paragraph of this Act, supra, p. 424.

[Superintendent — leave of absence.] * * * Hereafter the Secretary of War may grant the superintendent of the academy leave of absence without deduction from pay or allowances for the same period that the superintendent may grant leave of absence to other officers of the academy under the provisions of section thirteen hundred and thirty of the Revised Statutes. [37 Stat. L. 263.]

See the note to the first paragraph of this Act, supra, p. 424.

See R. S. sec. 1330, supra, p. 410.

[Promotion of professor.] * * * That any officer of the United States Army now holding the position of permanent professor at the United States Military Academy who on July first, nineteen hundred and fourteen, should have served not less than thirty-three years in the Army, one-third of which service shall have been as professor and instructor at the Military Academy, shall on that date have the rank, pay, and allowances of a colonel in the Army. [37 Stat. L. 264.]

See the note to the first paragraph of this Act, supra, p. 424.

See also the note to R. S. sec. 1309, supra, p. 406.

[Sec. 1.] [Purchase of technical and scientific supplies.] * * * That all technical and scientific supplies for the departments of instruction of
the Military Academy shall be purchased by contract or otherwise, as the Secretary of War may deem best. [38 Stat. L. 1136.]

The provisions of this and the following paragraph of the text are from the Military Academy Appropriation Act of March 4, 1915, ch. 146. Similar provisions have appeared in the Military Academy Appropriation Acts for many years.

[Use of wharf at West Point by vessels — collection of wharfage dues.]

The Secretary of War is authorized to have collected from vessels using the wharf and ferry slip at West Point, New York, such wharfage dues as he may deem just, reasonable, and necessary, the same to be paid at the time of landing to the post quartermaster or his authorized agent. [38 Stat. L. 1137.]

See the note to the preceding paragraph of this Act.

A further provision of this Act was as follows: "That until the apportionment under the Fourteenth Census of the United States becomes effective, whenever any cadet shall have finished three years of his course at the academy his successor may be admitted."

This was repealed by the Act of May 4, 1916. See the note to the Act of June 6, 1900, ch. 792, § 4. supra, p. 417.

The Military Academy Appropriation Act of April 19, 1910, ch. 174, 36 Stat. L. 323, contained the following provision:

"Hereafter, for six years from July first, anno Domini, nineteen hundred and ten, whenever any cadet shall have finished three years of his course at the United States Military Academy, his successor may be admitted to the Academy; and the corps of cadets is hereby increased to meet this provision."

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**MILITARY INSTRUCTION**

See Education; Military Academy

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**MILITARY PRISONS**

See Prisons and Prisoners

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**MILITARY RESERVATIONS**

See Public Lands; War Department and Military Establishment

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**MILITARY SECRETS**

See National Defense Secrets
MILITIA

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I. NATIONAL GUARD AND UNORGANIZED MILITIA

Sec. 57. [Composition of the militia.] The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to
become citizens of the United States, who shall be more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia. [39 Stat. L. 197.]

This and the following section 117 are from the Act of June 3, 1916, ch. 134, entitled "An Act for making further and more effectual provisions for the national defense, and for other purposes," frequently referred to as the "National Defense Act."

Sections 1625-1661 constituted title 16 of the Revised Statutes entitled "The Militia." Of these sections 1625-1660 were repealed by the Dick Act of Jan. 21, 1903, ch. 196, § 25, 32 Stat. L. 780, and the final section 1661 is noted under the Act of June 3, 1916, ch. 134, § 87, infra, p. 454. This last cited Act superseded entirely said Dick Act of 1903, and the various amendments thereof, as noted under the various sections of this Act following.

This and the following section 117 of this Act would seem to supersede the former provisions of the Dick Act of Jan. 21, 1903, ch. 196, § 1, 32 Stat. L. 778, which, as amended by the Act of May 27, 1908, ch. 204, § 1, 35 Stat. L. 399, was as follows:

"Sec. 1. That the militia shall consist of every able-bodied male citizen of the respective States and Territories and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age, and shall be divided into two classes: The organized militia, to be known as the National Guard of the State, Territory, or District of Columbia, or by such other designations as may be given them by the States or Territories; the remainder to be known as the Reserve Militia: Provided, That the provisions of this Act and of section sixteen hundred and sixty-one, Revised Statutes, as amended, shall apply only to the militia organized as a land force."

Construction.—Statutes providing for the establishment, discipline, and pay of the army should be liberally construed. State v. Dudley, (1910) 173 Ind. 633, 91 N. E. 223.


An enlisted man of the Ohio National Guard is a soldier of "the organized militia" as defined in the above section, and, as such, is liable to trial and punishment by court-martial as provided in the code of regulations of the Ohio National Guard and the articles of war of the United States as adopted in said code of regulations. McGurray v. Murphy, (1909) 80 Ohio St. 413, 88 N. E. 881, 17 Am. Cas. 444.

So it has been held in a decision by a state court: "The power of state governments to legislate concerning the militia existed and was exercised before the adoption of the Constitution of the United States, and as its exercise was not prohibited by that instrument, it is understood to remain with the States, subject only to the paramount authority of acts of Congress enacted in pursuance of the constitution of the United States. The section of the constitution related [art. I, sec. 8] does not confer on Congress unlimited power over the militia of the States. It is restricted to specific objects enumerated, and for all other purposes the militia remain as before the formation of the constitution, subject to state authorities. Nor is there any merit in the proposition that the authority a State may exercise over its own militia is derived from the constitution of the United States. The States always assumed to control their militia, and, except so far as they have conferred upon the national government exclusive or concurrent authority, the States retain the residue of authority over the militia they previously had and exercised. And no reason exists why a State may not control its own militia within constitutional limitations. Its exercise by the States is simply a means of self-protection." Dunne v. People. (1879) 94 Ill. 120, 34 Am. Rep. 213. See also Houston v. Moore, (1820) 5 Wheat. 1, 5 U. S. (L. ed.) 19.

Organization of militia.—Under the provision of R. S. sec. 1870 (see note supra, this page), declaring that the militia of each state shall be arranged into divisions, etc., "as the legislature of the state may direct," the fact that but a portion
of the militia has been so organized was held not to impair the validity of the organizations actually made. People v. Hill, (1891) 126 N. Y. 497, 27 N. E. 789. The governor of the state, as commander-in-chief of the military forces of the state, has power to consolidate companies and regiments. People v. Ewen, (1859) 17 How. Pr. (N. Y.) 375.

SEC. 117. [Applicable to land forces only.] The provisions of this Act in respect to the militia shall be applicable only to militia organized as a land force and not to the Naval Militia, which shall consist of such part of the militia as may be prescribed by the President for each State, Territory, or District: Provided, That each State, Territory, or District maintaining a Naval Militia as herein prescribed may be credited to the extent of the number thereof in the quota that would otherwise be required by section sixty-two of this Act. [39 Stat. L. 212.] See the note to the preceding section 57 of this Act.

[Militia Act construed—"State or Territory" to include District of Columbia.] That whenever the words "State or Territory" are used in the "Act to promote the efficiency of the militia, and for other purposes," approved January twenty-first, nineteen hundred and three, as amended, they shall be held to apply to and include the District of Columbia. [35 Stat. L. 636.]

This is from an Act of Feb. 18, 1909, ch. 146, entitled "An Act for the organization of the Militia in the District of Columbia." Said Act amended the prior Act of March 1, 1889, ch. 328, 25 Stat. L. 772, relating to the same subject and added several additional sections, among them being the provisions given in the text, numbered as "Sec. 74."

SEC. 59. [Exemptions from militia duty.] The Vice President of the United States; the officers, judicial and executive, of the Government of the United States and of the several States and Territories; persons in the military or naval service of the United States; customhouse clerks; persons employed by the United States in the transmission of the mail; artificers and workmen employed in the armories, arsenals, and navy yards of the United States; pilots; mariners actually employed in the sea service of any citizen or merchant within the United States, shall be exempt from militia duty without regard to age, and all persons who because of religious belief shall claim exemption from military service, if the conscientious holding of such belief by such person shall be established under such regulations as the President shall prescribe, shall be exempted from militia service in a combatant capacity; but no person so exempted shall be exempt from militia service in any capacity that the President shall declare to be noncombatant. [39 Stat. L. 197.]

This and the following sections 58, 60, 61 and 63 are from the Act of June 3, 1916, ch. 134. This section superseded the Dick Act of Jan. 21, 1903, ch. 196, § 2, 32 Stat. L. 775 which was as follows:

"Sec. 2. That the Vice-President of the United States, the officers, judicial and executive, of the Government of the United States, the members and officers of each House of Congress, persons in the military or naval service of the United States, all
custom-house officers, with their clerks, postmasters, and persons employed by the United States in the transmission of the mail, ferrymen employed at any ferry on a post road, artisans and workmen employed in the armories and arsenals of the United States, pilots, mariners actually employed in the sea service of any citizen or merchant within the United States, and all persons who are exempted by the laws of the respective States in which they are stationed, shall be exempted from militia duty, without regard to age: Provided, That nothing in this Act shall be construed to require or compel any member of any well-recognized religious sect or organization at present organized and existing whose creed forbids its members to participate in war in any form, and whose religious convictions are against war or participation therein, in accordance with the creed of said religious organization, to serve in the militia or any other armed or volunteer force under the jurisdiction and authority of the United States."

Exemption of persons by state.—Under the Act of Congress of 1792, providing that persons of the age of eighteen years and under the age of forty-five years, except certain officers specified and "all persons who now are or may hereafter be exempted by the laws of the respective States," shall be enrolled in the militia, it was held to be competent for the state legislature to exempt persons from enrolment, designating them by their age; for example, persons under twenty-one or over thirty years of age. Opinion of Justices, (1830) 52 Pick. (Mass.) 571.

The legislature also has power to revoke an exemption from serving in the militia, before granted to a certain class of citizens, and require them to do military duty. Com. v. Bird, (1815) 12 Mass. 443.

Power of captain to exempt private.—A captain in the militia has no authority to exempt a private from the performance of military duty on account of bodily infirmity, upon the certificate of a physician who is not a surgeon or surgeon's mate of the regiment, and does not reside within the bounds of the regiment. Cobb v. Lucas, (1833) 15 Pick. (Mass.) 1.


The clerks employed in the offices of the several departments of the government are not liable to militia duty. Ex p. Smith, (1826) 2 Cranch C. C. 603, 22 Fed. Cas. No. 12,967.

A justice of the peace, in the District of Columbia, is an officer of the government of the United States, and is exempt from militia duty. Wise v. Withers, (1806) 3 Cranch 331, 2 U. S. (L. ed.) 457.

Mariners.—Generally.—"To be "actually employed in the service of a citizen or merchant of the United States, is to be a mariner, and, in that character, liabilities and privations are incurred, which are inconsistent with militia duty; because mariners properly engaged are subjected to duties and penalties at all times and seasons; and the public interest is as dependent on the uninterrupted performance of their duty, as in the training and disciplining of the militia. . . . Men employed in the fishing-business, in vessels which require a license, and an agreement in the nature of a shipping paper, are as much mariners, as those who go on coasting or foreign voyages, and they are so treated by the laws of the United States." Com. v. Douglas, (1820) 17 Mass. 49.

The master of an enrolled vessel, employed in transporting stones, etc., from one port to another of Boston Bay, and occasionally making a short trip to sea for the purpose of fishing, was held not to be exempted from militia duty, as a mariner in the sea service. Ex p. Dunbar, (1817) 14 Mass. 383.

A person employed as first officer and pilot on board a steamer plying daily between two ports about twelve miles distant from each other, and whose duty it was to take the mail to and from the steamer and the post-office, was held not to be exempted, either as a mariner, a ferryman, or by reason of his so taking the mail, from liability to perform duty in the militia. Cousins v. Cowing, (1839) 23 Pick. (Mass.) 208.

Officer in army.—One claiming exemption from duty in the militia, as having been an officer in the army of the United States, must produce his commission, or show actual service by virtue of a lawful appointment. Com. v. Smith, (1816) 13 Mass. 316.

Sec. 58. [Composition of the National Guard.] The National Guard shall consist of the regularly enlisted militia between the ages of eighteen and forty-five years organized, armed, and equipped as hereinafter provided, and of commissioned officers between the ages of twenty-one and sixty-four years. [39 Stat. L. 197.]

See the note to the preceding sec. 59 of this Act. The composition of the militia was formerly prescribed by the Dick Act of Jan. 21, 1903, ch. 196, § 3, 32 Stat. L. 776 which, as amended by the Act of May 27, 1908, ch. 204, § 2, 35 Stat. L. 399, was as follows:
"Sec. 3. That the regularly enlisted, organized, and uniformed active militia in the several States and Territories and the District of Columbia who have heretofore participated or shall hereafter participate in the apportionment of the annual appropriation provided by section sixteen hundred and sixty-one of the Revised Statutes of the United States, as amended, whether known and designated as National Guard, militia, or otherwise, shall constitute the organized militia. On and after January twenty-first, nineteen hundred and ten, the organization, armament, and discipline of the organized militia in the several States and Territories and the District of Columbia shall be the same as that which is now or may hereafter be prescribed for the Regular Army of the United States, subject in time of peace to such general exceptions as may be authorized by the Secretary of War. Provided, That in peace and war each organized division of militia may have one inspector of small arms practice with the rank of major; each regiment of infantry or cavalry of organized militia one assistant inspector of small arms practice with the rank of captain; and each separate or unassigned battalion of infantry or engineers or squadron of cavalry of organized militia one assistant inspector of small arms practice with the rank of first lieutenant. Provided also, That the President of the United States in time of peace may, by order, fix the minimum number of enlisted men in each company, troop, battery, signal corps, engineer corps, and hospital corps: And provided further, That any corps of artillery, cavalry, and infantry existing in any of the States at the passage of the Act of May eighth, seventeen hundred and ninety-two, which, by the laws, customs, or usages of the States have been in continuous existence, shall be continued in existence under the provisions of this Act, unless the General Court of the State shall, by law, alter or modify the provisions of this Act. Provided further, That any corps of artillery, cavalry, and infantry of the United States, persons who are not members of the military service of the United States, who are commissioned for any period, who are not members of the militia of any State or Territory of the United States, or who are not members of the army of the United States, or who are not members of the militia of any foreign country or of any foreign power, shall be subject to the laws of the United States, and shall be subject to such privileges and be subject to the discipline prescribed by the laws of the United States. The word "organization," as used in the section here quoted as superseded, does not relate to or include the enlistment of a soldier. Organization relates to the distribution of the personnel of the army or militia, and to the enlistment of units. It provides for the distribution of the personnel into different arms and corps, such as infantry, cavalry, artillery, staff corps, medical corps, signal corps, etc., and the distribution of the personnel in each arm of the service corps into different units, such as divisions, brigades, companies, platoons, sections, squads, etc., and, further, into different ranks or grades such as generals, colonels, lieutenants-colonels, majors, captains, lieutenants, sergeants, corporals, privates, etc. Enlistment is the contract of service that a soldier, as distinguished from the officer, enters into with the state or the United States. The enlistment may be different in each state, some for seven years, some for five years, some for three years, with varying provisions for enlistment, and yet the organization of all may be the same; but it is essential to the effectiveness and efficiency of the forces called into the national service that the organization thereof should be the same—one harmonious whole. Acker r. Bell (1911) 62 FLA. 108, 57 So. 326, Ann. Cas. 1913C 1269, 39 L. R. A. (N. S.) 454.

Sec. 60. [Organization of National Guard units.] Except as otherwise specifically provided herein, the organization of the National Guard, including the composition of all units thereof, shall be the same as that which is
or may hereafter be prescribed for the Regular Army, subject in time of peace to such general exceptions as may be authorized by the Secretary of War. And the President may prescribe the particular unit or units, as to branch or arm of service, to be maintained in each State, Territory, or the District of Columbia in order to secure a force which, when combined, shall form complete higher tactical units. [39 Stat. L. 197.]

See the note to section 59 of this Act, supra, p. 434.

SEC. 61. [Maintenance of other troops by the States.] No State shall maintain troops in time of peace other than as authorized in accordance with the organization prescribed under this Act: Provided, That nothing contained in this Act shall be construed as limiting the rights of the States and Territories in the use of the National Guard within their respective borders in time of peace: Provided further, That nothing contained in this Act shall prevent the organization and maintenance of State police or constabulary. [39 Stat. L. 198.]

See the note to section 59 of this Act, supra, p. 434.

SEC. 63. [Retention of ancient privileges.] Any corps of Artillery, Cavalry, or Infantry existing in any of the States on the passage of the Act of May eighth, seventeen hundred and ninety-two, which by the laws, customs, or usages of said States has been in continuous existence since the passage of said Act, under its provision and under the provisions of section two hundred and thirty-two and sections sixteen hundred and twenty-five to sixteen hundred and sixty, both inclusive, of title sixteen of the Revised Statutes of eighteen hundred and seventy-three, and the Act of January twenty-first, nineteen hundred and three, relating to the militia, shall be allowed to retain its ancient privileges, subject, nevertheless, to all duties required by law of militia: Provided, That said organizations may be a part of the National Guard and entitled to all the privileges of this Act, and shall conform in all respects to the organization, discipline, and training of the National Guard in time of war: Provided further, That for purposes of training and when on active duty in the service of the United States they may be assigned to higher units, as the President may direct, and shall be subject to the orders of officers under whom they shall be serving. [39 Stat. L. 198.]

See the note to section 59 of this Act, supra, p. 434.

The Act of May 8, 1792, mentioned in the text was incorporated in various sections of the Revised Statutes which were subsequently repealed as indicated in the note to section 57 of this Act, supra, p. 432.

R. S. sec. 232 mentioned in this section was repealed by the Act of Jan. 21, 1903, ch. 196, § 25, 32 Stat. L. 775 and is set out in the note to section 12 of said Act, infra, p. 433.

As to R. S. secs. 1825-1860 and the Act of Jan. 21, 1903, ch. 196, mentioned in the text see the notes to section 57 of this Act, supra, p. 432.

[Officers and enlisted men — staff corps and departments.] • • • That the National Guard of any State, Territory, or the District of Columbia, shall include such officers and enlisted men of the Staff Corps and
Departments, corresponding to those of the Regular Army, as may be authorized by the Secretary of War. [40 Stat. L. — ]

This is from the Army Appropriation Act of May 12, 1917, ch. 134.

SEC. 62. [Number of the National Guard.] The number of enlisted men of the National Guard to be organized under this Act within one year from its passage shall be for each State in the proportion of two hundred such men for each Senator and Representative in Congress from such State, and a number to be determined by the President for each Territory and the District of Columbia, and shall be increased each year thereafter in the proportion of not less than fifty per cent until a total peace strength of not less than eight hundred enlisted men for each Senator and Representative in Congress shall have been reached: Provided, That in States which have but one Representative in Congress such increase shall be at the discretion of the President: Provided further, That this shall not be construed to prevent any State, Territory, or the District of Columbia from organizing the full number of troops required under this section in less time than is specified in this section, or from maintaining existing organizations if they shall conform to such rules and regulations regarding organization, strength, and armament as the President may prescribe: And provided further, That nothing in this Act shall be construed to prevent any State with but one Representative in Congress from organizing one or more regiments of troops, with such auxiliary troops as the President may prescribe; such organizations and members of such organizations to receive all the benefits accruing under this Act under the conditions set forth herein: Provided further, That the word Territory as used in this Act and in all laws relating to the land militia and the National Guard shall include and apply to Hawaii, Alaska, Porto Rico, and the Canal Zone, and the militia of the Canal Zone shall be organized under such rules and regulations, not in conflict with the provisions of this Act, as the President may prescribe. [39 Stat. L. 198.]

This and the following sections 64, 65, 68-75, 77-80, 82, 91, 109, 110, 118, and 111 are from the Act of June 3 1916, ch. 134.

SEC. 64. [Assignment of National Guard to brigades and divisions.] For the purpose of maintaining appropriate organization and to assist in instruction and training, the President may assign the National Guard of the several States and Territories and the District of Columbia to divisions, brigades, and other tactical units, and may detail officers either from the National Guard or the Regular Army to command such units: Provided, That where complete units are organized within a State, Territory, or the District of Columbia the commanding officers thereof shall not be displaced under the provisions of this section. [39 Stat. L. 198.]

See the note to the preceding section 62 of this Act.

SEC. 65. [Chiefs of staff of National Guard divisions.] The President may detail one officer of the Regular Army as chief of staff and one officer of the Regular Army or the National Guard as assistant to the chief of
staff of any division of the National Guard in the service of the United States as a National Guard organization: Provided, That in order to insure the prompt mobilization of the National Guard in time of war or other emergency, the President may, in time of peace, detail an officer of the Regular Army to perform the duties of chief of staff for each fully organized tactical division of the National Guard. [39 Stat. L. 199.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 68. [Location of units.] The States and Territories shall have the right to determine and fix the location of the units and headquarters of the National Guard within their respective borders: Provided, That no organization of the National Guard, members of which shall be entitled to and shall have received compensation under the provisions of this Act, shall be disbanded without the consent of the President, nor, without such consent, shall the commissioned or enlisted strength of any such organization be reduced below the minimum that shall be prescribed therefor by the President [39 Stat. L. 200.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 69. [Enlistments in the National Guard.] Hereafter the period of enlistment in the National Guard shall be for six years, the first three years of which shall be in an active organization and the remaining three years in the National Guard Reserve, hereinafter provided for, and the qualifications for enlistment shall be the same as those prescribed for admission to the Regular Army: Provided, That in the National Guard the privilege of continuing in active service during the whole of an enlistment period and of reenlisting in said service shall not be denied by reason of anything contained in this Act. [39 Stat. L. 200.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 70. [Federal enlistment contract.] Enlisted men in the National Guard of the several States, Territories, and the District of Columbia now serving under enlistment contracts which contain an obligation to defend the Constitution of the United States and to obey the orders of the President of the United States shall be recognized as members of the National Guard under the provisions of this Act for the unexpired portion of their present enlistment contracts. When any such enlistment contract does not contain such obligation, the enlisted man shall not be recognized as a member of the National Guard until he shall have signed an enlistment contract and taken and subscribed to the following oath of enlistment, upon signing which credit shall be given for the period already served under the old enlistment contract: "I do hereby acknowledge to have voluntarily enlisted this — day of ———, 19—, as a soldier in the National Guard of the United States and of the State of ———, for the period of three years in service and three years in the reserve, under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the State of ———, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I
will obey the orders of the President of the United States and of the govern-er of the State of ——, and of the officers appointed over me according to law and the rules and articles of war." [39 Stat. L. 201.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 71. [Federal enlistment contract — oath.] Hereafter all men enlisting for service in the National Guard shall sign an enlistment contract and take and subscribe to the oath prescribed in the preceding section of this Act. [39 Stat. L. 201.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 72. [Discharge of enlisted men from the National Guard.] An enlisted man discharged from service in the National Guard shall receive a discharge in writing in such form and with such classification as is or shall be prescribed for the Regular Army, and in time of peace discharges may be given prior to the expiration of terms of enlistment under such regulations as the President may prescribe. [39 Stat. L. 201.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 73. [Federal oath for National Guard officers.] Commissioned officers of the National Guard of the several States, Territories, and the District of Columbia now serving under commissions regularly issued shall continue in office, as officers of the National Guard, without the issuance of new commissions: Provided, That said officers have taken, or shall take and subscribe to the following oath of office: "I, ——, do solemnly swear that I will support and defend the Constitution of the United States and the constitution of the State of ——, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will obey the orders of the President of the United States and of the governor of the State of ——; that I make this obligation freely, without any mental reservation or purpose of evasion, that I will well and faithfully discharge the duties of the office of —— in the National Guard of the United States and of the State of —— upon which I am about to enter, so help me God." [39 Stat. L. 201.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 74. [Qualifications for National Guard officers.] Persons hereafter commissioned as officers of the National Guard shall not be recognized as such under any of the provisions of this Act unless they shall have been selected from the following classes and shall have taken and subscribed to the oath of office prescribed in the preceding section of this Act: Officers or enlisted men of the National Guard; officers on the reserve or unassigned list of the National Guard; officers, active or retired, and former officers of the United States Army, Navy, and Marine Corps; graduates of the United States Military and Naval Academies and graduates of schools, colleges, and universities where military science is taught under the supervision of an officer of the Regular Army, and, for the technical branches and staff corps or departments, such other civilians as may be especially qualified for duty therein. [39 Stat. L. 201.]

See the note to section 62 of this Act, supra, p. 438.
The acceptance by the commanding general of the National Guard of the District of Columbia of a commission as colonel in the volunteer army, for service in the war with Spain, did not operate as a vacation of the District command. (1898) 22 Op. Atty.-Gen. 237.

SEC. 75. [Same.] The provisions of this Act shall not apply to any person hereafter appointed an officer of the National Guard unless he first shall have successfully passed such tests as to his physical, moral, and professional fitness as the President shall prescribe. The examination to determine such qualifications for commission shall be conducted by a board of three commissioned officers appointed by the Secretary of War from the Regular Army or the National Guard, or both. [39 Stat. L. 202.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 77. [Elimination and disposition of officers.] At any time the moral character, capacity, and general fitness for the service of any National Guard officer may be determined by an efficiency board of three commissioned officers, senior in rank to the officer whose fitness for service shall be under investigation, and if the findings of such board be unfavorable to such officer and be approved by the official authorized to appoint such an officer, he shall be discharged. Commissions of officers of the National Guard may be vacated upon resignation, absence without leave for three months, upon the recommendation of an efficiency board, or pursuant to sentence of a court-martial. Officers of said guard rendered surplus by the disbandment of their organizations shall be placed in the National Guard Reserve. Officers may, upon their own application, be placed in the said reserve. [39 Stat. L. 202.]

See the note to section 62 of this Act, supra, p. 438.

The resignation of a military office does not take effect until accepted by the proper superior authority. (1898) 22 Op. Atty.-Gen. 237.

SEC. 78. [The National Guard Reserve.] Subject to such rules and regulations as the President may prescribe, a National Guard Reserve shall be organized in each State, Territory, and the District of Columbia, and shall consist of such organizations, officers, and enlisted men as the President may prescribe, or members thereof may be assigned as reserves to an active organization of the National Guard: Provided, That members of said reserves, when engaged in field or coast-defense training with the active National Guard, shall receive the same Federal pay and allowances as enlisted men of like grade on the active list of said guard when likewise engaged: Provided further, That, except as otherwise specifically provided in this Act, no commissioned or enlisted reservist shall receive any pay or allowances out of any appropriation made by Congress for National Guard purposes. [39 Stat. L. 202.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 79. [Reserve battalions for recruit training.] When members of the National Guard and the enlisted reserve thereof of any State, Territory, or the District of Columbia shall have been brought into the service of the United States in time of war, there shall be immediately organized, either from such enlisted reserve or from the unorganized militia, in such State,
Territory, or District, one reserve battalion for each regiment of Infantry or Cavalry, or each nine batteries of Field Artillery, or each twelve companies of Coast Artillery, brought into the service of the United States, and such reserve battalion shall constitute the fourth battalion of any such regiment or twelve companies of Coast Artillery. Reserve battalions shall consist of four companies of such strength as may be prescribed by the President of the United States. When the members of three or more regiments of the National Guard of any State, Territory, or District shall have been brought into the service of the United States, the reserve battalions of such regiments may be organized into provisional regiments and higher units. If for any reason there shall not be enough voluntary enlistments to keep the reserve battalions at the prescribed strength, a sufficient number of the unorganized militia shall be drafted into the service of the United States to maintain each of such battalions at the proper strength. As vacancies occur from death or other causes in any organization in the service of the United States and composed of men taken from the National Guard, men shall be transferred from the reserve battalions to the organizations in the field so that such organizations may be maintained at war strength. Officers for the reserve battalions provided for herein shall be drafted from the National Guard Reserve or Coast Artillery companies of the National Guard or the Officers' Reserve Corps, such officers to be taken, if practicable, from the States, respectively, in which the battalions shall be organized. Officers and nonecommissioned officers returned to their home stations because of their inability to perform active field service may be assigned to reserve battalions for duty, and all soldiers invalided home shall be assigned to and carried on the rolls of reserve battalions until returned to duty or until discharged. [39 Stat. L. 202.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 80. [Leaves of absence for certain Government employees.] All officers and employees of the United States and of the District of Columbia who shall be members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be engaged in field or coast-defense training ordered or authorized under the provisions of this Act. [39 Stat. L. 203.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 82. [Armament, equipment, and uniform of the National Guard.] The National Guard of the United States shall, as far as practicable, be uniformed, armed, and equipped with the same type of uniforms, arms, and equipments as are or shall be provided for the Regular Army. [39 Stat. L. 203.]

See the note to section 62 of this Act, supra, p. 438.

SEC. 91. [Discipline to conform to that of Regular Army.] The discipline (which includes training) of the National Guard shall conform to the system which is now or may hereafter be prescribed for the Regular Army, and the training shall be carried out by the several States, Territories, and
the District of Columbia so as to conform to the provisions of this Act. [39 Stat. L. 306.]

See the note to section 62 of this Act, supra, p. 438.

Sec. 109. [Pay for National Guard officers.] Certain commissioned officers on the active list belonging to organizations of the National Guard of each State, Territory, and the District of Columbia participating in the apportionment of the annual appropriation for the support of the National Guard shall receive compensation for their services, except during periods of service for which they may become lawfully entitled to the same pay as officers of corresponding grades of the Regular Army, as follows, not to include longevity pay: A captain $500 per year and the same pay shall be paid to every officer of higher rank than that of captain, a first lieutenant $240 per year, and a second lieutenant $200 per year. Regulations to be prescribed by the Secretary of War shall determine the amount and character of service that must be rendered by officers to entitle them to the whole or specific parts of the maximum pay hereinbefore authorized: Provided, That all staff officers, aids-de-camp, and chaplains shall receive not to exceed one-half of the pay of a captain, except that regimental adjutants, and majors and captains in command of machine-gun companies, ambulance companies, field hospital companies, or sanitary troops shall receive the pay hereinbefore authorized for a captain. [39 Stat. L. 209.]

See the note to section 62 of this Act, supra, p. 438.

Sec. 110. [Pay for National Guard enlisted men.] Each enlisted man on the active list belonging to an organization of the National Guard of a State, Territory, or the District of Columbia, participating in the apportionment of the annual appropriation for the support of the National Guard, shall receive compensation for his services, except during periods of service for which he may become lawfully entitled to the same pay as an enlisted man of corresponding grade in the Regular Army, at a rate equal to twenty-five per centum of the initial pay now provided by law for enlisted men of corresponding grades of the Regular Army: Provided, That such enlisted man shall receive the compensation herein provided if he shall have attended not less than forty-eight regular drills during any one year, and a proportionate amount for attendance upon a lesser number of such drills, not less than twenty-four; and no such enlisted man shall receive any part of said compensation except as authorized by this proviso and the three provisos next following: Provided further, That the compensation provided herein shall be computed for semi-annual periods, beginning the first day of January and the first day of July of each year, in proportion to the number of drills attended; and no compensation shall be paid to any enlisted man for the first semiannual period of any year unless he shall have attended during said period at least twenty-four drills, but any lesser number of drills attended during said period shall be reckoned with the drills attended during the second semiannual period in computing the compensation, if any, due him for that year: Provided further, That when any man enters into an enlistment other than an immediate reenlistment he shall be entitled to proportional compensation for that year if during the remainder of the year he shall attend a number of drills whose ratio to twenty-four is
not less than the ratio of the part of the year so served to the whole year; and when any man's enlistment shall expire the compensation, if any, to which he may be entitled shall be determined in like manner: Provided further, That periods of any actual military duty equivalent to the drills herein prescribed (except those periods of service for which members of the National Guard may become lawfully entitled to the same pay as officers and enlisted men of the corresponding grades in the Regular Army) may be accepted as service in lieu of such drills when so provided by the Secretary of War.

All amounts appropriated for the purpose of this and the last preceding section shall be disbursed and accounted for by the officers and agents of the Quartermaster Corps of the Army, and all disbursements under the foregoing provisions of this section shall be made as soon as practicable after the thirty-first day of December and the thirtieth day of June of each year upon pay rolls prepared and authenticated in the manner to be prescribed by the Secretary of War: Provided, That stoppages may be made against the compensation payable to any officer or enlisted man hereunder to cover the cost of public property lost or destroyed by and chargeable to such officer or enlisted man.

Except as otherwise specifically provided herein, no money appropriated under the provisions of this or the last preceding section shall be paid to any person not on the active list, nor to any person over sixty-four years of age, nor to any person who shall fail to qualify as to fitness for military service under such regulations as the Secretary of War shall prescribe, nor to any State, Territory, or District, or officer or enlisted man in the National Guard thereof, unless and until such State, Territory, or District provides by law that staff officers, including officers of the Pay, Inspection, Subsistence, and Medical Departments, hereafter appointed shall have had previous military experience and shall hold their positions until they shall have reached the age of sixty-four years, unless retired prior to that time by reason of resignation, disability, or for cause to be determined by a court-martial legally convened for that purpose, and that vacancies among said officers shall be filled by appointment from the officers of the militia of such State, Territory, or District: Provided further, That the preceding proviso shall not apply to any State, Territory, or District until sixty days next after the adjournment of the next session of its legislature held after the approval of this Act. [39 Stat. L. 209.]

See the note to section 82 of this Act, supra, p. 438.

Sec. 118. [Necessary rules and regulations.] The President shall make all necessary rules and regulations and issue such orders as may be necessary for the thorough organization, discipline, and government of the militia provided for in this Act. [39 Stat. L. 213.]

See the note to section 82 of this Act, supra, p. 438.

Sec. 111. [National Guard when drafted into Federal service.] When Congress shall have authorized the use of the armed land forces of the United States, for any purpose requiring the use of troops in excess of those of the Regular Army, the President may, under such regulations, including such physical examination, as he may prescribe, draft into the military service of the United States, to serve therein for the period of the war unless
sooner discharged, any or all members of the National Guard and of the National Guard Reserve. All persons so drafted shall, from the date of their draft, stand discharged from the militia, and shall from said date be subject to such laws and regulations for the government of the Army of the United States as may be applicable to members of the Volunteer Army, and shall be embodied in organizations corresponding as far as practicable to those of the Regular Army or shall be otherwise assigned as the President may direct. The commissioned officers of said organizations shall be appointed from among the members thereof, officers with rank not above that of colonel to be appointed by the President alone, and all other officers to be appointed by the President by and with the advice and consent of the Senate. Officers and enlisted men in the service of the United States under the terms of this section shall have the same pay and allowances as officers and enlisted men of the Regular Army of the same grades and the same prior service. [39 Stat. L. 211.]

See the note to section 62 of this Act, supra, p. 438.

The former provisions on this subject were contained in sections 4 and 5 of the Act of Jan. 21, 1903, ch. 196, 32 Stat. L. 776 as amended by the Act of May 27, 1908, ch. 294, §§ 3 and 4, 35 Stat. L. 400, and sections 6 and 10 of the Act of Jan. 21, 1903, ch. 196, 32 Stat. L. 776, which sections were as follows:

"Sec. 4. When ever the United States is invaded or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States, or the President is unable with the regular forces at his command to execute the laws of the Union, it shall be lawful for the President to call forth such number of the militia of the State or of the States or Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose, through the governor of the respective State or Territory, or through the commanding general of the militia of the District of Columbia, from which State, Territory, or District such troops may be called, to such officers of the militia as he may think proper."

"Sec. 5. That whenever the President calls forth the organized militia of any State, Territory, or of the District of Columbia, to be employed in the service of the United States, he may specify in his call the period for which such service is required, and the militia so called shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the President: Provided, That no commissioned officer or enlisted man of the organized militia shall be held to service beyond the term of his existing commission or enlistment. Provided further, that when the military needs of the Federal Government arising from the necessity to execute the laws of the Union, suppress insurrection, or repel invasion, can not be met by the regular forces, the organized militia shall be called into the service of the United States in advance of any volunteer force which it may be determined to raise."

"Sec. 6. That when the militia of more than one State is called into the actual service of the United States by the President he may, in his discretion, apportion them among such States or Territories or to the District of Columbia according to representative population."

"Sec. 10. That the militia, when called into the actual service of the United States, shall, during their time of service, be entitled to the same pay and allowances as are or may be provided by law for the Regular Army."

Power of President.—Congress may "provide for calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasions," and the authority to call forth the militia has been exclusively vested in the President. Alabama Great Southern R. Co. v. U. S., (1914) 49 Ct. Cl. 522.

The Federal Constitution clearly distinguishes between the army and navy on the one hand and the militia upon the other. The latter may be called forth by the President for specific purposes, and when so called forth and assembled comes under the control of and into the service of the United States. Alabama Great Southern R. Co. v. U. S., (1914) 49 Ct. Cl. 522.

As to the similar power conferred on the President by the Act of 1795, it was said: "The power thus conferred by Congress to the President is doubtless of a very high and delicate nature. A free
people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the President are addressed, may decide for himself, and equally open to be contested by every militia-man who shall refuse to obey the orders of the President? We are all of opinion that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons." Martin v. Mott, (1827) 12 Wheat. 19, 6 U. S. (L. ed.) 537.

It has, however, been ruled by the Attorney-General that the Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States affords no warrant for the use of the militia by the general government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, and hence the President has no authority to call forth the organized militia of the states and send it into a foreign country with the regular army as a part of an army of occupation. (1912) 29 Op. Atty.-Gen. 322.

Under a state statute providing that each officer of the National Guard "shall be entitled to pay at the same rates in every respect, as the corresponding grades may at the time be entitled to in the United States army," it has been held that such officers are given the increased pay to which United States officers are entitled on account of length of service. State v. Dudley, (1910) 178 Ind. 633, 91 N. E. 228.

Joint Resolution To authorize the President to draft members of the National Guard and of the Organized Militia of the several States, Territories, and the District of Columbia and members of the National Guard and Militia Reserve into the military service of the United States under certain conditions, and for other purposes.

[Res. of July 1, 1916, No. 211, 39 Stat. L. 339.]

[SEC. 1.] [Drafting National Guard, etc., into federal service — period of service.] That in the opinion of the Congress of the United States an emergency now exists which demands the use of troops in addition to the Regular Army of the United States, and that the President be, and he is hereby, authorized to draft into the military service of the United States, under the provisions of section one hundred and eleven of the national defense Act approved June third, nineteen hundred and sixteen, so far as the provisions of said section may be applicable and not inconsistent with the terms hereof, any or all members of the National Guard and of the Organized Militia of the several States, Territories, and the District of Columbia and any and all members of the National Guard and Organized Militia Reserves, to serve for the period of the emergency, not exceeding three years, unless sooner discharged: Provided, That all persons so drafted shall, from the date of their draft, stand discharged from the militia during the period of their service under said draft. [39 Stat. L. 339.]

The Act of June 3, 1916, ch. 134, § 111 mentioned in this section is given in the preceding paragraph of the text.

The Army Appropriation Act of Aug. 29, 1916, ch. 418, § 1, 39 Stat. L. 633 contained a provision as follows:

"That when members of the National Guard, who have been mustered into the service of the United States, have been discharged under the order of the War Department which provides that members of the National Guard with dependent families may be mustered out, transportation from their position on the Mexican border to their homes may be authorized by the Secretary of War; of persons on their discharge
from the United States disciplinary barracks or from any place in which they have been held under a sentence of dishonorable discharge and confinement for more than six months, or from the Government Hospital for the Insane after transfer thereto from such barracks or place, to their homes (or elsewhere as they may elect), provided the cost in each case shall not be greater than to the place of last enlistment."

SEC. 2. [Pensions.] That the provisions of section one hundred and twelve of the national defense Act of June third, nineteen hundred and sixteen, shall be applicable to any officer or enlisted man drafted into the service of the United States pursuant to the provisions of this joint resolution. [39 Stat. L. 340.]


SEC. 3. [Organizations — officers — vacancies.] That when organizations the members of which are drafted under the provisions of this resolution do not constitute complete tactical units the President may, by combining such organizations, organize battalions, regiments, brigades, and divisions, and may appoint officers for such units from the Regular Army, from the members of such organizations, from those duly qualified and registered pursuant to section twenty-three of the Act of Congress approved January twenty-first, nineteen hundred and three, or members of the Officers Reserve Corps as provided in section thirty-eight of the national defense Act of June third, nineteen hundred and sixteen, officers with rank not above that of colonel to be appointed by the President alone and all other officers to be appointed by the President, by and with the advice and consent of the Senate: Provided, That vacancies incident to the appointment of officers of the Regular Army to the positions in the forces drafted for this emergency may be filled under the provisions of section eight of the Act of April twenty-fifth, nineteen hundred and fourteen. [39 Stat. L. 340.]

For the Act of Jan. 21, 1903, ch. 190, § 23 mentioned in this section see War Department and Military Establishment.

The Act of June 3, 1916, ch. 134, § 38, mentioned in this section is given in War Department and Military Establishment.

For the Act of April 25, 1914, ch. 71, § 8, also mentioned in this section see War Department and Military Establishment.

SEC. 4. [Rank and precedence.] That whenever in time of war or public danger or during the emergency declared in section one of this resolution, two or more officers of the same grade are on duty in the same field, department, or command, or organizations thereof, the President may assign the command of the forces of such field, department, or command, or of any organization thereof, without regard to seniority of rank in the same grade. In the absence of such assignment by the President, officers of the same grade shall rank and have precedence in the following order without regard to date of rank or commission as between officers of different classes, namely: First, officers of the Regular Army and officers of the Marine Corps detached for service with the Army by order of the President; second, officers of forces drafted into the military service of the United States: Provided, That officers of the Regular Army holding commissions in forces drafted into the service of the United States shall rank and have precedence under said commissions as if they were commissioned in the Regular Army; but the rank of officers of the Regular Army under their commissions in the
forces drafted into the service of the United States shall not for the purpose
of this resolution be held to antedate muster or draft into the service of the

SEC. 115. [Physical examination.] Every officer and enlisted man of
the National Guard who shall be called into the service of the United
States as such shall be examined as to his physical fitness under such regu-
lations as the President may prescribe without further commission or enlist-
ment: Provided, That immediately preceding the muster out of an officer or
enlisted man, called into the active service of the United States he shall be
physically examined under rules prescribed by the President of the United
States, and the record thereof shall be filed and kept in the War Depart-
ment. [39 Stat. L. 212.]

This is from the Act of June 3, 1916, ch. 134.
This section together with section 111 of this Act, supra, p. 444, would seem to
supersede the Act of Jan. 21, 1909, ch. 196, § 7, 32 Stat. L. 776, as amended by the
Act of May 27, 1908, ch. 204, 35 Stat. L. 401, reading as follows:
"SEC. 7. That every officer and enlisted man of the militia who shall be called forth
in the manner hereinafter prescribed, shall be mustered for service without further
enlistment, and without further medical examination previous to such muster, except
for those States and Territories which have not adopted the standard of medical
examination prescribed for the Regular Army: Provided, however, That any officer or
enlisted man of the militia who shall refuse or neglect to present himself for such
muster, upon being called forth as herein prescribed, shall be subject to trial by court-
martial and shall be punished as such court-martial may direct."  

Consent of parents or guardian.—The provision in the superseded section that,
when called into service by the President, no further enlistment is necessary, simply
does away with the delay necessary to the physical examination or other pre-
requisites of a similar nature to the enlistment of the soldier, and has no refer-
ence to the necessity of the consent of his parents or guardian. Acker v. Bell,

SEC. 8. [Courts-martial — composition.] That the majority membership
of courts-martial for the trial of officers or men of the militia when in
the service of the United States shall be composed of militia officers. [32 Stat.
L. 776, as amended by 35 Stat. L. 401.]

This is a part of the Dick Act of Jan. 21, 1903, ch. 196.
As originally enacted this section was as follows:
"SEC. 8. That courts-martial for the trial of officers or men of the militia, when in
the service of the United States, shall be composed of militia officers only."

It was amended to read as given in the text by the Militia Act of May 27, 1908,
ch. 204, § 6.
For other provisions relating to courts-martial, see Articles of War; War Depart-
ment and Military Establishment.

Presumption as to acts of court-martial.
—The acts of such a court are presumed
to be correct; and it is not competent for the plaintiff to show their irregularity.
Slade v. Minor, (1817) 2 Cranch C. C. 139,
22 Fed. Cas. No. 12,937.

So in an action of trespass against the
marshal of the District of Columbia for
levying a distress for a militia fine, it is
only necessary for him, in his justifica-
tion, to prove those facts which give juris-
diction to the military court; and that it
was regularly constituted, and imposed the
fine. Slade v. Minor, (1817) 2
Cranch C. C. 139, 22 Fed. Cas. No. 12,937.

A court-martial, organized under the
authority of a state, has no power to
assess fines upon delinquent militiamen,
for failing to obey a requisition to enter
the service, emanating from the Secretary

SEC. 101. [National Guard, when subject to laws governing Regular Army.] The National Guard when called as such into the service of the United States shall, from the time they are required by the terms of the call to respond thereto, be subject to the laws and regulations governing the Regular Army, so far as such laws and regulations are applicable to officers and enlisted men whose permanent retention in the military service, either on the active list or on the retired list, is not contemplated by existing law. [39 Stat. L. 208.]

This and the following sections 102–108 are from the Act of June 3, 1916, ch. 134. The former provisions on this subject were contained in the Act of Jan. 21, 1903, ch. 196, § 3. 32 Stat. L. 776, which read as follows:

"Sec. 3. That the militia, when called into the actual service of the United States, shall be subject to the same Rules and Articles of War as the regular troops of the United States."

SEC. 102. [System of courts-martial for National Guard.] Except in organizations in the service of the United States, courts-martial in the National Guard shall be of three kinds, namely, general courts-martial, special courts-martial, and summary courts-martial. They shall be constituted like, and have cognizance of the same subjects, and possess like powers, except as to punishments, as similar courts provided for by the laws and regulations governing the Army of the United States, and the proceedings of courts-martial of the National Guard shall follow the forms and modes of procedure prescribed for said similar courts. [39 Stat. L. 208.]

See the note to the preceding section 101 of this Act.

SEC. 103. [Convening of general courts-martial — power of courts.] General courts-martial of the National Guard not in the service of the United States may be convened by orders of the President, or of the governors of the respective States and Territories, or by the commanding general of the National Guard of the District of Columbia, and such courts shall have the power to impose fines not exceeding $200; to sentence to forfeiture of pay and allowances; to a reprimand; to dismissal or dishonorable discharge from the service; to reduction of noncommissioned officers to the ranks; or any two or more of such punishments may be combined in the sentences imposed by such courts. [39 Stat. L. 208.]

See the note to section 101 of this Act, supra, this page.

SEC. 104. [Special courts-martial.] In the National Guard, not in the service of the United States, the commanding officer of each garrison, fort, post, camp, or other place, brigade, regiment, detached battalion, or other detached command, may appoint special courts-martial for his command; but such special courts-martial may in any case be appointed by superior authority when by the latter deemed desirable. Special courts-martial shall have power to try any person subject to military law, except a commissioned officer, for any crime or offense made punishable by the military laws of the
United States, and such special courts-martial shall have the same powers of punishment as do general courts-martial, except that fines imposed by such courts shall not exceed $100. [39 Stat. L. 208.]

See the note to section 101 of this Act, supra, p. 449.

Sec. 105. [Summary courts-martial.] In the National Guard, not in the service of the United States, the commanding officer of each garrison, fort, post, or other place, regiment or corps, detached battalion, company, or other detachment of the National Guard may appoint for such place or command a summary court to consist of one officer, who shall have power to administer oaths and to try the enlisted men of such place or command for breaches of discipline and violations of laws governing such organizations; and said court, when satisfied of the guilt of such soldier, may impose fines not exceeding $25 for any single offense; may sentence noncommissioned officer to reduction to the ranks; may sentence to forfeiture of pay and allowances. The proceedings of such court shall be informal, and the minutes thereof shall be the same as prescribed for summary courts of the Army of the United States. [39 Stat. L. 208.]

See the note to section 101 of this Act, supra, p. 449.

Sec. 106. [Courts-martial—sentences.] All courts-martial of the National Guard, not in the service of the United States, including summary courts, shall have the power to sentence to confinement in lieu of fines authorized to be imposed: Provided, That such sentences of confinement shall not exceed one day for each dollar of fine authorized. [39 Stat. L. 209.]

See the note to section 101 of this Act, supra, p. 449.

Sec. 107. [Approval of sentences.] No sentence of dismissal from the service or dishonorable discharge, imposed by a National Guard court-martial, not in the service of the United States, shall be executed until approved by the governor of the State or Territory concerned, or by the commanding general of the National Guard of the District of Columbia. [39 Stat. L. 209.]

See the note to section 101 of this Act, supra, p. 449.

Sec. 108. [Courts-martial—securing attendance of parties and witnesses—process.] In the National Guard, not in the service of the United States, presidents of courts-martial and summary court officers shall have power to issue warrants to arrest accused persons and to bring them before the court for trial whenever such persons shall have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, and to issue subpoenas and subpoenas duces tecum and to enforce by attachment attendance of witnesses and the production of books and papers, and to sentence for a refusal to be sworn or to answer as provided in actions before civil courts.

All processes and sentences of said courts shall be executed by such civil officers as may be prescribed by the laws of the several States and Territories, and in every State where no provision shall have been made for such court, and in the Territories and the District of Columbia, such processes
and sentences shall be executed by a United States marshal or his duly appointed deputy, and it shall be the duty of any United States marshal to execute all such processes and sentences and make return thereof to the officer issuing or imposing the same. [39 Stat. L. 309.]

See the note to section 101 of this Act, supra, p. 449.

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SEC. 11. [Commencement of pay.] That when the militia is called into the actual service of the United States, or any portion of the militia is called forth under the provisions of this Act, their pay shall commence from the day of their appearing at the place of company rendezvous, but this provision shall not be construed to authorize any species of expenditure previous to arriving at such places of rendezvous which is not provided by existing laws to be paid after their arrival at such place of rendezvous. [32 Stat. L. 776, as amended by 35 Stat. L. 401.]

This is from the Dick Act of Jan. 21, 1903, ch. 196.
This section was amended to read as given in the text by the Militia Act of May 27, 1908, ch. 204, § 7. The amendment consisted in the substitution after the words "any portion of the militia" of the words "is called forth" in lieu of the words "is accepted" which had appeared in the original text.
See also the Act of June 3, 1916, ch. 134, § 111, supra, p. 444.

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[SEC. 1.] [Payment of men enlisted by state authorities.] • • • nothing in this Act or previous Acts of Congress shall be construed to prohibit the paying of men enlisted by State authorities of any State for militia organization for the purpose of bringing said organization up to the minimum necessary to permit of the muster in of said organization, from the date of such enlistments to the date of muster in or from date of enlistment to date of rejection, after physical examination. [39 Stat. L. 624.]

This and the following paragraph of the text are from the Army Appropriation Act of Aug. 29, 1916, ch. 418.

[Support of members of National Guard drafted into service of United States — suits — "family" defined.] • • • That the sum of $2,000,000 is hereby appropriated out of any money in the Treasury not otherwise appropriated, to be expended under the direction of the Secretary of War, and under such rules and regulations as he may prescribe, for the support of, at a cost of not more than $50 per month, or so much of said amount as the Secretary of War may deem necessary, and not more than such enlisted man has been contributing monthly to the support of his family at the time of his being called or drafted into the service of the United States or during his enlistment period in the Regular Army at the time of such call or draft of the Organized Militia or National Guard, the family of each enlisted man of the Organized Militia or National Guard called or drafted into the service of the United States until his discharge from such service, and the family of each enlisted man of the Regular Army until his discharge from active service therein or until the discharge of the Organized Militia or National Guard from such service if such enlisted man is at that time in
active service in the Regular Army, which family during the term of
service of such enlisted man has no other income, except the pay of such
enlisted man, adequate for the support of said family: Provided, That the
action of the Secretary of War in all cases provided for in this paragraph
shall be final, and no right to prosecute a suit in the Court of Claims or in
any other court of the United States against the Government of the United
States shall accrue to such enlisted man, or to any member of the family of
any such enlisted man, by virtue of the passage of this Act: And provided
further, That this paragraph shall not apply to any such enlisted man who
shall marry after the fifteenth day of July, nineteen hundred and sixteen;
and the word "family" shall include only wife, children, and dependent
mothers. [39 Stat. L. 649.]

See the note to the preceding paragraph of this section.
This paragraph was amended by the Act of Sept. 8, 1916, ch. 463, § 901, and the Act
of April 17, 1917, ch. —, § 1, given in the two paragraphs of the text following.

SEC. 901. [Act of Aug. 29, 1916, ch. 418, sec. 1, amended.] The act
approved August twenty-ninth, nineteen hundred and sixteen, making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes, is hereby amended as follows:

"The sum of $2,000,000, therein appropriated to be expended under the
direction of the Secretary of War for the support of the family of each
enlisted man of the Organized Militia or National Guard, or of the Regular
Army, as therein provided, shall be available to be paid on the basis of and
for time subsequent to June eighteenth, nineteen hundred and sixteen, the
date of the call by the President, and the time for which such payment
shall be made shall correspond with the time of service of the enlisted men,
and payment shall be made without reference to the enlisted man having
enlisted before or after the call by the President." [39 Stat. L. 801.]

This is a part of the Revenue Act of Sept. 8, 1916, ch. 463.
The provisions of the Act of Aug. 29, 1916, ch. 418, § 1, amended by this section are
given in the preceding paragraph of the text.
See also the following paragraph of the text.

[Sec. 1.] [Act of Aug. 29, 1916, ch. 418, sec. 1, amended.] * * *
That the provision in the Act of August twenty-ninth, nineteen hundred
and sixteen, as amended by section nine hundred and one of the Act of Sep-
tember eighth, nineteen hundred and sixteen, for the Federal support of
families of enlisted men shall, with respect to enlisted men belonging to
organizations of the Organized Militia or National Guard which entered the
service of the United States under the calls of the President of May ninth,
nineteen hundred and sixteen, and June eighteenth, nineteen hundred and
sixteen, and enlisted men of the Regular Army who by the provisions of
Acts above cited are beneficiaries thereof only during the time the Organized
Militia or National Guard continue in the service of the United States under
said calls, apply only to applications stated in the form prescribed by the
MILITIA

Secretary of War which are received in the office of the Depot Quartermaster, Washington, District of Columbia, on or before June thirtieth, nineteen hundred and seventeen. [40 Stat. L. — ]

This is from the Deficiencies Appropriation Act of April 17, 1917, ch. — .
The provisions of the Act of Aug. 29, 1916, ch. 418, § 1, amended by this section are given in the second preceding paragraph of the text.
See also the preceding paragraph of the text.

SEC. 12. [Adjutant-general in each State, etc.—duties—report to Congress.] That there shall be appointed in each State, Territory and District of Columbia, an Adjutant-General, who shall perform such duties as may be prescribed by the laws of such State, Territory, and District, respectively, and make returns to the Secretary of War, at such times and in such form as he shall from time to time prescribe, of the strength of the organized militia, and also make such reports as may from time to time be required by the Secretary of War. That the Secretary of War shall, with his annual report of each year, transmit to Congress an abstract of the returns and reports of the adjutants-general of the States, Territories, and the District of Columbia, with such observations thereon as he may deem necessary for the information of Congress. [32 Stat. L. 776.]

This is from the Dick Act of Jan. 21, 1903, ch. 196. R. S. sec. 232, repealed by section 25 of this Act (32 Stat. L. 780) was as follows:

"Sec. 232. The Secretary of War shall lay before Congress, on or before the first Monday in February of each year, an abstract of the returns of the adjutants-general of the several States of the militia thereof."

Act of March 2, 1803, ch. 15, 2 Stat. L. 207.
See also the following paragraph of the text.

Office of adjutant-general. —In Nebraska it has been held that the office of adjutant-general exists in the state by virtue of an appointment from the governor as commander-in-chief of the military forces, acting under authority given him by Congress (1 Statutes at Large 273), and the Act of March 4, 1870. Gen. Stat. 470. Such an office was held not to be executive within the meaning of the constitutional provision providing that "no other executive state office (aside from those mentioned), shall be continued or created."

State c. Weston, (1876) 4 Neb. 234.

SEC. 66. [Adjutants general of States, and so forth.] The adjutants general of the States, Territories, and the District of Columbia and the officers of the National Guard shall make such returns and reports to the Secretary of War, or to such officers as he may designate, at such times and in such form as the Secretary of War may from time to time prescribe: Provided, That the adjutants general of the Territories and of the District of Columbia shall be appointed by the President with such rank and qualifications as he may prescribe, and each adjutant general for a Territory shall be a citizen of the Territory for which he is appointed. [39 Stat. L. 199.]

This and the following sections 67 and 119 are from the Act of June 3, 1916, ch. 134. See also the preceding paragraph of the text.

SEC. 67. [Appropriation, apportionment, and disbursement of funds for the National Guard.] A sum of money shall hereafter be appropriated
annually, to be paid out of any money in the Treasury not otherwise appropriated, for the support of the National Guard, including the expense of providing arms, ordnance stores, quartermaster stores, and camp equipage, and all other military supplies for issue to the National Guard, and such other expenses pertaining to said guard as are now or may hereafter be authorized by law.

The appropriation provided for in this section shall be apportioned among the several States and Territories under just and equitable procedure to be prescribed by the Secretary of War and in direct ratio to the number of enlisted men in active service in the National Guard existing in such States and Territories at the date of apportionment of said appropriation, and to the District of Columbia, under such regulations as the President may prescribe: Provided, That the sum so apportioned among the several States, Territories, and the District of Columbia, shall be available under such rules as may be prescribed by the Secretary of War for the actual and necessary expenses incurred by officers and enlisted men of the Regular Army when traveling on duty in connection with the National Guard; for the transportation of supplies furnished to the National Guard for the permanent equipment thereof; for office rent and necessary office expenses of officers of the Regular Army on duty with the National Guard; for the expenses of the Military Bureau, including clerical services, now authorized for the Division of Militia Affairs; for expenses of enlisted men of the Regular Army on duty with the National Guard, including quarters, fuel, light, medicines, and medical attendance; and such expenses shall constitute a charge against the whole sum annually appropriated for the support of the National Guard, and shall be paid therefrom and not from the allotment duly apportioned to any particular State, Territory, or the District of Columbia; for the promotion of rifle practice, including the acquisition, construction, maintenance, and equipment of shooting galleries and suitable target ranges; for the hiring of horses and draft animals for the use of mounted troops, batteries, and wagons; for forage for the same; and for such other incidental expenses in connection with lawfully authorized encampments, maneuvers, and field instruction as the Secretary of War may deem necessary, and for such other expenses pertaining to the National Guard as are now or may hereafter be authorized by law. * * * [39 Stat. L. 199.]

See the note to the preceding section 68 of this Act. Further provisions of this section are given infra, p. 463.

Former provisions relating to this subject were made by various Acts as follows:


"Sec. 1661. That the sum of two million dollars is hereby annually appropriated, to be paid out of any money in the Treasury not otherwise appropriated, for the purpose of providing arms, ordnance stores, quartermaster stores, and camp equipage for issue to the militia, such appropriation to remain available until expended."

The Act of Aug. 18, 1894, ch. 301, 28 Stat. L. 406, provided that the permanent annual appropriation made by this section should "not lapse with the end of any fiscal year nor be turned into the surplus fund, but shall remain a permanent appropriation and be available for the several States and Territories and District of Columbia until expended as provided in said Acts, or otherwise disposed of by Congress." This was superseded by said R. S. sec. 1661, as last amended, by which such appropriation was to "remain available until expended."

"Sec. 2. That said appropriation shall be apportioned among the several States and Territories, under the direction of the Secretary of War, according to the number of Senators and Representatives to which each State respectively is entitled in the Congress of the United States, and to the Territories and District of Columbia such proportion and under such regulations as the President may prescribe: Provided, however, That no State shall be entitled to the benefits of the appropriation apportioned to it unless the number of its regularly enlisted, organized, and uniformed active militia shall be at least one hundred men for each Senator and Representative to which such State is entitled in the Congress of the United States. And the amount of said appropriation which is thus determined not to be available shall be covered back into the Treasury: Provided also, That the sums so apportioned among the several States and Territories and the District of Columbia shall be available for the purposes named in section fourteen of the Act of January twenty-first, nineteen hundred and three, for the actual excess of expenses of travel in making the inspections therein provided for over the allowances made for the same by law; for the promotion of rifle practice, including the acquisition, construction, maintenance, and equipment of shooting galleries and suitable target ranges; for the hiring of horses and draft animals for the use of mounted troops, batteries, and wagons; for forage for the same and for such other incidental expenses in connection with encampments, maneuvers, and field instruction provided for in sections fourteen and fifteen of the said Act of January twenty-first, nineteen hundred and three, as the Secretary of War may deem necessary."

A provision of the Act of June 13, 1890, ch. 423, 26 Stat. L. 156, reading as follows:

"That hereafter the cost of the Ordnance Department of all ordnance and ordnance stores issued to the States, Territories, and District of Columbia, under the act of February twelfth, eighteen hundred and eighty-seven, shall be credited to the appropriation for "manufacture of arms at national armories," and used to procure like ordnance stores, and that said appropriation shall be available until exhausted, not exceeding two years."

A provision of the Act of April 27, 1914, ch. 72, 38 Stat. L. 306, reading as follows:

"That hereafter the allotment to any State, Territory, or the District of Columbia, from the annual appropriation made by section sixteen hundred and sixty-one, Revised Statutes, as amended, shall be available for the purposes specified by law only under such conditions as may be prescribed by the Secretary of War to secure effective organizational field or camp service for instruction and generally increased field efficiency on the part of the Organized Militia."

Sec. 119. [Annual estimates required.] The Secretary of War shall cause to be estimated annually the amount necessary for carrying out the provisions of so much of this Act as relates to the militia, and no money shall be expended under said provisions except as shall from time to time be appropriated for carrying them out. [39 Stat. L. 213.]

See the note to section 66 of this Act, supra, p. 453.

Sec. 3. [Purchase of arms, etc., and accountability.] That the purchase or manufacture of arms, ordnance stores, quartermaster stores, and camp equipage for the militia under the provisions of this Act shall be made under the direction of the Secretary of War, as such arms, ordnance and quartermaster stores, and camp equipage are now manufactured or otherwise provided for the use of the Regular Army, and they shall be received for and shall remain the property of the United States, and be annually accounted for by the governors of the States and Territories and by the commanding general of the National Guard of the District of Columbia, for which purpose the Secretary of War shall prescribe and supply the necessary blanks and make such regulations as he may deem necessary to protect the interests of the United States. [24 Stat. L. 402, as amended by 34 Stat. L. 450.]

This section is part of an Act of Feb. 12, 1887, ch. 129. This section was amended to read as given in the text by an Act of June 23, 1906, ch. 3515, § 3. The amendment consisted in the addition of the words "and by the
commanding general of the National Guard of the District of Columbia" after the word "Territories" making the section to read as here given.

The "provisions of this Act" relating to the purchase, etc., of arms, etc., mentioned in this section were those made by section 1 of this Act, which amended R. S. sec. 1661, noted under the Act of June 3, 1916, ch. 134, § 87, supra, p. 464.

When a state or territory had an unex- pended balance to its credit under the old law on June 30, 1887, which remained available, the attorney-general advised that such balance could be drawn upon to supply ordnance stores to it. But when the quota belonging to any state or territory under the old law had been over- drawn, the amount overdrawn was not chargeable to such state or territory under the new law. (1887) 19 Op. Atty.-Gen. 61.

Replacing arms and stores used in war.

— In the absence of any of the approv- iation for the maintenance of the militia in the several states, or of arms, ordnance stores, etc., purchased with it, the govern- ment is not required or empowered to issue to the several states stores in kind to replace such arms, ordnance stores, etc., as were exhausted, consumed, or im- paired by use in the war with Spain; nor can it make compensation for such stores, as they were the property of the United States. (1899) 22 Op. Atty.-Gen. 372.

SEC. 87. [Disposition and replacement of damaged property, and so forth.] All military property issued to the National Guard as herein pro- vided shall remain the property of the United States. Whenever any such property issued to the National Guard in any State or Territory or the Dis- trict of Columbia, shall have been lost, damaged, or destroyed, or become unserviceable or unsuitable by use in service or from any other cause, it shall be examined by a disinterested surveying officer of the Regular Army or the National Guard, detailed by the Secretary of War, and the report of such surveying officer shall be forwarded to the Secretary of War, or to such officer as he shall designate to receive such reports; and if it shall appear to the Secretary of War from the record of survey that the property was lost, damaged, or destroyed through unavoidable causes, he is hereby authorized to relieve the State or Territory or the District of Columbia from further accountability therefor. If it shall appear that the loss, damage, or destruction of property was due to carelessness or neglect, or that its loss, damage, or destruction could have been avoided by the exercise of reasonable care, the money value of such property shall be charged to the accountable State, Territory, or District of Columbia, to be paid from State, Territory, or District funds, or any funds other than Federal. If the articles so surveyed are found to be unserviceable or unsuitable, the Secretary of War shall direct what disposition, by sale or otherwise, shall be made of them; and if sold, the proceeds of such sale, as well as stoppages against officers and enlisted men, and the net proceeds of collections made from any person or from any State, Territory, or District to reimburse the Government for the loss, damage, or destruction of any property, shall be deposited in the Treasury of the United States as a credit to said State, Territory, or the District of Columbia, accountable for said property, and as a part of and in addition to that portion of its allotment set aside for the purchase of similar supplies, stores, or material of war: Provided further, That if any State, Territory, or the District of Columbia shall neglect or refuse to pay, or to cause to be paid, the money equivalent of any loss, damage, or destruction of property charged against such State, Territory, or the District of Columbia by the Secretary of War after survey by a disinterested officer appointed as hereinbefore provided, the Secretary
of War is hereby authorized to debar such State, Territory, or the District of Columbia from further participation in any and all appropriations for the National Guard until such payment shall have been made. [39 Stat. L. 204.]

These and the following sections 88, 83-85 were from the Act of June 3, 1916, ch. 134. The former provision on this subject was made by the Act of Feb. 12, 1887, ch. 129, §4, 24 Stat. L. 402, as amended by the Act of June 22, 1906, ch. 3515, §4, 34 Stat. L. 450, as follows:

"Sec. 4. That whenever any property furnished to any State or Territory, or the District of Columbia, as hereinbefore provided, has been lost or destroyed, or has become unserviceable or unsuitable from use in service, or from any other cause, it shall be examined by a disinterested surveying officer of the organized militia, to be appointed by the governor of the State or Territory, or the commanding general of the National Guard of the District of Columbia, to whom the property has been issued, and his report shall be forwarded by said governor or commanding general direct to the Secretary of War, and if it shall appear to the Secretary of War from the record of survey that the property has been lost or destroyed through unavoidable causes, he is hereby authorized to relieve the State from further accountability therefor; if it shall appear that the loss or destruction of property was due to carelessness or neglect or that its loss could have been avoided by the exercise of reasonable care, the money value thereof shall be charged against the allotment to the States under section sixteen hundred and sixty-one of the Revised Statutes as amended. If the articles so surveyed are found to be unserviceable or unsuitable, the Secretary of War shall direct what disposition, by sale or otherwise, shall be made of them, except unserviceable clothing which shall be destroyed, and if sold the proceeds of such sale shall be covered into the Treasury of the United States."

Sec. 88. [Proceeds of sale of condemned stores—disposition.] The net proceeds of the sale of condemned stores issued to the National Guard and not charged to State allotments shall be covered into the Treasury of the United States, as shall also stoppages against officers and enlisted men, and the net proceeds of collections made from any person to reimburse the Government for the loss, damage, or destruction of said property not charged against the State allotment issued for the use of the National Guard. [39 Stat. L. 205.]

See the note to the preceding section 87 of this Act.

Sec. 83. [Issuance by Secretary of War.] The Secretary of War is hereby authorized to procure, under such regulations as the President may prescribe, by purchase or manufacture, within the limits of available appropriations made by Congress, and to issue from time to time to the National Guard, upon requisition of the governors of the several States and Territories or the commanding general of the National Guard of the District of Columbia, such number of United States service arms, with all accessories, field-artillery matériel, engineer, coast artillery, signal, and sanitary matériel, accoutrements, field uniforms, clothing, equipage, publications, and military stores of all kinds, including public animals, as are necessary to arms, uniform, and equip for field service the National Guard in the several States, Territories, and the District of Columbia: Provided, That as a condition precedent to the issue of any property as provided for by this Act, the State, Territory, or the District of Columbia desiring such issue shall make adequate provision, to the satisfaction of the Secretary of War, for the protection and care of such property: Provided further, That, whenever it shall be shown to the satisfaction of the Secretary of War that the National Guard of any State, Territory, or the District of Columbia, is properly organized, armed, and equipped for field service,
funds allotted to that State, Territory, or District for the support of its National Guard may be used for the purchase of any article issued by any of the supply departments of the Army.

[39 Stat. L. 203.]
MILITIA

to replace obsolete or condemned prior issues. turn in to the War Depart-
ment or otherwise dispose of, in accordance with the directions of the
Secretary of War, all property so replaced or condemned, and shall not
receive any money credit therefor. [39 Stat. L. 204.]

See the notes to section 87 of this Act, supra, p. 456, and section 83 of this Act,
supra, p. 457.

[Issue of new type of small arms to militia.] It shall be the duty of
the Secretary of War, whenever a new type of small arm shall have been
adopted for the use of the Regular Army, and when a sufficient quantity
of such arms shall have been manufactured to constitute, in his discretion,
an adequate reserve for the armament of any regular and volunteer forces
that it may be found necessary to raise in case of war; to cause the organi-
ized militia of the United States to be furnished with small arms of the
type so adopted, with bayonets and the necessary accouterments and equip-
ments, including ammunition therefor: Provided, That such issues shall
be made in the manner provided in section thirteen of the Act approved
January twenty-first, nineteen hundred and three, entitled "An Act to
promote the efficiency of the militia, and for other purposes." [34 Stat. L.
1174.]

This is a provision of the Army Appropriation Act of March 2, 1907, ch. 2511.
This Act of Jan. 21, 1903, ch. 196, § 13, mentioned in this section is noted as super-

[Issue of automatic pistols for Organized Militia.] ⋆ ⋆ ⋆ That when-
ever in his opinion a sufficient number of automatic pistols of the standard
service type, holsters, and pistol-cartridge boxes therefor, shall have been
procured and be available for the purpose, the Secretary of War is hereby
authorized to issue, on the requisition of the governors of the several States
and Territories, or of the commanding general of the Militia of the District
of Columbia, such number of standard pistols, holsters, and pistol-cartridge
boxes therefor as are required for arming all of the Organized Militia in
said States, Territories, and District of Columbia, without charging the cost
or value thereof, or any expense connected therewith, against the allotment
to said State, Territory, or District of Columbia, out of the annual appro-
priation provided by section sixteen hundred and sixty-one of the Revised
Statutes, as amended, or requiring payment therefor, and to exchange,
without receiving any money credit therefor, ammunition, or parts thereof,
suitable to the new standard pistol, round for round, for corresponding
ammunition suitable to the old revolver theretofore issued to said States,
Territory, or District by the United States: Provided, That the said
standard pistols, holsters, and pistol-cartridge boxes therefor shall be
receipted for and shall remain the property of the United States and be
annually accounted for by the governors of the States and Territories and
the commanding general of the Militia of the District of Columbia as now
required by law, and that each State, Territory, and District shall, on
receipt of the new pistols, holsters, and pistol-cartridge boxes, and ammun-
ition, turn in to the Ordnance Department of the United States Army, with-
out receiving any money credit therefor and without expense for transportion, all United States revolvers and ammunition therefor, holsters, and revolver-cartridge boxes now in its possession. [36 Stat. L. 1057.]

This was from the Army Appropriation Act of March 3, 1911, ch. 209.
R. S. sec. 1661, mentioned in the text is noted as superseded under the Act of June 3, 1916, ch. 134, § 67, supra, p. 454.

[Infantry equipment — issuance by Secretary of War.] That whenever in the opinion of the Secretary of War a sufficient number of Infantry equipment, model of nineteen hundred and ten, shall have been procured and shall be available for the purpose the Secretary of War is hereby authorized to issue on the requisition of the governors of the several States and Territories or the commanding general of the District of Columbia National Guard, such numbers thereof as are required for equipping the National Guard in said States, Territories, and the District of Columbia, without charging the cost or value thereof or any expenses connected therewith, against any allotments to said States. Territories, or the District of Columbia, provided that the equipment thus issued shall be received for and shall remain the property of the United States and be annually accounted for in the manner prescribed by the Act of June third, nineteen hundred and sixteen, and that each State, Territory, and the District of Columbia shall, upon receipt of new equipment, turn in to the Ordnance Department of the United States Army, without receiving any money credit therefor and without expense for transportation of Infantry equipment now in its possession, the property of the United States, and replaced by articles of the model of nineteen hundred and ten equipment. [40 Stat. L. —.]

This and the following paragraph of the text are from the Army Appropriation Act of May 12, 1917, ch. —.

[Field artillery material.] • • • For the purpose of manufacturing and procuring field artillery material for the National Guard of the several States, Territories, and the District of Columbia, but to remain the property of the United States and to be accounted for in the manner now prescribed by law, the Secretary of War is hereby authorized, under such regulations as he may prescribe, on the requisitions of the governors of the several States and Territories or the commanding general of the National Guard of the District of Columbia, to issue said artillery material to the National Guard; and the sum of $10,000,000 is hereby appropriated and made immediately available for the manufacture, procurement, and issue of the articles constituting the same. [40 Stat. L. —.]

See the note to the preceding paragraph of the text.
Provisions similar to those of this paragraph have appeared in like Acts for preceding years.

SEC. 89. [Horses for Cavalry and Field Artillery of National Guard.] Funds allotted by the Secretary of War for the support of the National
Guard shall be available for the purchase, under such regulations as the Secretary of War may prescribe, of horses conforming to the Regular Army standards for the use of Field Artillery and Cavalry of the National Guard, said horses to remain the property of the United States and to be used solely for military purposes.

Horses so purchased may be issued not to exceed thirty-two to any one battery or troop, under such regulations as the Secretary of War may prescribe; and the Secretary of War is further authorized to issue, in lieu of purchase, for the use of such organizations, condemned Army horses which are no longer fit for service, but which may be suitable for the purposes of instruction, such horses to be sold as now provided by law when said purposes shall have been served. [39 Stat. L. 205.]

This and the following section 90 are from the Act of June 3, 1916, ch. 134.

SEC. 90. [Funds allotted for support of National Guard — availability for purchases.] Funds allotted by the Secretary of War for the support of the National Guard shall be available for the purchase and issue of forage, bedding, shoeing, and veterinary services, and supplies for the Government horses issued to any battery or troop, and for the compensation of competent help for the care of the material, animals, and equipment thereof, under such regulations as the Secretary of War may prescribe: Provided, That the men to be compensated, not to exceed five for each battery or troop, shall be duly enlisted therein and shall be detailed by the battery or troop commander, under such regulations as the Secretary of War may prescribe, and shall be paid by the United States disbursing officer in each State, Territory, and the District of Columbia. [39 Stat. L. 205.]

See the note to the preceding section 89 of this Act.

[Sec. 1.] [Horses for field artillery, etc.] • • • Arming, equipping, and training the National Guard: To provide for the purchase, under such regulations as the Secretary of War may prescribe, of horses conforming to the Regular Army standards for the use of Field Artillery, Cavalry, signal companies, engineer companies, ambulance companies, and other mounted units of the National Guard, said horses to remain the property of the United States and to be used solely for military purposes. Horses so purchased may be issued not to exceed thirty-two to any one battery, troop, or company, or four to a battalion or regimental headquarters, under such regulations as the Secretary of War may prescribe. [39 Stat. L. 645.]

This is from the Army Appropriation Act of Aug. 29, 1916, ch. 418.

[Horses and mules — transfer by Secretary of War — distribution.] • • • That the Secretary of War is hereby authorized to transfer to those organizations of the National Guard entitled thereto such number of horses and pack mules purchased by the Quartermaster Corps of the Army under the provisions of the Act of July first, nineteen hundred and sixteen, not
required for the proper equipment of organizations of the Regular Army, that can be issued to National Guard organizations under the regulations prescribed by the Secretary of War, all expenses incident to such transfer to be met from appropriations made for and on behalf of the National Guard; pack mules so transferred may be issued not to exceed six to any one radio company, machine-gun troop or company, or four to any one ambulance company, under such regulations as the Secretary of War may prescribe. [40 Stat. L. — ]

This and the following paragraph of the text are from the Army Appropriation Act of May 12, 1917, ch. — .

[Care of material, etc.— help — pay.] * * * To provide for the compensation of competent help for the care of matériel, animals, and equipment thereof, under such regulations as the Secretary of War may prescribe: Provided, That the men to be compensated, not to exceed five for each battery, troop, or company, shall be duly enlisted therein and shall be detailed by the battery, troop, or company commander under such regulations as the Secretary of War may prescribe, and shall be paid by the United States disbursing officer in each State, Territory, and the District of Columbia. [40 Stat. L. — ]

See the note to the preceding paragraph of the text.

[Purchases for state coast artillery — withdrawal in time of war.] For the purchase of material, equipment, books of instruction, range finders, and fire-control equipment for the instruction and use of state coast artillery organizations, * * *: Provided, That in time of war, or threatened war, such equipment may, in the discretion of the Secretary of War, be withdrawn from armories or other places where it is in use by the state coast artillery organizations, and may be used in the fortifications of the United States. [36 Stat. L. 261.]

This is from the Army Appropriation Act of March 23, 1910, ch. 115. The Act of May 10, 1894, ch. 172, § 2, 22 Stat. L. 93, provided as follows: "Sec. 2. That the Secretary of War is hereby authorized at his discretion, to issue, on the requisition of a governor of a State bordering on the sea or gulf coast, and having a permanent camping ground for the encampment of the militia not less than six days annually, two heavy guns and four mortars, with carriages and platforms, if such can be spared, for the proper instruction and practice of the militia in heavy artillery drill, and for this purpose a suitable battery for these cannon will be constructed; and for said construction and the transportation of said cannon, and so forth, the sum of five thousand dollars is hereby appropriated for supplying each State that may so apply." It was repealed by the Act of March 2, 1907, ch. 2507, § 1, 34 Stat. L. 1060.

Sec. 93. [Inspections of the National Guard.] The Secretary of War shall cause an inspection to be made at least once each year by inspectors general, and if necessary by other officers, of the Regular Army, detailed by him for that purpose, to determine whether the amount and condition of the property in the hands of the National Guard is satisfactory; whether the National Guard is organized as hereinbefore prescribed; whether the
officers and enlisted men possess the physical and other qualifications prescribed; whether the organization and the officers and enlisted men thereof are sufficiently armed, uniformed, equipped, and being trained and instructed for active duty in the field or coast defense, and whether the records are being kept in accordance with the requirements of this Act. The reports of such inspections shall serve as the basis for deciding as to the issue to and retention by the National Guard of the military property provided for by this Act, and for determining what organizations and individuals shall be considered as constituting parts of the National Guard within the meaning of this Act. [39 Stat. L. 206.]

This and the following part of section 67 and section 116 are from the Act of June 3, 1916, ch. 134.

This and the following section of the text would seem to supersede the provisions of the Dick Act of Jan. 21, 1903, ch. 196, § 14, 32 Stat. L. 777, which was as follows:

"Sec. 14. That whenever it shall appear by the report of inspections, which it shall be the duty of the Secretary of War to cause to be made at least once in each year by officers detailed by him for that purpose, that the organized militia of a State or Territory or of the District of Columbia is sufficiently armed, uniformed, and equipped for active duty in the field, the Secretary of War is authorized, on the requisition of the governor of such State or Territory, to pay to the quartermaster-general thereof, or to such other officer of the militia of said State as the said governor may designate and appoint for the purpose, so much of its allotment out of the said annual appropriation under section sixteen hundred and sixty-one of the Revised Statutes as amended as shall be necessary for the payment, subsistence, and transportation of such portion of said organized militia as shall engage in actual field or camp service for instruction, and the officers and enlisted men of such militia while so engaged shall be entitled to the same pay, subsistence, and transportation or travel allowances as officers and enlisted men of corresponding grades of the Regular Army are or may hereafter be entitled by law, and the officer so designated and appointed shall be regarded as a disbursing officer of the United States, and shall render his accounts through the War Department to the proper accounting officers of the Treasury for settlement, and he shall be required to give good and sufficient bonds to the United States, in such sums as the Secretary of War may direct, faithfully to account for the safe-keeping and payment of public money so intrusted to him for disbursement."

Sec. 67. [Property and disbursing officers.] • • • The governor of each State and Territory and the commanding general of the National Guard of the District of Columbia shall appoint, designate, or detail, subject to the approval of the Secretary of War, an officer of the National Guard of the State, Territory, or District of Columbia who shall be regarded as property and disbursing officer for the United States. He shall receipt and account for all funds and property belonging to the United States in possession of the National Guard of his State, Territory, or District, and shall make such returns and reports concerning the same as may be required by the Secretary of War. The Secretary of War is authorized, on the requisition of the governor of a State or Territory or the commanding general of the National Guard of the District of Columbia, to pay to the property and disbursing officer thereof so much of its allotment out of the annual appropriation for the support of the National Guard as shall, in the judgment of the Secretary of War, be necessary for the purposes enumerated therein. He shall render, through the War Department, such accounts of Federal funds intrusted to him for disbursement as may be required by the Treasury Department. Before entering upon the performance of his duties as property and disbursing officer he shall be required to give good and sufficient bond to the United States, the amount thereof to be determined by the Secretary of War, for the faithful performance of his duties and for the safe-keeping and proper disposition
of the Federal property and funds intrusted to his care. He shall, after
having qualified as property and disbursing officer, receive pay for his
services at a rate to be fixed by the Secretary of War, and such compen-
sation shall be a charge against the whole sum annually appropriated for
the support of the National Guard: Provided, That when traveling in the
performance of his official duties under orders issued by the proper
authorities he shall be reimbursed for his actual necessary traveling
expenses, the sum to be made a charge against the allotment of the State,
Territory, or District of Columbia: Provided further, That the Secretary
of War shall cause an inspection of the accounts and records of the property
and disbursing officer to be made by an inspector general of the Army at
least once each year: And provided further, That the Secretary of War
is empowered to make all rules and regulations necessary to carry into
effect the provisions of this section. [39 Stat. L. 200.]

See the note to the preceding section 93 of this Act.
The preceding part of this section is given supra, p. 463.

SEC. 116. [Noncompliance with Federal Act.] Whenever any State
shall, within a limit of time to be fixed by the President, have failed or
refused to comply with or enforce any requirements of this Act, or any
regulation promulgated thereunder and in aid thereof by the President or
the Secretary of War, the National Guard of such State shall be debarred,
wholly or in part, as the President may direct, from receiving from the
United States any pecuniary or other aid, benefit, or privilege authorized
or provided by this Act or any other law. [39 Stat. L. 212.]

See the note to section 93 of this Act, supra, p. 463.

[Bonds not required of militia officers.] * * * That officers of the
organized militia who may hereafter be furnished, under proper authority,
with funds for the purchase of coffee, or other components of the travel
ration for the use of their respective commands, shall not be required to
furnish bonds for the safe-keeping and disbursement of the same. [35 Stat.
L. 117.]

This is from the Army Appropriation Act of May 11, 1908, ch. 163.

SEC. 94. [Encampments and maneuvers.] Under such regulations as the
President may prescribe the Secretary of War is authorized to provide for
the participation of the whole or any part of the National Guard in encamp-
ments, maneuvers, or other exercises, including outdoor target practice, for
field or coast-defense instruction, either independently or in conjunction
with any part of the Regular Army, and there may be set aside from the
funds appropriated for that purpose and allotted to any State, Territory,
or the District of Columbia, such portion of said funds as may be necessary
for the payment, subsistence, transportation, and other proper expenses of
such portion of the National Guard of such State, Territory, or the District
of Columbia as shall participate in such encampments, maneuvers, or
other exercises, including outdoor target practice, for field and coast-defense instruction; and the officers and enlisted men of such National Guard while so engaged shall be entitled to the same pay, subsistence, and transportation as officers and enlisted men of corresponding grades of the Regular Army are or hereafter may be entitled by law. [39 Stat. L. 206.]

This and the following sections 95 and 97 are from the Act of June 3, 1916, ch. 134. The former provisions relating to the matter mentioned in these sections was contained in the Dick Act of Jan. 21, 1903, ch. 196, § 15, 32 Stat. L. 777, which, as amended by the Act of May 27, 1908, ch. 204, § 9, 35 Stat. L. 402, and the Act of April 21, 1910, ch. 185, 36 Stat. L. 329, was as follows:

"Sec. 15. That the Secretary of War is authorized to provide for participation by any part of the organized militia of any State, Territory, or the District of Columbia, on the request of the governor of a State or Territory, or the commanding-general of the militia of the District of Columbia, in the encampments, maneuvers, and field instruction of any part of the Regular Army, at or near any military post or camp or lake or sea-coast defenses of the United States. In such case the organized militia so participating shall receive the same pay, subsistence, and transportation as is provided by law for the officers and men of the Regular Army, and no part of the sums appropriated for the support of the Regular Army shall be used to pay any part of the expenses of the organized militia of any State or Territory or the District of Columbia, while engaged in joint encampments, maneuvers, and field instruction of the Regular Army and militia: Provided, That the Secretary of War is authorized, under requisition of the governor of a State or Territory or the commanding-general of the militia of the District of Columbia, to pay to the quartermaster-general, or such other officer of the militia as may be duly designated and appointed for the purpose, so much of its allotment, under the annual appropriation authorized by section sixteen hundred and sixty-one, Revised Statutes, as amended, as shall be necessary for the payment, subsistence, transportation, and other expenses of such portion of the organized militia as may engage in encampments, maneuvers, and field instruction with any part of the Regular Army at or near any military post or camp or lake or sea-coast defenses of the United States, and the Secretary of War shall forward to Congress, at each session next after said encampments, a detailed statement of the expense of such encampments and maneuvers: Provided, That the command of such military post or camp and the officers and troops of the United States there stationed shall remain with the regular commander of the post without regard to the rank of the commanding or other officers of the militia temporarily so encamped within its limits or in its vicinity: Provided further, That except as herein specified the right to command during such joint encampments, maneuvers, and field instruction shall be governed by the rules set out in Articles One Hundred and twenty-two and One hundred and twenty-four of the rules and articles for the government of the armies of the United States."

Purpose of Act.—When the Act of Jan. 21, 1903, ch. 196, was enacted, Congress were not legislating to reward the officers of the militia for long and faithful service, but were merely providing a method whereby the militia at the request of the governor of a state might be instructed by experienced army officers. Bowie v. U. S., (1909) 45 Ct. Cl. 42.

Word "troops" construed.—The section here quoted implies a distinction between "the troops of the United States" stationed at a military post and "the militia temporarily encamped" there for instruction, in its provision that the regular commander of the post shall remain in command without regard to the rank of the commanding officers of the militia present. Alabama Great Southern R. Co. v. U. S., (1914) 49 Ct. Cl. 522.

Under the Constitution and military laws of Alabama and Mississippi the active militia or National Guard is enrolled for certain specific purposes, and while so enrolled as soldiers of the State they are not "troops" within the meaning of section 10, article 1, of the Federal Constitution. Alabama Great Southern R. Co. v. U. S., (1914) 49 Ct. Cl. 522.

Sec. 95. [Commanding officers at encampments, etc.] When any part of the National Guard participates in encampments, maneuvers, or other
exercises, including outdoor target practice, for field or coast-defense instruction at a United States military post, or reservation, or elsewhere, if in conjunction with troops of the United States, the command of such military post or reservation and of the officers and troops of the United States on duty there or elsewhere shall remain with the commander of the United States troops without regard to the rank of the commanding or other officer of the National Guard temporarily engaged in the encampments, maneuvers, or other exercises. [39 Stat. L. 207.]

See the note to the preceding section 93 of this Act.

SEC. 97. [Camps for instruction of National Guard.] Under such regulations as the President may prescribe the Secretary of War may provide camps for the instruction of officers and enlisted men of the National Guard. Such camps shall be conducted by officers of the Regular Army detailed by the Secretary of War for that purpose, and may be located either within or without the State, Territory, or District of Columbia to which the members of the National Guard designated to attend said camps shall belong. Officers and enlisted men attending such camps shall be entitled to pay and transportation, and enlisted men to subsistence in addition, at the same rates as for encampments or maneuvers for field or coast-defense instruction. [39 Stat. L. 207.]

See the note to section 94 of this Act, supra, p. 464.

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[Sec. 1.] [Reduced rates by common carriers to National Guard.]
- • • That hereafter nothing in the Act of February fourth, eighteen hundred and eighty-seven, known as the Act to regulate commerce, or any amendments thereto, shall be construed to prohibit any common carrier from giving reduced rates for members of National Guard organizations traveling to and from joint encampments with the Regular Army. [39 Stat. L. 646.]

This is from the Army Appropriation Act of Aug. 29, 1916, ch. 418.
The Interstate Commerce Act of Feb. 4, 1887, ch. 104 mentioned in this paragraph is given in Interstate Commerce, vol. 4, p. 331 et seq.

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SEC. 98. [Encampments, etc., of National Guard — pay.] When any portion of the National Guard shall participate in encampments, maneuvers, or other exercises, including outdoor target practice, for field or coast-defense instruction, under the provisions of this Act, it may, after being duly mustered, be paid at any time after such muster for the period from the date of leaving the home rendezvous to date of return thereto as determined in advance, both dates inclusive; and such payment, if otherwise correct, shall pass to the credit of the disbursing officer making the same. [39 Stat. L. 207.]

This and the following sections 99 and 86 are from the Act of June 3, 1916, ch. 134.
This section superseded a former provision of the Act of June 12, 1906, ch. 3078, 34 Stat. L. 249, as follows:
"That hereafter when any portion of the organized militia of any State, Territory, or the District of Columbia participates in the encampment, maneuvers, and field instruction of any part of the Regular Army, under the provisions of section fifteen of the Act of January twenty-first, nineteen hundred and three, they may, after being duly mustered by an officer of the Regular Army, be paid at any time after such muster for the period from the date of leaving the home rendezvous to date of return thereto as determined in advance, both dates inclusive, and such payment, if otherwise correct, shall pass to the credit of the paymaster making the same."

Sec. 99. [National Guard officers and men at service schools, and so forth.] Under such regulations as the President may prescribe, the Secretary of War may, upon the recommendation of the governor of any State or Territory or the commanding general of the National Guard of the District of Columbia, authorize a limited number of selected officers or enlisted men of the National Guard to attend and pursue a regular course of study at any military service school of the United States, except the United States Military Academy; or to be attached to an organization of the same arm, corps, or department to which such officer or enlisted man shall belong, for routine practical instruction at or near an Army post during a period of field training or other outdoor exercises; and such officer or enlisted man shall receive, out of any National Guard allotment of funds available for the purpose, the same travel allowances and quarters, or commutation of quarters, and the same pay, allowances, and subsistence to which an officer or enlisted man of the Regular Army would be entitled for attending such school, college, or practical course of instruction under orders from proper military authority, while in actual attendance at such school, college, or practical course of instruction: Provided, That in no case shall the pay and allowances authorized by this section exceed those of a captain. [39 Stat. L. 207.]

See the note to the preceding section 98 of this Act.

The former provision on this subject was made by the Dick Act of Jan. 21, 1903, ch. 196, § 16, 32 Stat. L. 402, which, as amended by the Act of May 27, 1908, ch. 204, § 10, 35 Stat. L. 402, was as follows:

"Sec. 16. That whenever any officer or enlisted man of the organized militia shall attend the recommendation of the governor of any State, Territory, or the commanding general of the District of Columbia militia, and when authorized by the President, attend and pursue a regular course of study at any military school or college of the United States, such officer or enlisted man shall receive from the annual appropriation for the support of the Army, the same travel allowances and quarters or commutation of quarters to which an officer or enlisted man of the Regular Army would be entitled for attending such school or college under orders from proper military authority; such officer shall also receive commutation and subsistence at the rate of one dollar per day and each enlisted man such subsistence as is furnished to an enlisted man of the Regular Army while in actual attendance upon a course of instruction."

Sec. 86. [Purchase by state, etc., of supplies from War Department.] Any State, Territory, or the District of Columbia may, with the approval of the Secretary of War, purchase for cash from the War Department for the use of the National Guard, including the officers thereof, any stores, supplies, material of war, and military publications furnished to the Army, in addition to those issued under the provisions of this Act, at the price at which they shall be listed to the Army, with cost of transportation added. The funds received from such sales shall be credited to the appropriation to which they shall belong, shall not be covered into the Treasury, and shall be available until expended to replace therewith the supplies sold to the States in the manner herein authorized: Provided, That stores, supplies, and matériel of war so purchased by a State, Territory, or the District of
Columbia may, in time of actual or threatened war be requisitioned by the United States for use in the military service thereof, and when so requisitioned by the United States and delivered credit for the ultimate return of such property in kind shall be allowed to such State, Territory, or the District of Columbia. [39 Stat. L. 304.]

See the note to section 98 of this Act, supra, p. 466.
The former provision on this subject was made by the Dick Act of Jan. 21, 1903, ch. 196, § 17, 32 Stat. L. 778, which was as follows:

"Sec. 17. That the annual appropriation made by section sixteen hundred and sixty-one, Revised Statutes, as amended, shall be available for the purpose of providing for issue to the organized militia any stores and supplies or publications which are supplied to the Army by any department. Any State, Territory, or the District of Columbia may, with the approval of the Secretary of War, purchase for cash from the War Department, for the use of its militia, stores, supplies, material of war, or military publications, such as are furnished to the Army, in addition to those issued under the provisions of this Act, at the price at which they are listed for issue to the Army, with the cost of transportation added, and funds received from such sales shall be credited to the appropriations to which they belong and shall not be covered into the Treasury, but shall be available until expended to replace therewith supplies sold to the States and Territories and to the District of Columbia in the manner herein provided."

The section here quoted superseded the Act of Feb. 24, 1897, ch. 310, § 3, 29 Stat. L. 592, and the Act of March 15, 1898, ch. 69, 30 Stat. L. 326, which provided 'for the sale of stores and supplies to States and Territories.

An Act To promote the efficiency of the reserve militia and to encourage rifle practice among the members thereof.


[Sec. 1.] [Sale of army rifles to rifle clubs.] That the Secretary of War is hereby authorized to sell, at the prices at which they are listed for the Army, upon the request of the governors of the several States and Territories, such magazine rifles belonging to the United States as are not necessary for the equipment of the Army and the organized militia, for the use of rifle clubs formed under regulations prepared by the National board for the promotion of rifle practice and approved by the Secretary of War. [33 Stat. L. 986.]

[Issue of rifles, etc., to clubs and schools — regulations.] * * * That the Secretary of War is hereby authorized to issue, without expense to the United States, for use in target practice, United States magazine rifles and appendages therefor not of the existing service model and not necessary for the maintenance of a proper reserve supply, together with forty rounds of ball cartridges suitable to said arm, for each range at which target practice is had, not to exceed a total of one hundred and twenty rounds per year per man participating in target practice, to rifle clubs organized under the rules of the National Board for the Promotion of Rifle Practice and to schools having a uniformed corps of cadets and carrying on military training, in sufficient number for the conduct of proper target practice.

Issues of public property under this provision shall be made in compliance with regulations prescribed by the Secretary of War insuring the designed use of the property issued, providing against loss to the United
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States through lack of proper care, and for the return of the property when required, and embodying such other requirements as he may consider necessary adequately to safeguard the interests of the United States. [38 Stat. L. 370.]

This is from the Army Appropriation Act of April 27, 1914, ch. 72.

SEC. 113. [Encouragement of rifle practice.] The Secretary of War shall annually submit to Congress recommendations and estimates for the establishment and maintenance of indoor and outdoor rifle ranges, under such a comprehensive plan as will ultimately result in providing adequate facilities for rifle practice in all sections of the country. And that all ranges so established and all ranges which may have already been constructed, in whole or in part, with funds provided by Congress shall be open for use by those in any branch of the military or naval service of the United States and by all able-bodied males capable of bearing arms, under reasonable regulations to be prescribed by the controlling authorities and approved by the Secretary of War. That the President may detail capable officers and noncommissioned officers of the Regular Army and National Guard to duty at such ranges as instructors for the purpose of training the citizenry in the use of the military arm. Where rifle ranges shall have been so established and instructors assigned to duty thereat, the Secretary of War shall be authorized to provide for the issue of a reasonable number of standard military rifles and such quantities of ammunition as may be available for use in conducting such rifle practice. [39 Stat. L. 211.]

This is from the Act of June 3, 1916, ch. 134. The Army Appropriation Act of May 12, 1917, ch. —, 40 Stat. L. —, contained a provision as follows:

"To establish and maintain indoor and outdoor rifle ranges for the use of all able-bodied males capable of bearing arms, under reasonable regulations to be prescribed by the National Board for Promotion of Rifle Practice and approved by the Secretary of War; for the employment of labor in connection with the establishment of outdoor and indoor rifle ranges, including labor in operating targets; for the employment of instructors; for clerical services; for badges and other insignia; for the transportation of employees, instructors, and civilians to engage in practice; for the purchase of materials, supplies, and services, and for expenses incidental to instruction of citizens of the United States in marksmanship, to be expended under the direction of the Secretary of War and to remain available until expended, $20,000."

[SEC. 1.] [Director of Civilian Marksmanship — appointment.] * * *

That the President be, and he is hereby, authorized, in his discretion, to appoint, as Director of Civilian Marksmanship, under the direction of the Secretary of War, an officer of the Army or of the Marine Corps. [39 Stat. L. 648.]

This is from the Army Appropriation Act of Aug. 29, 1916, ch. 418.

SEC. 2. [Sale of ammunition, ordnance stores, etc.—rifle practice.] That the Secretary of War is hereby authorized in his discretion to sell to
the several States and Territories, as prescribed in section seventeen of the Act approved January twenty-first, nineteen hundred and three, for the use of said clubs, ammunition, ordnance stores, and equipments of the Government standard at the prices at which they are listed for the Army. The practice of the rifle clubs herein provided shall be carried on in conformity to regulations prescribed by the national board for the promotion of rifle practice, approved by the Secretary of War, and the results thereof shall be filed in the office of the Military Secretary of the Army. [33 Stat. L. 967.]

This section is part of an Act of March 3, 1905, ch. 1416.
The Act of Jan. 21, 1903, ch. 196, § 17 mentioned in the text is noted as superseded under the Act of June 3, 1916, ch. 134, § 86. supra, p. 467.

[SEC. 1.] [Rifle clubs and schools — supplies furnished for target practice.] * * * The Secretary of War is hereby authorized to issue, under such rules and regulations as he may prescribe, for use in target practice, targets, target materials, and other necessary accessories, to rifle clubs organized under the rules of the National Board for the Promotion of Rifle Practice and to schools having a uniformed corps of cadets and carrying on military training, in sufficient number for the proper conduct of target practice. [39 Stat. L. 643.]

This is from the Army Appropriation Act of Aug. 29, 1916, ch. 418.

* * * [Rifle clubs — instructors.] That the Secretary of War, in his discretion, and under such regulations as he may prescribe, may authorize the detail of enlisted men of the Army as temporary instructors in rifle practice to organized rifle clubs requesting such instruction. [40 Stat. L. —.]

This is from the Army Appropriation Act of May 12, 1917, ch. —.

SEC. 54. [Training camps.] The Secretary of War is hereby authorized to maintain, upon military reservations or elsewhere, camps for the military instruction and training of such citizens as may be selected for such instruction and training, upon their application and under such terms of enlistment and regulations as may be prescribed by the Secretary of War; to use, for the purpose of maintaining said camps and imparting military instruction and training thereat, such arms, ammunition, accouterments, equipments, tentage, field equipage, and transportation belonging to the United States as he may deem necessary; to furnish, at the expense of the United States, uniforms, subsistence, transportation by the most usual and direct route within such limits as to territory as the Secretary of War may prescribe, and medical supplies to persons receiving instruction at said camps during the period of their attendance thereat, to authorize such expenditures, from proper Army appropriations, as he may deem necessary for water, fuel, light, temporary structures, not including quarters
for officers nor barracks for men, screening, and damages resulting from field exercises, and other expenses incidental to the maintenance of said camps, and the theoretical winter instruction in connection therewith; and to sell to persons receiving instruction at said camps, for cash and at cost price plus ten per centum, quartermaster and ordnance property, the amount of such property sold to any one person to be limited to that which is required for his proper equipment. All moneys arising from such sales shall remain available throughout the fiscal year following that in which the sales are made, for the purpose of that appropriation from which the property sold was authorized to be supplied at the time of the sale. The Secretary of War is authorized further to prescribe the courses of theoretical and practical instruction to be pursued by persons attending the camps authorized by this section; to fix the periods during which such camps shall be maintained; to prescribe rules and regulations for the government thereof; and to employ thereat officers and enlisted men of the Regular Army in such numbers and upon such duties as he may designate. [39 Stat. L. 194.]

This is from the Act of June 3, 1916, ch. 134.
This section was in part amended by the following paragraph of the text.

[Civilian military training.] * * * For the expense of maintaining, upon military reservations or elsewhere, camps for the military instruction and training of such citizens physically capable of bearing arms as may be selected under such regulations as may be prescribed by the Secretary of War, and for furnishing said citizens, at the expense of the United States, uniforms, subsistence, transportation by the most usual and direct route within said limits as to territory as may be prescribed; for such expenditures as may be deemed necessary for water, fuel, light, temporary structures, not including quarters for officers nor barracks for men, screening, and damages resulting from field exercises, and other expenses incidental to maintaining said camps and the theoretical winter instruction in connection therewith, including textbooks and stationery; for furnishing such equipments, tenteage, field equipage, and transportation belonging to the United States as may be deemed necessary as authorized by section fifty-four of the Act of Congress approved June third, nineteen hundred and sixteen, $3,281,000: Provided, That the Secretary of War is hereby authorized out of this appropriation to pay to persons designated by him for training as officers in the Army during the period of their training the sum of not to exceed $100 per month in addition to the allowances authorized by said section fifty-four: Provided, That they shall agree to accept appointment in the Officers’ Reserve Corps, in such grade as may be tendered by the Secretary of War.

Provided further, That so much of section fifty-four of the Act of June third, nineteen hundred and sixteen, entitled “An Act for making further and more effectual provision for the national defense, and for other purposes,” as relates to the transportation of citizens who, conformably to such regulations as the Secretary of War may prescribe, attend training camps be, and the same is hereby amended so as to provide that said citizens shall be paid as traveling allowances three and one-half cents per mile for the distance by the shortest usually traveled route from the places from
which they are authorized to proceed to the camp and for the return travel thereto: Provided further, That the payment of travel pay for the return journey may be made in advance of the actual performance of travel. [40 Stat. L. —.]

This is from the Army Appropriation Act of May 12, 1917, ch. —.
The Act of June 5, 1916, ch. 134, § 54 in part amended by this paragraph is given in the preceding paragraph of the text.

SEC. 92. [Training of the National Guard.] Each company, troop, battery, and detachment in the National Guard shall assemble for drill and instruction, including indoor target practice, not less than forty-eight times each year, and shall, in addition thereto, participate in encampments, maneuvers, or other exercises, including outdoor target practice, at least fifteen days in training each year, including target practice, unless such company, troop, battery, or detachment shall have been excused from participation in any part thereof by the Secretary of War: Provided, That credit for an assembly for drill or for indoor target practice shall not be given unless the number of officers and enlisted men present for duty at such assembly shall equal or exceed a minimum to be prescribed by the President, nor unless the period of actual military duty and instruction participated in by each officer and enlisted man at each such assembly at which he shall be credited as having been present shall be of at least one and one-half hours' duration and the character of training such as may be prescribed by the Secretary of War. [39 Stat. L. 206.]

This is from the Act of June 3, 1916, ch. 134.
The former provisions on this subject were contained in the Dick Act of Jan. 21, 1903, ch. 196, § 18, 32 Stat. L. 778, as follows: “Sec. 18. That each State or Territory furnished with material of war under the provisions of this or former Acts of Congress shall, during the year preceding each annual allotment of funds, in accordance with section sixteen hundred and sixty-one of the Revised Statutes as amended, have required every company, troop, and battery in its organized militia not excused by the governor of such State or Territory to participate in practice marches or go into camp of instruction at least five consecutive days, and to assemble for drill and instruction at company, battalion, or regimental armories or rendezvous or for target practice not less than twenty-four times, and shall also have required during such year an inspection of each such company, troop, and battery to be made by an officer of such militia or an officer of the Regular Army.”

[Encampments, etc.] * * * To provide for the participation of the whole or any part of the National Guard in encampments, maneuvers, or other exercises, including outdoor target practice and field and coast defense instruction, either independently or in conjunction with any part of the Regular Army, and there may be set aside from the funds apportioned for that purpose and allotted to any State, Territory, or the District of Columbia, such portion of said funds as may be necessary for the payment, subsistence, transportation, and other proper expenses of such portion of the National Guard of said State, Territory, or the District of Columbia as shall participate in such encampments, maneuvers, or other exercises, including outdoor target practice and field and coast defense instruction; and the officers and enlisted men of such National Guard while so engaged
shall be entitled to the same pay, subsistence, and transportation as officers and enlisted men of corresponding grades of the Regular Army are or hereafter may be entitled to by law. To provide for camps of instruction for the instruction of officers and enlisted men of the National Guard. Such camps shall be conducted by officers of the Regular Army detailed by the Secretary of War for the purpose, and may be located either within or without the State, Territory, or District of Columbia to which the members of the National Guard designated to attend said camps shall belong. Officers and enlisted men attending such camps shall be entitled to pay and transportation and enlisted men to subsistence in addition at the same rates as for encampments or maneuvers for field and coast defense instruction. [40 Stat. L. ——]

This and the two paragraphs of the text following are from the Army Appropriation Act of May 12, 1917, ch. ——.

[Service schools, etc.— attendance — pay and allowance.] * * * To provide for the attendance of selected officers or enlisted men of the National Guard who pursue a regular course of study at any military service school of the United States except the United States Military Academy; or to be attached to an organization of the same arm, corps, or department to which such officers or enlisted men shall belong, for routine practical instruction at or near an Army post during a period of field training or other outdoor exercises; and such officers or enlisted men shall receive out of any National Guard allotment of funds available for the purpose, the same travel allowances and quarters or commutation of quarters, and the same pay, allowance, and subsistence to which officers or enlisted men of the Regular Army would be entitled for attending such school, college, or practical course of instruction under orders from proper military authority while in actual attendance at such school, college, or practical course of instruction; Provided, That in no case shall the pay and allowances authorized herein exceed those of a captain. [40 Stat. L. ——]

See the note to the preceding paragraph of the text.

[Land for target ranges — sale.] * * * That when any land which has been heretofore or may be hereafter acquired by purchase for a target range for the use of the National Guard of any State, Territory, or the District of Columbia, shall have become useless or shall be found to be unavailable for such purpose, the Secretary of War may cause the same to be sold either in whole or in two or more parts as he may deem best for the interests of the United States. In the disposal of such property, the Secretary of War shall cause the same to be appraised either as a whole or in two or more tracts, having due reference to the requirements of any permanent improvements made thereon; and he shall cause the property to be offered at public or private sale at not less than the appraised value. The expenses for advertising, appraisement, survey, and sale shall be paid from the proceeds of the sale; and the net proceeds thereof shall be placed to the credit of the State, Territory, or District of Columbia, as additional to its allotment under section sixty-seven of the Act of June third, nineteen hundred and sixteen. [40 Stat. L. ——]

See the note to the second preceding paragraph of the text.
SEC. 19. [Detail of army officers for encampments — report.] That upon the application of the governor of any State or Territory furnished with material of war under the provisions of this Act or former laws of Congress, the Secretary of War may detail one or more officers of the Army to attend any encampment of the organized militia, and to give such instruction and information to the officers and men assembled in such camp as may be requested by the governor. Such officer or officers shall immediately make a report of such encampment to the Secretary of War, who shall furnish a copy thereof to the governor of the State or Territory. [32 Stat. L. 778.]

This is a part of the Dick Act of Jan. 21, 1903, ch. 196. This section was in part superseded by the Act of June 3, 1916, ch. 134, § 96 given in the following paragraph of the text.

SEC. 96. [Use of Regular Army personnel.] The Secretary of War may detail one or more officers and enlisted men of the Regular Army to attend any encampment, maneuver, or other exercise for field or coast-defense instruction of the National Guard, who shall give such instruction and information to the officers and men assembled for such encampment, maneuver, or other exercise as may be directed by the Secretary of War or requested by the governor or by the commanding officer of the National Guard there on duty. [39 Stat. L. 207.]

This and the following sections 100 and 36 are from the Act of June 3, 1916, ch. 134. See the preceding paragraphs of the text and the note thereon.

SEC. 100. [Detail of officers of Regular Army to duty with the National Guard.] The Secretary of War shall detail officers of the active list of the Army to duty with the National Guard in each State, Territory, or District of Columbia, and officers so detailed may accept commissions in the National Guard, with the permission of the President and terminable in his discretion, without vacating their commissions in the Regular Army or being prejudiced in their relative or lineal standing therein. The Secretary of War may, upon like application, detail one or more enlisted men of the Regular Army with each State, Territory, or District of Columbia for duty in connection with the National Guard. But nothing in this section shall be so construed as to prevent the detail of retired officers as now provided by law. [39 Stat. L. 208.]

See the note to the preceding section 96 of this Act, and see also the note to section 81 of the Act, infra, p. 475.

SEC. 36. [Sergeants for duty with the National Guard.] For the purpose of assisting in the instruction of the personnel and care of property in the hands of the National Guard the Secretary of War is authorized to detail from the Infantry, Cavalry, Field Artillery, Corps of Engineers, Coast Artillery Corps, Medical Department, and Signal Corps of the Regular Army not to exceed one thousand sergeants for duty with corresponding organizations of the National Guard and not to exceed one hundred sergeants for duty with the disciplinary organizations at the United States Disciplinary Barracks, who shall be additional to the sergeants authorized
by this Act for the corps, companies, troops, batteries, and detachments from which they may be detailed. [39 Stat. L. 189.]

See the note to section 96 of this Act, supra, p. 474.

[Inspector-instructors — use of state armories.] • • • That whenever practicable inspector-instructors shall use the State armories or other public buildings for offices. [40 Stat. L. —.]

This is from the Army Appropriation Act of May 12, 1917, ch. —.

Sec. 81. [Militia Bureau of the War Department.] The National Militia Board created by section eleven of the Act of May twenty-seventh, nineteen hundred and eight, amending section twenty of the Act of January twenty-first, nineteen hundred and three, shall, from the date of the approval of this Act, be abolished. The Militia Division now existing in the War Department shall hereafter be known as the Militia Bureau of said department, shall, like other bureaus of said department, be under the immediate supervision of the Secretary of War, and shall not form a part of any other bureau, office, or other organization, but the Chief of the Militia Bureau shall be ex officio a member of the General Staff Corps: Provided, That the President may, in his discretion, assign to duty in the Militia Bureau as assistants to the chief thereof not to exceed one colonel and one lieutenant colonel of the National Guard, for terms of four years, and any such officer while so assigned shall, subject to such regulations as the President may prescribe, receive out of the whole fund appropriated for the support of the militia the pay and allowances of a Regular Army officer having the same rank and length of service as said National Guard officer, whose prior service in the Organized Militia shall be counted in ascertaining his rights under this proviso. [39 Stat. L. 203.]

This is from the Act of June 3, 1916, ch. 134.
See also sections 96, 100, 36, of this Act, supra, p. 474.

The Act of January 21, 1903, ch. 106, § 20, 32 Stat. L. 779, as amended by the Act of May 27, 1908, ch. 204, § 11, 35 Stat. L. 402, mentioned in the text was as follows:

"Sec. 20. That upon the application of the governor of any State or Territory furnished with material of war under the provisions of this Act, or former laws of Congress, the Secretary of War may, in his discretion, detail one or more officers or enlisted men of the Army to report to the governor of such State or Territory for duty in connection with the organized militia. All such assignments may be revoked at the request of the governor of such State or Territory or at the pleasure of the Secretary of War. The Secretary of War is hereby authorized to appoint a board of five officers on the active list of the organized militia so selected as to secure, as far as practicable, equitable representation to all sections of the United States, and which shall, from time to time, as the Secretary of War may direct, proceed to Washington, District of Columbia, for consultation with the Secretary of War, respecting the condition, status, and needs of the whole body of the organized militia. Such officers shall be appointed for the term of four years unless sooner relieved by the Secretary of War.
"The actual and necessary traveling expenses of the members of the Board, together with a per diem to be established by the Secretary of War, shall be paid to the members of the Board. The expenses herein authorized, together with the necessary clerical and
office expenses of the division of militia affairs in the office of the Secretary of War, shall constitute a charge against the whole sum annually appropriated under section sixteen hundred and sixty-one, Revised Statutes, as amended, and shall be paid therefrom, and not from the allotment duly apportioned to any particular State, Territory, or the District of Columbia; and a list of such expenses shall be submitted to Congress annually by the Secretary of War in connection with his annual report."

The Army Appropriation Act of Aug. 29, 1916, ch. 418, § 1, 39 Stat. L. 646, contained a provision as follows:

"To provide for the necessary clerical and office expenses of the Militia Bureau authorized by section sixty-seven of the Act approved June third, nineteen hundred and sixteen: Chief clerk, $2,000; clerks — two of class four, three of class three, seven of class two, fifteen of class one, eight at $1,000 each; messenger; two assistant messengers; two laborers, at $600 each per annum."

SEC. 21. [Ammunition for target practice, etc.] That the troops of the militia encamped at any military post or camp of the United States may be furnished such amounts of ammunition for instruction in firing and target practice as may be prescribed by the Secretary of War, and such instruction in firing shall be carried on under the direction of an officer selected for that purpose by the proper military commander. [32 Stat. L. 779.]

This and the following section 22 are from the Dick Act of Jan. 21, 1903, ch. 196.

SEC. 22. [Pension for wounds, etc.—pension to widow.] That when any officer, nonecommissioned officer, or private of the militia is disabled by reason of wounds or disabilities received or incurred in the service of the United States he shall be entitled to all the benefits of the pension laws existing at the time of his service, and in case such officer, nonecommissioned officer, or private dies in the service of the United States or in returning to his place of residence after being mustered out of such service, or at any time, in consequence of wounds or disabilities received in such service, his widow and children, if any, shall be entitled to all the benefits of such pension laws. [32 Stat. L. 779.]

See the note to the preceding section 21 of this Act.
See also the following paragraph of the text and Res. of July 1, 1916, No. 211, § 2, supra, p. 447.

SEC. 112. [Pensions to drafted members of National Guard.] When any officer or enlisted man of the National Guard drafted into the service of the United States in time of war is disabled by reason of wounds or disability received or incurred while in the active service of the United States in time of war, he shall be entitled to all the benefits of the pension laws existing at the time of his service, and in case such officer or enlisted man dies in the active service of the United States in time of war or in returning to his place of residence after being mustered out of such service, or at any other time in consequence of wounds or disabilities received in such active service, his widow and children, if any, shall be entitled to all the benefits of such pension laws. [39 Stat. L. 211.]

This and the following section 76 are from the Act of June 3, 1916, ch. 134. See the preceding paragraph of the text and the note thereto.
SEC. 76. [Filling of vacancies when drafted into Federal service.] All vacancies occurring in any grade of commissioned officers in any organization in the military service of the United States and composed of persons drafted from the National Guard under the provisions of this Act shall be filled by the President, as far as practicable, by the appointment of persons similarly taken from said guard, and in the manner prescribed by law for filling similar vacancies occurring in the volunteer forces. [39 Stat. L. 202.]

See the note to the preceding section 112 of this Act.

SEC. 49. [Officers and employees who are members of National Guard of District of Columbia—leave of absence.] That all officers and employees of the United States and of the District of Columbia who are members of the National Guard shall be entitled to leave of absence from their respective duties, without loss of pay or time, on all days of any parade or encampment ordered or authorized under the provisions of this act. [25 Stat. L. 779.]

This is from an Act of March 1, 1889, ch. 328, entitled "An Act to provide for the organization of the Militia of the District of Columbia."

Applicability generally.—An employee of a department absent from his duty while at Omaha, Nebr., at a prize drill duly ordered by a superior officer of the National Guard, of which he was a member, is entitled to his pay while absent. (1892) 20 Op. Atty.-Gen. 437.

So leaves of absence of employees of the government in the discharge of military duties are not to be charged to the thirty days allowed them annually for rest and recreation. (1896) 21 Op. Atty.-Gen. 353.

But it has been ruled by the attorney-general that employees of the United States who are members of the National Guard are not entitled to leave of absence from their respective duties without loss of pay or time in order to engage in rifle practice, even although in the general orders of the commanding general of the militia such rifle practice may be called a parade. (1893) 20 Op. Atty.-Gen. 699.

Effect of Civil Service Act.—This section was not repealed or modified by the Act of March 3, 1893, ch. 211, § 5, given in Civil Service, vol. 2, p. 164. The object of the former was to provide for the public defense and that of the latter to regulate leaves of absence for private reasons or purposes. There is, therefore, no inconsistency between the two acts. (1896) 21 Op. Atty.-Gen. 353.

[SEC. 1.] [Members of National Guard of District of Columbia—interest in claims.] * * * That members of the National Guard of the District of Columbia who receive compensation for their services as such shall not be held or construed to be officers of the United States, or persons holding any place of trust or profit, or discharging any official function under or in connection with any Executive Department of the Government of the United States within the provision of section fifty-four hundred and ninety-eight of the Revised Statutes of the United States. [31 Stat. L. 844.]

This is from the District of Columbia Appropriation Act of March 1, 1901, ch. 670. A similar provision appeared in the Act of June 6, 1900, ch. 789, 31 Stat. L. 577. R. S. sec. 5498 mentioned in the text forbidding officers of the United States to prosecute, or assist or be interested in the prosecution of claims against the United States, except in the discharge of their official duties, was incorporated in Penal Laws, § 109, and repealed by section 341 thereof. See Penal Laws.
II. HOME GUARDS

An Act To authorize the issue to States and Territories and the District of Columbia of rifles and other property for the equipment of organizations of home guards.


[Home guards — arms and equipment.] That the Secretary of War during this existing emergency be, and he is hereby authorized, in his discretion, to issue from time to time to the several States and Territories and the District of Columbia for the equipment of such home guards having the character of State police or constabulary as may be organized by the several States and Territories and District of Columbia, and such other home guards as may be organized under the direction of the governors of the several States and Territories and the Commissioners of the District of Columbia or other State troops or militia, such rifles and ammunition therefor, cartridge belts, haversacks, canteens, in limited amounts as available supplies will permit, provided that the property so issued shall remain the property of the United States and shall be receipted for by the governors of the several States and Territories and Commissioners of the District of Columbia and accounted for by them under such regulations and upon furnishing such bonds or security as the Secretary of War may prescribe, and that any property so issued shall be returned to the United States on demand when no longer needed for the purposes for which issued, or if, in the judgment of the Secretary of War, an exigency requires the use of the property for Federal purposes: Provided, That all home guards, State troops and militia receiving arms and equipments as herein provided shall have the use, in the discretion of the Secretary of War and under such regulations as he may prescribe, of rifle ranges owned or controlled by the United States of America. [40 Stat. L. —.]

III. NAVAL MILITIA

SEC. 1. [Naval militia constituted.] That of the Organized Militia as provided for by law such part of the same as may be duly prescribed in each State, Territory, and for the District of Columbia shall constitute a Naval Militia. [38 Stat. L. 283.]

This is the first section of the Naval Militia Act of Feb. 16, 1914, ch. 21, entitled "An Act To promote the efficiency of the Naval Militia, and for other purposes."

The Militia of the United States was divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia, by the Act of June 3, 1916, ch. 134, § 57, supra, p. 432.


[Composition of Naval Militia — age limit.] • • • That the Naval Militia shall consist of the regularly enlisted militia between the ages of
eighteen and forty-five years, organized as prescribed for the Naval Militia by law, and commissioned officers between the ages of twenty-one and sixty-two years (naval branch), and twenty-one and sixty-four years (Marine Corps branch): Provided, however, That enlisted men may continue in service after the age of forty-five years, and until the age of sixty-two years (naval branch), or sixty-four years (Marine Corps branch), provided the service is continuous. [39 Stat. L. 597.]

This and the following paragraph of the text are from the Naval Appropriation Act of Aug. 29, 1916, ch. 417.

[Period of enlistment — re-enlistment.] • • • That hereafter the period of enlistment in the Naval Militia shall be three years. An enlisted man who has served honorably for the full term of his enlistment may reenlist for a term of one, two, or three years, as he may elect. When a man reenlists within thirty days from the date of the expiration of his prior enlistment his term of service shall be considered as continuous, and shall be so dated. [39 Stat. L. 597.]

See the note to the preceding paragraph of the text.

SEC. 2. [Organization — equipment — vessels — enlisted men.] That on and after three years from the date of the passage of this Act the organization of the Naval Militia shall be units of convenient size, in each of which the number and ranks of officers and the distribution of the total enlisted strength among the several ratings of petty officers and other enlisted men shall be established by the Secretary of the Navy, who shall also establish the number of officers and the number of petty officers and other enlisted men required for the organization of such units into larger bodies for administrative and other purposes, and the arms and equipment of the Naval Militia of the several States, Territories, and the District of Columbia shall be the same as, or the equivalent of, that which is now or may hereafter be prescribed for the landing forces of the vessels of the United States Navy, and such other and additional arms, armament, and equipment, including vessels and stores, supplies, and equipment of all kinds for the repairing, maintenance, and operation of the same, as the Secretary of the Navy may from time to time prescribe for the training of the Naval Militia in duties afloat.

And the Secretary of the Navy is hereby authorized, in his discretion, to issue from time to time to the governors of the several States and Territories and to the commanding general District of Columbia Militia, or to the other proper State, Territorial, and District authorities, respectively, as a loan, vessels and such stores, supplies, and equipment of all kinds as may be necessary for the maintenance and operation of said vessels, and may detail to said vessels such number of officers and enlisted men as he may deem desirable for duty as ship keepers: Provided, That such enlisted men shall be in addition to the number now or hereafter allowed by law for the regular Naval Establishment. [38 Stat. L. 283.]

This section is a part of the Naval Militia Act of Feb. 16, 1914, ch. 21.

This section, together with the various other provisions of this Act, superseded the Act of Aug. 3, 1894, ch. 192, 28 Stat. L. 219, entitled "An Act to promote the efficiency
enlisted man enters into an enlistment he shall be entitled to proportional compensation for that year if during the remainder of the year he shall attend a number of said assemblies whose ratio to said minimum is not less than the ratio of the part of the year so served to the whole year; and when the enlistment of any man shall expire the compensation, if any, to which he may be entitled shall be determined in like manner: And provided further, That periods of any actual military duty equivalent to the assemblies hereinabove particularly referred to, except those periods of service for which, under existing or future laws, members of the Naval Militia may become entitled to the same pay as officers and enlisted men of the corresponding ranks, grades, or rates in the United States Navy and Marine Corps, may be accepted as service in lieu of such drills, when approved by the Secretary of the Navy. [39 Stat. L. 594.]

See the note to the first paragraph of this section, supra, p. 480.

[Payment.] * * * That the retainer pay provided above shall be paid quarterly, except as otherwise above provided, to officers and enlisted men of the Naval Militia through the disbursing officer provided for under section eleven of an Act to promote the efficiency of the Naval Militia, and for other purposes, approved February sixteenth, nineteen hundred and fourteen, who shall be an officer of the pay corps of the Naval Militia. The Secretary of the Navy is hereby authorized to pay to such disbursing officer so much of the amount appropriated to carry out the provisions of this Act as shall be necessary for the above purposes. [39 Stat. L. 594.]

See the note to the first paragraph of this section, supra, p. 480.

SEC. 10. [Secretary of Navy to issue arms, etc.—report of expenditures.] That the Secretary of the Navy is hereby authorized to procure, by purchase or manufacture, and issue from time to time to the Naval Militia such number of United States service or other arms, accessories, accouterments, equipment, uniforms, clothing, equipage, and military and naval stores of all kinds, under such regulations as he may prescribe, as are necessary to arm, uniform, and equip all of the Naval Militia in the several States, Territories, and the District of Columbia in accordance with the requirements of this Act without charging the cost or value thereof or any expense connected therewith against the allotment of such State, Territory, or District made from the annual appropriation provided for the arming and equipping of the Naval Militia in the annual appropriation for the Navy, or in any other general appropriation for the Naval Militia that may hereafter be made, or without requiring payment therefor, and to issue from time to time ammunition suitable for such arms as the Naval Militia of the several States, Territories, and the District of Columbia may be equipped with, and to exchange said arms, accessories, accouterments, equipment, equipage, stores, and ammunition when the same shall have become obsolete, without receiving any money credit therefor, for other arms, accessories, accouterments, equipment, equipage, stores, and ammunition suitable for the Naval Militia: Provided, That said property shall remain the property of the United States, and be annually accounted for
by the governor or other proper officer of the States, Territories, and the
commanding general District of Columbia Militia: Provided further, That
each State, Territory, and the District of Columbia shall, when and as
required by the Secretary of the Navy, turn in to the Navy Department, or
otherwise dispose of, in accordance with the direction of the Secretary of the
Navy, without receiving any money credit therefor, and without expense
for transportation or otherwise, such or all property theretofore issued
under the provisions of this Act. To provide means to carry into effect
the provisions of this section, the necessary money to cover the cost of pro-
curing, exchanging, or issuing of arms, accessories, accouterments, equip-
ment, uniforms, clothing, equipage, ammunition, and military and naval
stores to be exchanged or issued hereunder is hereby appropriated out of any
money in the Treasury not otherwise appropriated: Provided, That the
sum expended in the execution of the purchases and issues provided for in
this section shall not exceed the sum of $200,000 in any fiscal year: And
provided further, That the Secretary of the Navy shall annually submit to
Congress a report of expenditures made by him in the execution of the
requirements of this section. [38 Stat. L. 285.]

This is a part of the Naval Militia Act of Feb. 16, 1914, ch. 21.

[Responsibility for property.] * * * That officers and enlisted men
of the Naval Militia to whom property has been issued as herein provided
for shall be responsible for the safe-keeping and return thereof. Stoppages
may be made against the compensation payable to any officer or enlisted
man of the Naval Militia to cover the cost of public property lost or
destroyed by and chargeable to such officer or enlisted man. [39 Stat. L.
595.]

This and the following three paragraphs of the text are from the Naval Appropriation Act of Aug. 29, 1916, ch. 417.

[Accounting officers — appointment.] * * * The governor of each
State and Territory, and the commanding general of the District of Colum-
bia Militia, shall appoint either the above-described disbursing officer or
such other officer of the pay corps of the Naval Militia as he may elect as
accounting officer for each battalion thereof, or, at his option, for each
larger unit or combination of units of the same, who shall be responsible for
the proper accounting for all property belonging to the United States
issued to and for the use of such battalion, or larger unit or combination
of units. [39 Stat. L. 595.]

See the note to the preceding paragraph of the text.

[Accounts — bonds — issuance of property — inspection of accounts,
etc.] * * * Accounting officers shall render accounts as prescribed by
the Secretary of the Navy and shall be required to give good and sufficient
bonds to the United States in such sums as the Secretary of the Navy may
direct, conditioned upon the faithful accounting for all property belonging
to the United States and for the safe-keeping of such part thereof as may be
in the personal custody of such officer. Accounting officers may issue
any or all such property to other officers or enlisted men of the Naval Militia under such rules and regulations as may be prescribed: And provided further, That the Secretary of the Navy shall cause an inspection of the accounts and records of the accounting officers to be made by an officer of the Navy at least once each year. [39 Stat. L. 595.]

See the note to the second preceding paragraph of the text.

[Accounting officers — expenses.] • • • When accounting officers are traveling in the performance of their official duties under orders issued by the Secretary of the Navy they shall be reimbursed for their actual and necessary traveling expenses, the same to be made a charge against the appropriation “Arming and equipping Naval Militia.” [39 Stat. L. 595.]

See the note to the first paragraph of this section, supra, p. 483.

SEC. 14. [Appropriations — purchases of supplies by State, etc.] That the annual appropriation made by Congress for arming and equipping the Naval Militia in the annual appropriation for the Navy shall be available for the purpose of providing for issue to the Naval Militia any stores and supplies or publications which are supplied to the Navy by any department. Any State, Territory, or the District of Columbia may, with the approval of the Secretary of the Navy, purchase for cash from the Navy Department, for the use of its Naval Militia, stores, supplies, material of war, or military publications, such as are furnished to the Navy in addition to those issued under the provisions of this Act, at the price at which they are listed for issue to the Navy, with the cost of transportation added, and funds received from such sales shall be credited to the appropriation to which they belong and shall not be covered into the Treasury, but shall be available until expended to replace therewith the supplies sold to the States and Territories and to the District of Columbia in the manner herein provided. [38 Stat. L. 287.]

This section and the following sections 15, 12, 16, 17 and 18 are a part of the Naval Militia Act of Feb. 16, 1914, ch. 21.

SEC. 15. [Participation in annual allotment of funds by Congress — conditions precedent.] That each State or Territory or the District of Columbia furnished with material of war under the provisions of this or former Acts of Congress shall, during the year next preceding each annual allotment of funds, in order to participate in such annual allotment of funds, have required every ship’s company, engineer’s, navigator’s, and other divisions, or units, of its Naval Militia not excused by the governor of said State or Territory, or the commanding general District of Columbia Militia, for reasons satisfactory to the Secretary of the Navy, to participate during at least five consecutive days in such form of military or naval exercise as may have been prescribed by the Secretary of the Navy, and in default of such prescribing by the Secretary of the Navy, then in some form of Naval Militia exercise during at least five consecutive days to be prescribed by the governor of the said State or Territory, or the commanding officer of the District of Columbia Naval Militia; and shall also have required said divi-
sions to assemble for drill and instruction at armories or other places of rendezvous or for target practice not less than twenty-four times, and shall have required during such year an inspection of each of said divisions or units, to be made by an officer of said Naval Militia, or by an officer of the State service, or by an officer of the Regular Navy. [38 Stat. L. 288.]

See the note to the preceding section 14 of this Act.

SEC. 12. [Participation in cruises, etc., of Regular Navy — pay and allowances — duties — rank.] That the Secretary of the Navy is authorized, in his discretion, to provide for participation by any part of the Naval Militia of any State or Territory or the District of Columbia on the request of the governor of said State or Territory or the commanding general of the militia of said District, in any cruise, maneuvers, field instruction, or encampment of any part of the Regular Navy, afloat or on shore. In such case the Naval Militia so participating shall, if so requested by the governor or commanding general and allowed by the Secretary of the Navy, receive the same pay, subsistence and transportation as is provided by law for the officers and men of the Regular Navy, and no part of the sums appropriated for the support of the Regular Navy shall be used to pay any part of the expenses of the Naval Militia of any State, Territory, or the District of Columbia while engaged in such cruise, maneuvers, field instruction, or joint encampment of the Regular Navy and Naval Militia, but no payments to the Naval Militia under the provisions of this section and no allowances for mileage shall be made from appropriations made for the Navy, but shall be made solely from the sums appropriated for such cruise, maneuvers, field instruction, or for the Naval Militia: Provided, That officers of the Regular Navy in command of vessels upon which Naval Militia may be embarked, or in command of camps, navy yards, or other places in which Naval Militia may be encamped or be, shall remain in command of said vessels, camps, navy yards, or other places, as aforesaid, irrespective of the rank of the commanding or other officers of the Naval Militia on board said vessels or within said places: Provided further, That said commanding officers of the Regular Navy may, in the exercise of their discretion, place upon any duty to which his rank or rating would entitle him if he were of the same rank or rating in the Regular Navy, or duty of a lower grade, any officer, petty officer, or enlisted man of the Naval Militia so under his command as aforesaid, and may temporarily or permanently relieve from duty so imposed such officer, petty officer, or enlisted man; and in making details to command and duty, and relieving from command and duty as aforesaid, said commanding officer shall be held to the exercise of a reasonable discretion only, and for the purposes of this section it is to be presumed that a member of the Naval Militia is competent to be detailed for any duty to which his rank would entitle him until the contrary be apparent to such commanding officer: And provided further, That any officer or petty officer or enlisted man of the Naval Militia placed on duty as aforesaid or detailed to duty on a vessel assigned to the Naval Militia shall have, during the time that he is on duty, all authority over all persons inferior to himself in rank or equivalent rank necessary for the purpose of carrying out the duty upon which he has been so detailed. [38 Stat. L. 286.]

See the note to section 14 of this Act, supra, p. 484.
SEC. 16. [Detail of officers by Secretary of Navy for instruction.] That the Secretary of the Navy is hereby authorized and empowered, upon the request of the governor of any State or Territory, or of the commanding general District of Columbia Militia, having an organized Naval Militia, to detail an officer or officers, to inspect, instruct and examine such Naval Militia at such times and places as may be appointed by any of said governors or commanding general and may, upon his own motion, also detail officers for the purpose of formulating standard regulations for the organization, discipline, training, armament, and equipment of said Naval Militia, and for the professional examination of the officers, petty officers, and men composing the same, with a view to producing uniformity among the Naval Militia of the various States and assimilating them to the standard of the United States Navy. [38 Stat. L. 288.]

See the note to section 14 of this Act, supra, p. 484.

SEC. 17. [Detail of officers or enlisted men of Navy — appointment of board of officers of Naval Militia — duties — expenses.] That upon the application of the governor of any State or Territory, or of the commanding general District of Columbia Militia, furnished with material of war under the provisions of this Act or former laws of Congress, the Secretary of the Navy may, in his discretion, detail one or more officers or enlisted men of the Navy to report to the governor of such State or Territory, or to the commanding general of the District of Columbia Militia, for duty in connection with the Naval Militia. All such assignments may be revoked at the request of the governor of such State or Territory, the commanding general of the District of Columbia Militia, or at the pleasure of the Secretary of the Navy. The Secretary of the Navy is hereby authorized to appoint a board of five officers of the Naval Militia, which shall from time to time, as the Secretary of the Navy may direct, proceed to Washington, District of Columbia, for consultation with the Navy Department respecting the condition, status and needs of the whole body of the Naval Militia. Such officers shall be appointed for a term of four years, unless sooner relieved by the Secretary of the Navy.

The actual and necessary traveling expenses of the members of such board, together with a per diem to be established by the Secretary of the Navy, shall be paid to the members of the board. The expenses herein authorized, together with the necessary clerical and office expenses of the division of Naval Militia affairs in the office of the Secretary of the Navy, shall constitute a charge against the whole sum annually appropriated under the appropriation for the arming and equipping of the Naval Militia in the annual appropriation for the Navy, and shall be paid therefrom, and not from the allotment duly apportioned to any particular State, Territory, or the District of Columbia; and a statement of such expenses shall be submitted to Congress by the Secretary of the Navy in connection with his annual report. [38 Stat. L. 288.]

See the note to section 14 of this Act, supra, p. 484.

SEC. 18. [Ammunition furnished — instruction in firing.] That the Naval Militia embarked upon any vessel of the Navy, or other vessel, or encamped at any military post or camp of the United States, may be fur-
nished such amounts of ammunition for instruction in firing and target practice as may be prescribed by the Secretary of the Navy, and such instruction in firing shall be carried on under the direction of an officer selected for that purpose by the Secretary of the Navy. [38 Stat. L. 289.]

See the note to section 14 of this Act, supra, p. 484.

[Oil and fuel to vessels of Volunteer Patrol Squadrons.] • • • That the Secretary of the Navy is hereby authorized to sell at cost and issue lubricating oil and fuel to vessels of the Volunteer Patrol Squadrons duly enrolled in the several naval districts; and that during maneuvers or practice drills when any of the vessels of said Patrol Boat Squadrons shall be acting singly or as squadrons under the direct command or control of an officer or officers of the United States Navy, fuel shall be supplied to them free of charge. [39 Stat. L. 600, as amended by 39 Stat. L. 1172.]

This and the two paragraphs of the text following are from the Naval Appropriation Act of Aug. 29, 1916 ch. 417.

This paragraph was amended to read as given in the text by the Act of March 4, 1917, ch. 180. The amendment consisted in substituting the word "fuel" where it appears following the words "lubricating oil and" for the word "gasoline" which formerly appeared, and striking out the word "gasoline" which formerly appeared after the words "United States Navy."

[Government employees — attendance at drills, etc.] • • • Whenever a member of the Naval Militia who is employed under a department of the government of the United States attends drills, cruises, or other ordered duty of the Naval Militia, he shall receive the amount of the salary or wages he would have earned when so employed, in addition to the amount provided for by law as a member of the said Naval Militia: Provided, however, That such attendance shall not affect his efficiency rating in said department, nor shall he suffer demotion or loss of position during or at the termination of any naval or military service when ordered upon special or active duty of any kind. [39 Stat. L. 594.]

See the note to the preceding paragraph of the text.

[Officers and enlisted men — attendance at service schools — attachment to Navy or Marine Corps Command — pay, allowances, etc.] • • • That, under such regulations as the President may prescribe, the Secretary of the Navy may, upon the recommendation of the governor of any State or Territory, or the commanding general of the National Guard of the District of Columbia, authorize a limited number of selected officers or enlisted men of the Naval Militia to attend and pursue a regular course of study at any Navy or Marine Corps service school of the United States, except the United States Naval Academy; or to be attached to any Navy or Marine Corps command for routine practical instruction; and such officer or enlisted man shall receive out of any Naval Militia allotment of funds available for the purpose, the same travel allowances and quarters, or commutation of quarters, and the same pay, allowances, and subsistence to which an officer or enlisted man of the naval service would be entitled for attending such school, college, or practical course of instruction under orders from proper naval authority, while in actual attendance at such school, college, or
practical course of instruction: Provided, That in no case shall the pay and allowances authorized by this section exceed those of a lieutenant in the Navy. [39 Stat. L. 600.]

See the note to the second preceding paragraph of the text.
A similar provision of the Naval Militia Act of Feb. 16, 1914, ch. 21, § 13, 38 Stat. L. 287, was as follows:
"Sec. 13. That whenever any officer or enlisted man of the Naval Militia shall, upon the recommendation of the governor of any State, Territory, or the commanding officer of the District of Columbia Naval Militia, and when authorized by the Secretary of the Navy, attend and pursue a regular course of study at any military or naval school or college of the United States or on board ship, such officer or enlisted man shall receive from the annual appropriation for the support of the Navy the same travel allowances and quarters or commutation of quarters to which an officer or enlisted man of the Regular Navy would be entitled for attending such school or college or doing duty on such ship under orders from proper authority. Such officers shall also receive commutation of subsistence at the rate of $1 per day and each enlisted man such subsistence as is furnished to an enlisted man of the Regular Navy while in actual attendance upon a course of instruction."

SEC. 11. [Inspections — payment to State, etc., of allotment for arms — disburseing officers — accounts — bonds.] That when it shall appear by the report of inspections, which it shall be the duty of the Secretary of the Navy to cause to be made at least once in each year by officers detailed by him for that purpose, that the Naval Militia of a State, or Territory, or of the District of Columbia is sufficiently armed, uniformed, and equipped for active duty, the Secretary of the Navy is authorized, in his discretion, on the requisition of the governor of such State or Territory or of the commanding general District of Columbia Militia, to pay to such officer as may be properly designated and appointed by said governor or commanding general so much of its allotment from the annual appropriation for arming and equipping the Naval Militia in the annual appropriation for the Navy as shall be necessary for the payment, subsistence, and transportation of such portion of said Naval Militia as shall engage in actual service or instruction afloat or on shore; and the officers and men of such Naval Militia while so engaged may be paid therefrom the same pay, subsistence, and transportation or travel allowance as officers and men of corresponding grades of the Regular Navy are or may hereafter be entitled to by law, and the officer so designated and appointed shall be regarded as a disburse officer of the United States and shall render his accounts through the Navy Department to the proper accounting officer of the Treasury for settlement, and he shall be required to give good and sufficient bonds to the United States, in such sums as the Secretary of the Navy may direct, faithfully to account for the safekeeping and payment of the public moneys so intrusted to him for disbursement. [38 Stat. L. 286.]

This is a part of the Naval Militia Act of Feb. 16, 1914, ch. 21.

[Disbursing officers — traveling expenses.] * * * When disbursing officers are traveling in the performance of their official duties under orders issued by the Secretary of the Navy they shall be reimbursed for their actual and necessary traveling expenses, the same to be made a charge
against the appropriation "Arming and equipping Naval Militia." [39 Stat. L. 594.]

This is from the Naval Appropriation Act of Aug. 29, 1916, ch. 417.

SEC. 9. [Returns made by Adjutant-General — transmission to Congress.] That the adjutant general of each State, Territory, or the District of Columbia, or such other person, board, or bureau as may be provided by the laws of such State, Territory, or the District of Columbia to perform for the Naval Militia the duties ordinarily performed by such adjutant general, shall make returns to the Secretary of the Navy, at such times and in such form as the Secretary of the Navy shall from time to time prescribe, of the strength of the Naval Militia, and also make such reports as may from time to time be required by the Secretary of the Navy. That the Secretary of the Navy shall, with his annual report of each year, transmit to Congress an abstract of the returns and reports of the adjutants general, or of such person, board, or bureau of the States, Territories, and the District of Columbia, with such observations thereon as he may deem necessary for the information of Congress. [38 Stat. L. 285.]

This and the following sections 3, 4, 5, 6, 7, 8 and 19 are from the Naval Militia Act of Feb. 16, 1914, ch. 21.

SEC. 3. [Authority of President to call forth.] That in the event of war, actual or threatened, with any foreign nation involving danger of invasion, or of rebellion against the authority of the Government of the United States, or whenever the President is, in his judgment, unable with the regular forces at his command to execute the laws of the United States, it shall be lawful for the President to call forth such number of the Naval Militia of a State or of the States, or Territories, or of the District of Columbia, as he may deem necessary to repel such invasion, suppress such rebellion, or to enable him to execute such laws, and to issue his orders for that purpose, through the governor of the respective State or Territory, or through the commanding officer of the Naval Militia of the District of Columbia, from which State, Territory, or District such Naval Militia may be called, to such officers of the Naval Militia as he may think proper. [38 Stat. L. 284.]

See the note to the preceding section 9 of this Act.

SEC. 4. [Term of service — precedence over volunteer naval force — manning vessels.] That whenever the President calls forth all or any part of the Naval Militia of any State, Territory, or of the District of Columbia, to be employed in the service of the United States, he may specify in his call the period for which such service is required, and the Naval Militia so called shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the President: Provided, That if no period be stated in the call of the President, the period shall be held to mean the existence of the emergency, of which the President shall be the sole judge: And provided further, That no commissioned officer or enlisted man of the Naval Militia shall be held to service beyond the term of his existing commission or enlistment: Provided further, That when the military needs of the Federal Government,
arising from the necessity to execute the laws of the United States suppress insurrection, or repel invasion, can not be met by the regular forces, the Naval Militia qualified as herein provided and any existing Naval Reserve now or hereafter organized shall be called into the service of the United States in advance of any volunteer naval force which it may then be determined to raise: And provided further, That nothing herein contained shall prevent the Secretary of the Navy, when vessels are purchased or otherwise acquired by the United States for a war, from manning such vessels by all or part of the officers and men then serving on said vessels. [38 Stat. L. 284.]

See the note to section 9 of this Act, supra, p. 489.

Sec. 5. [Conditions precedent to service — failure to obey President's call — courts-martial — rank of officers.] That every officer and enlisted man of the Naval Militia who shall be called forth in the manner hereinafore prescribed shall be mustered for service without further appointment or enlistment, and without further professional examination previous to such muster, except for those States and Territories and the District of Columbia, if the case may so be, which have not adopted a standard of professional and physical examination prescribed by the Secretary of the Navy for the Naval Militia, and whose officers and petty officers shall not have been examined and found qualified in accordance therewith by boards of officers which shall be appointed by said Secretary: Provided, however, That any officer or enlisted man of the Naval Militia so qualified who shall refuse or neglect to present himself for such muster upon being called forth as herein prescribed, shall be subject to trial by court-martial and shall be punished as such court-martial may direct: And provided further, That Naval Militia officers mustered as such into the service of the United States under the provisions of this Act shall rank with but after officers of the Regular Navy in the same grade and rank; except that for the purpose of determining who shall exercise command over a combined force, composed of vessels commanded by Naval Militia officers and of vessels commanded by officers of the Navy acting in conjunction, all officers of the Naval Militia of or above the rank of lieutenant commander will be regarded as junior to lieutenant commanders of the Navy. [38 Stat. L. 284.]

See the note to section 9 of this Act, supra, p. 489.

As originally enacted this section contained a second proviso as follows: "That when in the service of the United States officers of the Naval Militia may serve on courts-martial for the trial of officers and men of the Regular or Naval Militia service, but in the cases of courts-martial convened for the trial of officers of the Regular service, the majority of the members shall be officers of the Regular service; and officers and men of the Naval Militia may be tried by courts-martial the members of which are officers of the Regular or Naval Militia service, or both."

This was repealed by the Act of Oct. 6, 1917, ch. —, a further proviso of which is given infra, p. 497.

Sec. 6. [Regulations governing service.] That the Naval Militia, when called into the service of the United States, shall be governed by the Navy regulations and the articles for the government of the Navy. [38 Stat. L. 285.]

See the note to section 9 of this Act, supra, p. 489.

The articles for the Government of the Navy are given in vol. I, p. 16.
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SEC. 7. [Pay and allowances.] That the Naval Militia, when called into the service of the United States, shall, during their time of service, be entitled to the same pay and allowances as are or may be provided by law for the Regular Navy. [38 Stat. L. 285.]

See the note to section 9 of this Act, supra, p. 489.

SEC. 8. [Commencement of pay.] That when the Naval Militia is called into the service of the United States, or any portion of the Naval Militia is called forth under the provisions of this Act, their pay shall commence from the day of their reporting in obedience to such call at their local ship, armory, or quarters; but this provision shall not be construed to authorize any species of expenditure previous to arriving at such places which is not provided by existing laws to be paid after their arrival at such places. [38 Stat. L. 285.]

See the note to section 9 of this Act, supra, p. 489.

SEC. 19. [Pensions.] That when any officer, petty officer, or enlisted man of the Naval Militia is disabled by reason of wounds or disabilities received or incurred in the naval service of the United States in time of war he shall be entitled to all the benefits of the pension laws existing at the time of his service, and in case such officer, petty officer, or enlisted man dies in the naval service of the United States in time of war, or in returning to his place of residence after being mustered out of such naval service, or at any time in consequence of wounds or disabilities received in such naval service in time of war, his widow and children, if any, shall be entitled to all the benefits of such pension laws. [38 Stat. L. 289.]

See the note to section 9 of this Act, supra, p. 489.
For the provisions of the pension laws see PENSIONS.

[Courts-martial.] • • • That courts-martial in the Naval Militia of the several States and Territories and in the District of Columbia shall except when the Naval Militia shall have been called into the service of the United States, consist of general courts-martial, summary courts-martial, and deck courts. [39 Stat. L. 598.]

The provisions of this and the following seventeen paragraphs of the text are from the Naval Appropriation Act of Aug. 29, 1916, ch. 417.

[General courts-martial.] • • • That general courts-martial shall consist of not less than three nor more than thirteen officers, and may be convened by order of the governor of a State or Territory, or the commanding general of the District of Columbia Militia. [39 Stat. L. 598.]

See the notes to the preceding paragraph of this section.

[Summary courts-martial.] • • • That summary courts-martial may be ordered by the governor of a State, or Territory or by the commanding general of the District of Columbia Militia, or by the commanding officer of a Naval Militia battalion or brigade. [39 Stat. L. 598.]

See the notes to the second preceding paragraph of this section.
[Deck courts.] * * * That deck courts may be ordered by the commanding officer of a Naval Militia battalion or brigade, or by a Naval Militia officer in command of Naval Militia forces on shore or on any vessel loaned to a State, Territory, or the District of Columbia, or on any vessel on which said forces may be serving. [39 Stat. L. 598.]

See the notes to the first paragraph of this section, supra, p. 491.

[Jurisdiction and procedure.] * * * That the above courts-martial and deck courts herein provided for shall be constituted and have cognizance of the same subjects and possess like powers, except as to punishments, as similar courts provided for in the Navy of the United States, and the proceedings of courts-martial of the Naval Militia shall follow the forms and modes of procedure prescribed for such courts in the Navy of the United States. [39 Stat. L. 598.]

See the notes to the first paragraph of this section, supra, p. 491.

[Place of holding courts.] * * * That every precept or order for the convening of any such court may authorize said court to sit at any place or places within the territorial limits of the State, Territory, or District where such Naval Militia may be located, or organized, as the convening authority may designate, and may further provide that any such court may be convened and sit on board any such naval or other vessel, wherever the same may from time to time happen to be, or at such place or places ashore, outside the territorial limits referred to above, as, in the judgment of the said convening authority, may be convenient or desirable for the purposes of such courts-martial. [39 Stat. L. 598.]

See the notes to the first paragraph of this section, supra, p. 491.

[Powers of general courts-martial.] * * * That general courts martial shall have power to impose fines not exceeding $200, to sentence to forfeiture of pay and allowances, to a reprimand, to dismissal or dishonorable discharge from the service, to reduction in rank or rating; or any two or more of such punishments may be combined in the sentences imposed by such courts. [39 Stat. L. 598.]

See the notes to the first paragraph of this section, supra, p. 491.

[Powers of summary courts-martial.] * * * That summary courts-martial shall have the same powers of punishment as general courts-martial, except that fines imposed by summary courts-martial shall not exceed $100. [39 Stat. L. 598.]

See the notes to the first paragraph of this section, supra, p. 491.

[Powers of deck-courts.] * * * That deck courts may impose fines not exceeding $50 for any single offense, may sentence enlisted men to reduction in rank or rating, to forfeiture of pay and allowances, to a reprimand, to discharge with other than dishonorable discharge, or to a fine in addition to any one of the other sentences specified. [39 Stat. L. 598.]

See the notes to the first paragraph of this section, supra, p. 491.
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[Confinement in lieu of fines.] * * * That all courts-martial of the Naval Militia, including deck courts, shall have the power to sentence to confinement in lieu of fines authorized to be imposed: Provided, That such sentences shall not exceed one day for each dollar of fine authorized. [39 Stat. L. 598.]

See the notes to the first paragraph of this section, supra, p. 491.

[Dismissal or dishonorable discharge.] * * * That no sentence of dismissal or dishonorable discharge from the Naval Militia shall, except when the Naval Militia shall have been called into the service of the United States, be executed without the approval of the governor of the State or Territory or the commanding general of the District of Columbia Militia. [39 Stat. L. 598.]

See the notes to the first paragraph of this section, supra, p. 491.

[Warrants — subpoenas — attachments.] * * * That presidents of general courts-martial, senior members of summary courts-martial, and deck-court officers of the Naval Militia shall have the power to issue warrants to arrest accused persons and to bring them before the court for trial whenever such persons have disobeyed an order in writing from the convening authority to appear before such court, a copy of the charge or charges having been delivered to the accused with such order, and to issue subpoenas and subpoenas duces tecum, and to enforce by attachment attendance of witnesses and the production of books and papers, and to sentence for a refusal to be sworn or to answer, all as authorized for similar proceedings for courts-martial in the Navy of the United States. [39 Stat. L. 598.]

See the notes to the first paragraph of this section, supra, p. 491.

[Execution of processes and sentences.] * * * That all processes and sentences of said courts-martial shall be executed by such civil or other officers as may be prescribed by the laws of the several States and Territories, except as hereinafter alternatively provided, and in any State where no provisions have been made for such action and in the Territories and the District of Columbia the same shall be executed by a United States marshal, or by his duly appointed deputy, and it shall further be the duty in any case of any United States marshal, when so required by the convening authority of any such court-martial, to execute all such processes and sentences and make return thereof to the officer issuing or imposing the same. [39 Stat. L. 599.]

See the notes to the first paragraph of this section, supra, p. 491.

[Fines — collection.] * * * That the amount of any fine imposed under sentence of the courts heretofore named on any member of the Naval Militia may be collected from him, or may be deducted from any amount due said member as accrued pay or retainer pay under the provisions of this Act, or otherwise. [39 Stat. L. 599.]

See the notes to the first paragraph of this section, supra, p. 491.

[Fines — disposition.] * * * That all fines assessed under the provisions of this Act and collected or withheld shall be paid to the commanding officer of the Naval Militia brigade, battalion, or separate unasigned unit of which the person against whom such fine shall have been
assessed is a member, to be used by said commanding officer to replace lost or damaged property or for such other purposes of his Naval Militia organization as he may decide, subject to such regulations as may be prescribed by the Secretary of the Navy. Upon the receipt of a certificate from the authority convening the court as to any fine assessed by it, any United States disbursing officer concerned shall pay over any funds due the said member not exceeding the amount of such fine to said commanding officer upon the sole receipt of said commanding officer. [39 Stat. L. 599.]

See the notes to the first paragraph of this section, supra, p. 491.

[Courts of inquiry.] * * * That courts of inquiry in the Naval Militia shall be instituted, constituted, and conducted in the same manner and shall have like powers and duties as similar courts in the Navy of the United States, except that in the Naval Militia courts of inquiry shall be ordered by the governor of the State or Territory, the commanding general of the District of Columbia Militia, or the commanding officer of a Naval Militia brigade or battalion. [39 Stat. L. 599.]

See the notes to the first paragraph of this section, supra, p. 491.

[Disbandment.] * * * That no part of the Naval Militia which is entitled to compensation under the provisions of this Act shall be disbanded without the consent of the President. [39 Stat. L. 595.]

See the notes to the first paragraph of this section, supra, p. 491.

[Annual estimates.] * * * That the Secretary of the Navy shall cause to be estimated annually the amount necessary for carrying out the provisions of this Act, and no money shall be expended under said provisions, except as shall, from time to time, be appropriated for carrying them out. [39 Stat. L. 600.]

See the notes to the first paragraph of this section, supra, p. 491.

Sec. 20. [Expenditures by Secretary of Navy, how met.] That all expenditures authorized to be paid by the Secretary of the Navy under the provisions of this Act shall be paid out of the $200,000 appropriated in section ten of this Act, except such additional expenditures as may be authorized by the annual naval appropriation Act. [38 Stat. L. 289.]

This and the following section 22 are from the Naval Militia Act of Feb. 16, 1914, ch. 21.

Sec. 22. [Repeal.] That all laws and sections of laws conflicting with the provisions of this Act are hereby repealed. [38 Stat. L. 290.]

See the note to the preceding section 20 of this Act.

IV. NATIONAL NAVAL VOLUNTEERS

[National Naval Volunteers — force created.] * * * That to provide a force for use in any emergency, including that of actual or imminent war, requiring the use of naval forces in addition to those of the Regular Navy, of
which emergency the President shall be, for the purposes of this Act, the sole judge, there is hereby created a force, to be known as the "National Naval Volunteers," into which the President alone is authorized, under such regulations as he may prescribe, to at any time enroll, by commission, warrant, and enlistment, respectively, and without examination, such number of the officers and men of the various branches of the Naval Militia as he may decide to so enroll from among those of the Naval Militia who have theretofore conformed to the standard of professional and physical examination prescribed for such officers and men under section five of an Act entitled "An Act to promote the efficiency of the Naval Militia, and for other purposes," approved February sixteenth, nineteen hundred and fourteen, and who may volunteer for such enrollment; and may also similarly enroll, immediately upon the occurrence of any such emergency (subject to their first or subsequently passing examinations satisfactory to him, or may, if he shall think best, enroll without any examination), such further number of the officers and men of the Naval Militia as may so volunteer from among those of the Naval Militia who have not theretofore conformed to said standards. Such officers and men, so enrolled by commission, warrant, or enlistment, shall be eligible and liable for call for immediate service in the event of any such emergency. [39 Stat. L. 595.]

This and the three paragraphs of the text following are from the Naval Appropriation Act of Aug. 29, 1918, ch. 417.
The Act of Feb. 16, 1914, ch. 21, § 5, mentioned in this paragraph is given supra, p. 490.

[Members subject to draft.] * * * That the President may also, in the event of such emergency, draft into the naval service of the United States and enroll as members of the said Volunteers as many officers and men of the Naval Militia as he may think best, and with or without examination, as he may decide, from among those of the Naval Militia who shall not theretofore have volunteered and been enrolled in said Volunteers: Provided That no commissioned or warrant officer drafted or otherwise enrolled shall be compelled to serve in said Volunteers in a lower rank or grade than that which he held in the Naval Militia at the time of being drafted or otherwise enrolled: Provided further, That the President may commission, warrant, or rate in said Volunteers any person who shall be so enrolled as above. [39 Stat. L. 596.]

See the note to the preceding paragraph of the text.

[Subject of Navy regulations — period of service — failure to obey call.] * * * That when the National Naval Volunteers are ordered by the President into the active service they will, from the date such orders are issued until such time as they may be discharged from such service, be subject to the laws for the government of the Navy in so far as those laws may properly be applied to persons not in the regular permanent naval service.

That all persons so enrolled shall be held to service in said Volunteers during the continuance of any such emergency and during the period of any existing or thereafter ensuing war, unless sooner relieved by order of the President or until reaching the age of sixty-two years for those in the naval branch and the age of sixty-four years for those in the Marine Corps
branch, upon attaining which ages such persons, respectively, shall be relieved from such enrollment: Provided, That during the continuance of any such emergency or war any enrolled person who shall fail to obey the call to service of the President may be arrested and compelled to serve, and, in addition thereto, may be tried by court-martial as a deserter and punished as such in such manner as said court-martial may lawfully direct. [39 Stat. L. 596.]

See the note to the first paragraph of this section, supra, p. 494.

[Relief from Naval Militia duty—pay allowances, etc.] • • •
That every person enrolled in said Volunteers shall, from the date of the call of the President, and during the continuance of his active service under said call, stand relieved from all duty as a member of the Naval Militia, and shall, during said period, have in said Volunteers all the authority and obligations of a person of similar rank, grade, or rate in the United States Navy or Marine Corps, shall be governed by the laws and regulations for the government of the Navy, and shall, during his time of active service, be entitled to the same pay and allowances as are, or may be hereafter, provided by law for a person of similar rank, grade, or rate in the United States Navy and Marine Corps, respectively. [39 Stat. L. 596.]

See the note to the first paragraph of this section, supra, p. 494.

Sec. 21. [Examination of applicants for commissions—commissions in Navy.] That, for the purpose of securing a list of persons especially qualified to hold commissions in the Navy or in any reserve or volunteer naval force which may hereafter be called for and organized under the authority of Congress, other than a force composed of Organized Naval Militia, the Secretary of the Navy is authorized from time to time to convene the examining boards at suitable and convenient places in different parts of the United States, who shall examine as to their qualifications for naval duties all applicants who shall have served in the Regular Navy of the United States or in the Organized Naval Militia of any State or Territory or the District of Columbia. Such examination shall be under such rules and regulations prescribed by the Secretary of the Navy. The record of previous service of the applicant shall be considered as part of the examination. These applicants who pass such examinations shall be certified as to their fitness for naval duties and rank, and shall, subject to a physical examination at any time, constitute an eligible class for commissions, pursuant to such certification, in any volunteer naval force hereafter called for and organized under the authority of Congress other than a force composed of Organized Naval Militia; and the President is hereby further authorized, upon the outbreak of war, or when, in his opinion, war is imminent, to commission in the regular Navy for the exigency of such war such of the persons whose names have been certified as above provided as he may select: Provided, That no one shall be commissioned to a higher rank than the rank for which he may have been recommended by said examining board: And provided further, That the President may also, commission or warrant as of the highest rank formerly held by him, or the present equivalent of such former
rank in case the nomenclature or some of the specific duties of the same
may have been changed, any person who having been formerly a com-
missioned or warrant officer of the United States Navy shall have been honor-
ably discharged from the service: And provided further, That persons may
be commissioned in the Navy for engineer duties only, and for all line
duties other than engineer duties, and when so commissioned shall have
the full rank, pay, precedence, and so forth, of the line grade for which
they are commissioned. [38 Stat. L. 289.]

This is from the Naval Militia Act of Feb. 16, 1914, ch. 21.

[Service — rank, etc.] That the members of the said Volunteers may be
ordered to duty with the Navy or separately, and either within or without
the territorial limits of the United States, and when so serving shall rank
with but after those of corresponding rank, grades, or rates in the United
States Navy or Marine Corps, except that for the purpose of determinin-
who shall exercise command over a combined force, composed of vessels
commanded by officers of said Volunteers, and of vessels commanded by
officers of the United States Navy, acting in conjunction, and for the pur-
pose of determining who shall exercise command on shore over a combined
force composed of military units commanded by officers of said Volunteers
and officers of the United States Navy or Marine Corps, acting in conjunc-
tion, all officers of said Volunteers of or above the rank of lieutenant com-
mander (naval branch) or major (Marine Corps branch) will be regarded
as junior to lieutenant commanders of the Navy and majors of the United
States Marine Corps, respectively, and provided that as between themselves
officers of the said Volunteers shall take rank and precedence as of the dates
of the commissions in the Naval Militia under which enrolled in said
Volunteers. [39 Stat. L. 596.]

This and the following paragraph of the text are from the Naval Appropriation

[Promotions and rewards.] * * * That no distinction shall be made
between the regular naval service and the National Naval Volunteers when
in active service under the call of the President, in respect to promotions
or rewards for valorous conduct, or to the conferring upon officers or enlisted
men of brevet rank, medals of honor, or other rewards for distinguished
conduct. [39 Stat. L. 597.]

See the note to the preceding paragraph of the text.

[Officers serving on courts-martial.] That when actively serving under
the Navy Department in time of war or during the existence of an emer-
gency, pursuant to law, as a part of the naval forces of the United States,
commissioned officers of the Naval Reserve Force, Marine Corps Reserve,
National Naval Volunteers, Naval Militia, Coast Guard, Lighthouse Service,
Coast and Geodetic Survey, and Public Health Service are hereby empow-
ered to serve on naval courts-martial and deck courts under such regula-

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tions necessary for the proper administration of justice and in the interests of the services involved, as may be prescribed by the Secretary of the Navy:

* * * And provided further, That any Act or parts of Acts in conflict with the provisions hereof are hereby repealed. [40 Stat. L. —.]

This is a part of an Act of Oct. 6, 1917, ch. —, entitled "An Act To provide for the service of officers of auxiliary naval forces on naval courts."

A proviso of this Act, omitted here, repealed a provision of the Act of Aug. 29, 1916, ch. 417, 39 Stat. L. 397, which was as follows: "That when serving under the call of the President, officers of said Volunteers may serve on courts-martial for the trial of officers and men of the United States Naval or Naval Militia service, or of said Volunteers, but in the cases of courts-martial convened for the trial of officers or enlisted men of the United States Navy or Marine Corps, the majority of the members shall be officers of the Regular Naval service, and officers and enlisted men of the said Volunteers may be tried by courts-martial, the members of which are members of the Regular Naval service, or of said Volunteers, or any or all of the same."

A further proviso of this Act, also omitted here, repealed a part of the Act of Feb. 16, 1914, ch. 21, § 5, as noted thereunder, supra, p. 490.

[Resignation — discharge — re-enrollment.] That any person so enrolled may tender his resignation to, or request his discharge from, the President, who may, in his discretion, accept such resignation or grant such discharge and disenroll such person, and any person so enrolled may be disenrolled by the President for any cause: Provided, That no person so enrolled shall be held against his will to such enrollment for a longer continuous period than three years, except during the pendency or duration of the emergency or of war hereinabove referred to. Any person enrolled may subsequently, upon his own application while so enrolled and if still a member of the Naval Militia, be reenrolled in any rank, grade, or rating for which he shall have been found qualified under the provisions of section five of an Act entitled "An Act to promote the efficiency of the Naval Militia, and for other purposes," approved February sixteenth, nineteen hundred and fourteen, and for which he shall also have been duly commissioned, warranted, enlisted, or rated, as the case may be, in the Naval Militia. [39 Stat. L. 596.]

This and the two paragraphs of the text following are from the Naval Appropriation Act of Aug. 29, 1916, ch. 417.

The Act of Feb. 16, 1914, ch. 21, § 5, mentioned in this paragraph is given supra, p. 490.

[Relief from active service.] That the President may relieve any and all persons in the National Naval Volunteers from active service when their services are no longer needed. [39 Stat. L. 597.]

See the note to the preceding paragraph of the text.

[Pensions.] That when any officer or enlisted man of the said Volunteers is disabled by reason of wounds or disabilities received in the active service of the United States, when called to duty under the provisions of this Act, he shall be entitled to all the benefits of the pension laws existing at the time of his service for the benefit of members of the United States Navy or Marine Corps, respectively, and in case such officer or enlisted man dies in
the active service of the United States, or in returning to his place of residence after being relieved from such active service, or at any time in consequence of wounds or disabilities received in such active service, his widow and children, or previously designated dependent relative, if any, shall be entitled to all the benefits of such pension laws. [39 Stat. L. 597.]

See the note to the second preceding paragraph of the text.

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I. BUREAU OF MINES

An Act To establish in the Department of the Interior a Bureau of Mines.


[Sec. 1.] [Bureau established—director—experts and employees.]
That there is hereby established in the Department of the Interior a bureau of mining, metallurgy, and mineral technology, to be designated the Bureau of Mines, and there shall be a director of said bureau, who shall be thoroughly equipped for the duties of said office by technical education and experience and who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall receive a salary of six thousand dollars per annum; and there shall be in the said bureau such experts and other employees, to be appointed by the Secretary of the Interior, as may be required to carry out the purposes of this Act in accordance with the appropriations made from time to time by Congress for such purposes. [37 Stat. L. 681.]

The provisions of this and the following sections 2-6 of this Act were originally enacted as the "Bureau of Mines" Act of May 16, 1910, ch. 240, 36 Stat. L. 369. By an Act of Feb. 25, 1913, ch. 72, entitled "An Act to amend an Act entitled 'An Act to establish in the Department of the Interior a Bureau of Mines,' approved May sixteenth, nineteen hundred and ten," the enacting clause of which was as follows: "That the Act to establish in the Department of the Interior a Bureau of Mines, approved May sixteenth, nineteen hundred and ten, be, and the same is hereby, amended to read as follows:" said Act of May 16, 1910, ch. 240, was amended to read as given in the foregoing section 1 and the following sections 2-6.
As originally enacted the Act of May 16, 1910, ch. 240, was as follows:

"[Sec. 1.] That there is hereby established in the Department of the Interior a bureau, to be called the Bureau of Mines, and a director of said bureau, who shall be thoroughly equipped for the duties of said office by technical education and experience and who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall receive a salary of six thousand dollars per annum; and there shall also be in the said bureau such experts and other employees as may from time to time be authorized by Congress.

"Sec. 2. That it shall be the province and duty of said bureau and its director, under the direction of the Secretary of the Interior, to make diligent investigation of the methods of mining, especially in relation to the safety of miners, and the appliances best adapted to prevent accidents, the possible improvement of conditions under which mining operations are carried on, the treatment of ores and other mineral substances, the use of explosives and electricity, the prevention of accidents, and other inquiries and technological investigations pertinent to said industries, and from time to time make such public reports of the work, investigations, and information obtained as the Secretary of said department may direct, with the recommendations of such bureau.

"Sec. 3. That the Secretary of the Interior shall provide the said bureau with furnished offices in the city of Washington, with such books, records, stationery, and appliances, and such assistants, clerks, stenographers, typewriters, and other employees as may be necessary for the proper discharge of the duties imposed by this Act upon such bureau, fixing the compensation of such clerks and employees within appropriations made for that purpose.

"Sec. 4. That the Secretary of the Interior is hereby authorized to transfer to the Bureau of Mines from the United States Geological Survey the supervision of the investigations of structural materials and the analyzing and testing of coals, lignites, and other mineral fuel substances and the investigation as to the causes of mine explosions; and the appropriations made for such investigations may be expended under the supervision of the Director of the Bureau of Mines in manner as if the same were so directed in the appropriations Acts; and such investigations shall hereafter be within the province of the Bureau of Mines, and shall cease and determine under the organization of the United States Geological Survey; and such experts, employees, property and equipment as are now employed or used by the Geological Survey in connection with the subjects herewith transferred to the Bureau of Mines are directed to be transferred to said bureau.

"Sec. 5. That nothing in this Act shall be construed as in any way granting to any officer or employee of the Bureau of Mines any right or authority in connection with the inspection or supervision of mines or metallurgical plants in any State.

"Sec. 6. This Act shall take effect and be in force on and after the first day of July, nineteen hundred and ten." [36 Stat. L. 369.]

By a provision of the Act of June 25, 1910, ch. 384, 36 Stat. L. 743, so much of said Act of May 16, 1910, ch. 240, as transferred to the Bureau of Mines the supervision of the investigations of structural materials and equipment was repealed.


Sec. 2. [DUTIES OF BUREAU.] That it shall be the province and duty of the Bureau of Mines, subject to the approval of the Secretary of the Interior, to conduct inquiries and scientific and technological investigations concerning mining, and the preparation, treatment, and utilization of mineral substances with a view to improving health conditions, and increasing safety, efficiency, economic development, and conserving resources through the prevention of waste in the mining, quarrying, metallurgical, and other mineral industries; to inquire into the economic conditions affecting these industries; to investigate explosives and peat; and on behalf of the Government to investigate the mineral fuels and unfinished mineral products belonging to, or for the use of, the United States, with a view to their most efficient mining, preparation, treatment and use; and to disseminate information concerning these subjects in such manner as will best carry out the purposes of this Act. [37 Stat. L. 681.]

See the notes to the preceding section 1 of this Act.
SEC. 3. [Reports of investigations—recommendations of Bureau.] That the director of said bureau shall prepare and publish, subject to the direction of the Secretary of the Interior, under the appropriations made from time to time by Congress, reports of inquiries and investigations, with appropriate recommendations of the bureau, concerning the nature, causes, and prevention of accidents, and the improvement of conditions, methods, and equipment, with special reference to health, safety, and prevention of waste in the mining, quarrying, metallurgical, and other mineral industries; the use of explosives and electricity, safety methods and appliances, and rescue and first-aid work in said industries; the causes and prevention of mine fires; and other subjects included under the provisions of this Act. [37 Stat. L. 681.]

See the notes to section 1 of this Act, supra, p. 505.

SEC. 4. [Personal interest of director or members in mines, etc.—temporary employment of experts.] In conducting inquiries and investigations authorized by this Act neither the director nor any member of the Bureau of Mines shall have any personal or private interest in any mine or the products of any mine under investigation, or shall accept employment from any private party for services in the examination of any mine or private mineral property, or issue any report as to the valuation or the management of any mine or other private mineral property: Provided, That nothing herein shall be construed as preventing the temporary employment by the Bureau of Mines, at a compensation not to exceed ten dollars per day, in a consulting capacity or in the investigation of special subjects, of any engineer or other expert whose principal professional practice is outside of such employment by said bureau. [37 Stat. L. 682.]

See the notes to section 1 of this Act, supra, p. 505.

SEC. 5. [Fees for tests—exceptions.] That for tests or investigations authorized by the Secretary of the Interior under the provisions of this Act, other than those performed for the Government of the United States or State governments within the United States, a reasonable fee covering the necessary expenses shall be charged, according to a schedule prepared by the Director of the Bureau of Mines and approved by the Secretary of the Interior, who shall prescribe rules and regulations under which such tests and investigations may be made. All moneys received from such sources shall be paid into the Treasury to the credit of miscellaneous receipts. [37 Stat. L. 682.]

See the notes to section 1 of this Act, supra, p. 505.

SEC. 6. [Effect.] That this Act shall take effect and be in force on and after its passage. [37 Stat. L. 682.]

See the notes to section 1 of this Act, supra, p. 505.

[Sec. 1.] [Estimates for personal services in Bureau at Washington.] • • • For the fiscal year nineteen hundred and seventeen, and annually thereafter, estimates shall be submitted specifically for all personal services required permanently and entirely in the Bureau of Mines at
Washington, District of Columbia, and previously paid from lump-sum or general appropriations. [38 Stat. L. 858.]

The provisions of the foregoing and of the following paragraph of the text are from the Sundry Civil Appropriation Act of March 3, 1915, ch. 75.

[Detail of employees — expenses — report.] * * * Persons employed during the fiscal year nineteen hundred and sixteen in field work, outside of the District of Columbia, under the Bureau of Mines, may be detailed temporarily for service in Washington, District of Columbia, for purposes of preparing results of their field work; all persons so detailed shall be paid in addition to their regular compensation only their actual traveling expenses or per diem in lieu of subsistence in going to and returning therefrom: Provided, That nothing herein shall prevent the payment to employees of the Bureau of Mines their necessary expenses or per diem, in lieu of subsistence while on temporary detail in Washington, District of Columbia, for purposes only of consultation or investigations on behalf of the United States. All details made hereunder, and the purposes of each, during the preceding fiscal year, shall be reported in the annual estimates of appropriations to Congress at the beginning of each regular session thereof. [38 Stat. L. 859.]

See the note to the preceding paragraph of this section.

An Act To provide for the establishment and maintenance of mining experiment and mine safety stations for making investigations and disseminating information among employees in mining, quarrying, metallurgical, and other mineral industries, and for other purposes.


[Sec. 1.] [Mining experiment and safety stations — duties — number.] That the Secretary of the Interior is hereby authorized and directed to establish and maintain in the several important mining regions of the United States and the Territory of Alaska, as Congress may appropriate for the necessary employees and other expenses, under the Bureau of Mines and in accordance with the provisions of the Act establishing said bureau, ten mining experiment stations and seven mine safety stations, movable or stationary, in addition to those already established, the province and duty of which shall be to make investigations and disseminate information with a view to improving conditions in the mining, quarrying, metallurgical, and other mineral industries, safeguarding life among employees, preventing unnecessary waste of resources, and otherwise contributing to the advancement of these industries: Provided, That not more than three mining experiment stations and mine safety stations hereinabove authorized shall be established in any one fiscal year under the appropriations made therefore. [38 Stat. L. 959.]

Sec. 2. [Acceptance of lands, etc., from States.] That the Secretary of the Interior is hereby authorized to accept lands, buildings, or other contributions from the several States offering to cooperate in carrying out the purposes of this Act. [38 Stat. L. 959.]
II. MINERAL LANDS AND MINING RESOURCES

Sec. 2318. [Mineral lands reserved.] In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. [R.S.]

Act of July 4, 1866, ch. 166, 14 Stat. L. 86.
Sections 2315-2362 constitute chapter 6 (entitled "Mineral Lands and Mining Resources") of title 32 (entitled "The Public Lands") of the Revised Statutes.

Generally.—After Dec. 1, 1873, title to lands known at the time to be valuable for their minerals, could only have been acquired under provisions specially authorizing their sale, as found in this chapter, except in the states of Michigan, Wisconsin, and Minnesota, and after May 5, 1876, in the states of Missouri and Kansas. By the Act of Congress of this latter date, "deposits of coal, iron, lead, or other mineral" in Missouri and Kansas were excluded from the operation of the Act of May 10, 1872, that is, from such provisions of that Act as were re-enacted in the Revised Statutes. In those portions of the Revised Statutes which relate to pre-emption and to homestead entries the clauses from the original acts excepting mineral lands are retained. R. S. secs. 2255, 2302 (title PUBLIC LANDS). Deffebach v. Hawke, (1885) 115 U. S. 392, 6 S. Ct. 95, 29 U. S. (L. ed.) 423. See also Davis v. Weibold, (1891) 159 U. S. 507, 11 S. Ct. 626, 35 U. S. (L. ed.) 238.

"This [text section] must be taken, in view of the fact that prior to the Act of July 4, 1866, no law authorized the sale or disposal of any mineral lands belonging to the United States, and the further fact that subsequent laws incorporated in the Revised Statutes provide expressly how title to such lands may be acquired, as limiting the power and authority of the land department in disposing of the public lands valuable for minerals to some method and under such conditions as may be specifically pointed out by some Act of Congress." Kansas City Min., etc., Co. v. Clay, (3 Ariz. 326, 1802) 29 Pac. 9.

R. S. secs. 2318-2328 relate mainly, if not exclusively, to mineral lodes or veins, and, among other things, they fix the amount or quantity of land which may be acquired under any one claim, the maximum of which is 1,500 feet along its length and 300 feet in width on each side of it, subject to further limitations under acts of the state legislatures, and the mining rules of the district. Reynolds v. Iron Silver Min. Co., (1886) 116 U. S. 687, 6 S. Ct. 601, 29 U. S. (L. ed.) 774.

Lands reserved.—It is not only valuable mineral lands and deposits that are reserved from sale. A township map showing a mining claim upon which there was upon the section "copper, gold, and silver bearing quartz," does not tend to show whether it was there in quantity or quality sufficient to make the land valuable for mining purposes. Merrill v. Dixon, (1880) 15 Nev. 401.

Lands valuable for minerals.—It is not enough to render lands valuable for minerals that there is some trace of minerals, but there must be minerals in such quantities as to justify the expenditure of effort to extract them; but it is not necessary that minerals of sufficient amount and value to allow immediate profitable working be shown to exist in the land, and it is enough if the vein or deposit has a present or prospective commercial value. Madison v. Octave Oil Co., (1908) 154 Cal. 768, 90 Pac. 176.


As to the effect of this statute qualifying a grant of lands to a state by enabling act, see Milner v. U. S., (C. C. A. 8th Cir. 1915) 228 Fed. 431, 143 C. C. A. 13, distinguishing Sweet v. U. S., (C. C. A. 8th Cir. 1915) 228 Fed. 421, 143 C. C. A. 3, wherein it was held that the grant of lands to Utah for school purposes was not a sale, and this section reserving mineral lands from sale was not applicable thereto.

Reserved for military purposes.—Mineral lands belonging to the public domain, which are reserved from sale under this section, may be reserved for military or other public purposes by the President. (1881) 17 Op. Atty.-Gen. 230.

Question of fact.—The question whether land is mining land, or valuable for minerals, is one of fact, which is the peculiar province of the land department of the United States to determine before the patent is issued. The issuance of such patent is conclusive in the absence of fraud, mistake, or imposition. Standard Quicksilver Co. v. Habashaw, (1901) 132 Cal. 115, 64 Pac. 113.

Sufficiency of evidence.—As to the sufficiency of evidence to prove that lands were mineral lands, see Madison v. Octave Oil Co., (1908) 154 Cal. 768, 90 Pac. 176.

Fraudulent purchase as agricultural land.—U. S. v. Culver, (W. D. Ark. 1892) 52 Fed. 81, was a suit brought for the purpose of procuring the cancellation of
two patents issued by the government to the defendant to certain lands named in
the complaint. The lands were purchased under a presidential proclamation, offering
them, together with a large quantity of other lands, for sale, and were pur-
chased at private sale. They were bought by private cash entry as agricultural
lands, though the purchaser knew their mineral character. It was held that such
a purchase vitiated the sale because of the fraud perpetrated upon the officers of
the government. To similar effect see Murray v. White, (1911) 43 Mont. 423,
113 Pac. 754, Ann. Cas. 1912A 1297.

Cited.—This section was cited in Mon-
tello Salt Co. v. Utah, (1911) 221 U. S.
462, 31 S. Ct. 706, 55 U. S. (L. ed.) 810,
Ann. Cas. 1912D 635, reversing (1908) 54
Utah 466, 98 Pac. 468.

Sec. 2319. [Mineral lands open to purchase by citizens.] All valu-
able mineral deposits in lands belonging to the United States, both surveyed
and unsurveyed, are hereby declared to be free and open to exploration and
purchase, and the lands in which they are found to occupation and purchase,
by citizens of the United States and those who have declared their intention
to become such, under regulations prescribed by law, and according to the
local customs or rules of miners in the several mining-districts, so far as the
same are applicable and not inconsistent with the laws of the United States.

[R. S.]

See R. S. sec. 2345, infra, p. 592.

Purpose of statute.—The object of the Act
of May 10, 1872, 17 Stat. L. 91, from which the provisions of this section were
carried into the Revised Statutes, was
"to promote the development of the min-
ing resources of the United States." It
is so expressed in its title and such devel-
opment is sought to be promoted by indi-
cating the manner in which claims to
mines can be established, and their extent,
and by offering a title to the original dis-
coverer or locator who should develop the
mine discovered and located or to his
assigns. McKinley v. Wheeler, (1888)
130 U. S. 639, 9 S. Ct. 638, 32 U. S.
(L. ed.) 1048.

Rights of property.—"Such right as
the mining laws allow and as Congress
concedes to develop and work the mines,
is property in the miner, and property of
great value.... Those claims are the
subject of bargain and sale, and consti-
tute very largely the wealth of the Pacific
coast state. They are property in the
full sense of the word, and their owner-
ship, transfer, and use are governed by
a well-defined code or codes of law, and
are recognized by the states and the federal
government. This claim may be sold,
transferred, mortgaged, and inherited
without infringing the title of the United
States." Forbes v. Gracey, (1876) 94
U. S. 785, 24 U. S. (L. ed.) 313. See also
Mt. Rose Min., etc., Co. v. Palmer, (1899)
20 Colo. 56, 56 Pac. 176, 77 A. S. R. 245,
50 L. R. A. 288; Gorman Min. Co. v. Alex-

Title by occupancy.—Title to mineral
lands cannot be acquired by occupancy
unless for the purpose of mining or ex-
tracting minerals. Burns v. Clark, (1901)
133 Cal. 634, 66 Pac. 12, 85 A. S. R. 233.

Persons entitled to locate claim—Cor-
poration—A private corporation formed
under the laws of a state, whose members
are citizens of the United States, may
locate a mining claim on the public lands
of the United States. McKinley v.
638, 32 U. S. (L. ed.) 1048. See also
U. S. v. Trinidad Coal, etc., Co., (1890)
187 U. S. 166, 11 S. Ct. 57, 34 U. S.
(L. ed.) 640.

Minor.—A minor may become a loca-
tor of mineral lands under this statute. No
requirement that the citizen shall be of
any particular age is expressed. Thomp-
son v. Spray, (1887) 72 Cal. 258, 14 Pac.
192.

Aliens.—The location by an alien and
all the rights following from such location
are voidable, not void, and are free from
attack by any one except the government.
Manuel v. Wulf, (1884) 102 U. S. 296,
14 S. Ct. 651, 38 U. S. (L. ed.) 532. See
also McKinley Creek Min. Co. v. Alaska
United Min. Co., (1902) 183 U. S. 563,
22 S. Ct. 84, 46 U. S. (L. ed.) 331; Bill-
ings v. Aspen Min., etc., Co., (C. C. A. 8th
Cir. 1902) 51 Fed. 339, 10 U. S. App. 1,
2 C. C. A. 252; Shear v. Nisula, (C. C. A.
9th Cir. 1904) 133 Fed. 200, 68 C. C. A.
263; Ferguson v. Neville, (1882) 61 Cal.
358; Holdt v. Hazard, (1900) 10 Cal.
App. 440, 102 Pac. 540; Gorman Min. Co.
r. Alexander, (1892) 2 S. D. 557, 51 N. W.
346, as to an alien grantee of locator. But
see Wood v. Aspen Min., etc., Co.,
(C. C. Colo. 1888) 38 Fed. 25; Altoona
Quicksilver Min. Co., (1896) 114 Cal. 100,
45 Pac. 1047; Tibbits v. Ab Tong, (1883)
4 Mont. 536, 2 Pac. 759.

As to invalidity of a territorial stat-
ute denying right of aliens to acquire

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mining lands, see Territory v. Lee, (1874) 2 Mont. 124.

"When application is made for the issuance of evidence of title to mining property, it is necessary to show that the applicant is a citizen of the United States, or has declared his intention to become such, before a conveyance of title can be properly issued; and, therefore, as was held by the Supreme Court in the case just cited [O’Reill v. Campbell, (1866) 116 U. S. 418 (6 S. Ct. 421, 29 U. S. (L. ed.) 669)], if a party is seeking to procure the title to mining property from the United States, if taken at the proper time, the objection of alienage would prevent the acquisition of title, and such objection may be made by any one adversely interested. In such cases the sovereign is a party in fact to the prosecution, as well as a party in law, for the procurement of title, and the objection of alienage, no matter by whom suggested, is based solely upon the right of the government to interpose the fact of alienage as a bar to procuring or holding an interest in real property. If, however, the grant of title, or the equivalent, is made to an alien, it cannot be attacked by any third party." Billings v. Aspen Min., etc., Co., (C. C. A. 8th Cir. 1892) 52 Fed. 250, 10 U. S. App. 322, 3 C. C. A. 69.

"In order to acquire a right of location and purchase under this act, a party seeking to acquire such right must either be a citizen of the United States, or must have declared his intention to become such. If, therefore, Smith, or any other locator under whom plaintiff claims, was not a citizen, or had not declared his intention to become such at the time of making his location, he acquired no right, under the act, by virtue of such location." North Noonday Min. Co. v. Orient Min. Co., (C. C. Cal. 1890) 1 Fed. 522.

"If a citizen and an alien jointly locate a claim, not exceeding the amount of ground allowed to one locator, such location is void. Hill v. Hill, (1900) 22 Utah 257, 62 Pac. 803, 83 A. S. R. 786.

"Soldier honorably discharged.—An alien who is honorably discharged after serving an enlistment in the United States army, occupies the status of one who has declared his intention to become a citizen under R. S. sec. 2166 (title NATURALIZATION). The fact that a locator of mineral lands was honorably discharged from the army has a strong bearing to show a declaration of intention to become a citizen, as well as a strong circumstance tending to show naturalization, and in connection with other facts and circumstances may be sufficient to establish the fact itself. Strickley v. Hill, (1900) 22 Utah 257, 62 Pac. 803, 83 A. S. R. 786.

"Naturalization before judgment.—Manuel v. Wulff, (1894) 162 U. S. 506, 14 S. Ct. 651, 38 U. S. (L. ed.) 332, was a case between two claimants of a mining claim, to determine the right to proceed in the United States land office for a patent, and proceedings were commenced in accordance with R. S. sec. 2326, infra, p. 565. The applicant at the time of making application for the patent was an alien, but it was held that naturalization before judgment removed the infirmity. See also Croesus Min., etc., Co. v. Colorado Land, etc., Co., (C. C. Colo. 1884) 19 Fed. 78.

"Right to select.—Under the provisions of a state constitution, that "foreigners who are, or who may hereafter become, bona fide residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native born citizens," a bona fide resident of the state is capable of taking by purchase the interest of one having the right of possession under R. S. sec. 2322, infra, p. 523. Ferguson v. Neville, (1882) 61 Cal. 356.

"Right to inherit.—The question of the right of an alien to inherit a mining claim located upon government land is, as against every person but the United States, determined by the laws of the state in which the mine is located. Lohmann v. Helmer, (C. C. Ore. 1900) 104 Fed. 178. See also Billings v. Aspen Min., etc., Co., (C. C. A. 8th Cir. 1892) 51 Fed. 338, 10 U. S. App. 1, 2 C. C. A. 252.

"Mineral deposits distinguished from land where found.—The valuable mineral deposits mentioned in the statute are declared to be open to purchase, and are distinguished from the land in which they are found. Water v. Min. Co. v. Doe, (C. C. A. 9th Cir. 1897) 82 Fed. 45, 48 U. S. App. 411, 27 C. C. A. 50. But see St. Louis Min., etc., Co. v. Montana Min. Co., (C. C. A. 8th Cir. 1902) 113 Fed. 900, 51 C. C. A. 530, 64 L. R. A. 207.

"Stone.—Under this statute the public lands are free and open to exploration and occupation by the citizen for his own profit. This applies to all land containing valuable deposits, including building stone. The right thus granted necessarily carries with it the license to take what may be found in the course of exploration and apply it to the discoverer's own use, or option is left to him to acquire the exclusive right to the land containing deposits; but if he does not choose to do so, he may still avail himself of the deposit exclusively or in common with others, unless someone else acquires the exclusive right from the government. In getting stone upon the public domain, the person
Is not a trespasser; by taking it and bestowing his labor upon it, and causing labor to be bestowed by an employee, he becomes the owner of it in fact against every person. See also the Act of Aug. 4, 1892, ch. 375, infra, p. 602. Sullivan v. Schultz, (1899) 22 Mont. 541, 57 Pac. 279.

Limes of land containing valuable deposits of building stone or limestone are permitted as "placer claims" under this section and R. S. sec. 2329, infra, p. 575, and one who had filed a coal declaratory statement on certain land may extract therefrom either stone or coal, if found therein, and become the owner of either. Johnston v. Harrington, (1892) 5 Wash. 73, 31 Pac. 316.

Limestone.—The mining laws were intended to embrace only deposits of ore, and Congress' "national" exclusions is idea of any nonmineralized deposit. Wheeler v. Smith, (1893) 5 Wash. 704, 32 Pac. 784. But see Sullivan v. Schultz, (1899) 22 Mont. 541, 57 Pac. 279.

Granite quarries.—Lands valuable solely or chiefly for granite quarrying are mineral lands. "The rulings of the land department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee, that the words 'valuable mineral deposit's' should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including nonmetallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone, and coal. The cases are far too numerous for citation, and there is practically no conflict in them. According to P. R. Co. v. Sodenberg, (1903) 188 U. S. 526, 23 St. Ct. 365, 47 U. S. (L. ed.) 575.


Gypsum is a mineral, and lands containing it are mineral lands, within the federal statutes. Madison v. Octave Oil Co., (1908) 164 Cal. 788, 99 Pac. 176.

Exception as to lands withdrawn from sale.—"Public lands belonging to the United States, for whose sale or disposition Congress has made provision by its general laws, are to be regarded as legally open for entry and sale under such laws, unless some particular lands have been withdrawn from sale by congressional authority or by an executive withdrawal under such authority, either expressed or implied." Lockhart v. Johnson, (1901) 181 U. S. 516, 21 S. Ct. 665, 45 U. S. (L. ed.) 979.

Withdrawals by President.—Withdrawals by the President of mineral lands from private acquisition have been made from time to time notwithstanding that there has been no direct authorization by Congress. Such practice having been acquiesced in by Congress leads to the presumption that the power is exercised in pursuance of the consent of Congress. U. S. v. Midwest Oil Co. (1915) 256 U. S. 469, 41 S. Ct. 306, 65 U. S. (L. ed.) 73.

Surface ground.—Necessity for appropriation of surface ground belonging to United States.—In order to make a valid mining location under this section, providing that all mineral deposits in mineral lands belonging to the United States, and the lands containing the same, shall be open to entry, etc., surface ground, including the vein or lode, must be appropriated, and such surface must be the property of the United States. Traphagen v. Kirk, (1904) 30 Mont. 562, 77 Pac. 53.

Location of lode claim after patent for placer claim.—Under this and the following sections providing for the disposition of lode or vein mining claims and placer deposits, a vein known to exist within the boundaries of a placer claim at the date of an application for a patent, and not included in the application, may be located by an adverse claimant after the issuance of the patent. Mitchum v. McCarty, (1906) 149 Cal. 603, 87 Pac. 86.

Location of mining claim through an agent.—"...Long prior to the Mineral Land Act of 1872, it had been held by the courts of California that a valid location of a mining claim could be initiated through an agent. So at that time it was well understood on this coast that the law authorized a location by an agent; or, in other words, that a valid location could be made without the locator participating in person. The law, as interpreted by the courts, had been acted upon in all this mining region until it had, in a certain sense, become a rule. Congress had full knowledge of the local laws, and had they intended to change or disaffirm this rule, it certainly would have been done by express provision. As there is no such provision, it is a fair presumption arising from section 2319, that it was the intention to affirm and continue in force this as well as all local laws and customs, as construed by the courts, not in conflict with the laws of the United States." Schultz v. Keeler, (1887) 2 Idaho 323, 13 Pac. 481. See also McCulloch v. Murphy, (C. C. Xev. 1908) 125 Fed. 147; Moore v. Hamerslag, (1895) 109 Cal. 122, 41 Pac. 805; Murley v. Ennis. (1874) 2 Colo. 300; Schultz v. Keeler. (1889) 2 Idaho 568, 21 Pac. 418; Dunlap v. Patterson, (1896) 4 Idaho 473, 42 Pac. 504, 85 A. S. R. 140.

Local customs or rules of miners.—In a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules
and customs, or state statutes, or even only a mere matter of fact." Shoshone Min. Co. v. Rutter, (1900) 177 U. S. 505, 20 S. Ct. 726, 44 U. S. (L. ed.) 804.

"The readjustment of the government, and this court also, have always acted upon the rule that all mineral locations were to be governed by the local rules and customs in force at the time of location, when such location was made prior to the passage of any mineral law by Congress." Glacier Mountain Silver Min. Co. v. Willis, (1888) 127 U. S. 471, 8 S. Ct. 1214, 32 U. S. (L. ed.) 172.

"Not conflict with statutes.—Rules and customs of miners, reasonable in themselves, and not in conflict with any higher law, have long been recognized and sanctioned by legislative enactments and judicial decision. A mining custom limiting all placer claims in that locality to eighty rods in length is a reasonable one and does not conflict either with the Acts of Congress or the laws of the territory. Rosenthal v. Ives, (1887) 2 Idaho 265, 12 Pac. 904."

"Existence of local law question of fact. —The question what local laws of the district were in force at the time of an application for a patent is one of fact, to be determined by the commissioner of the general land office. Parley's Park Silver Min. Co. v. Kerr, (1889) 130 U. S. 256, 9 S. Ct. 511, 32 U. S. (L. ed.) 906."

"Mining district.—The phrase "mining district" is well known, and means a section of country usually designated by name and described or understood as being confined within certain natural boundaries in which gold or silver, or both, are found in paying quantities and which is worked therefor under rules and regulations prescribed by the miners therein. U. S. v. Smith, (D. C. Ore. 1882) 11 Fed. 487."

"Town sites.—Whenever mines are found in lands belonging to the United States, whether within or without town sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with. Steel v. St. Louis Smelting, etc., Co., (1902) 106 U. S. 447, 1 S. Ct. 359, 27 U. S. (L. ed.) 236. See also Deffebach v. Hawke, (1886) 115 U. S. 392, 6 S. Ct. 95, 29 U. S. (L. ed.) 423."


"Cutting timber.—A locator may cut down or destroy trees as fast as the earth in which they stand is dug or washed away by the process of mining, and such timber may be used and disposed of by him in any way that is most profitable to himself rather than to let it remain on the ground to decay. But whether the cutting of the timber is incidental to the bona fide mining operation, or the mining operation is a mere pretext for appropriating or disposing of the timber, is a fact to be determined in each case by its own circumstances. U. S. v. Nelson, (1878) 5 Saw. 68, 27 Fed. Cas. No. 15,864."

"State tax.—A state tax on the proceeds of a mining claim is a lien only on the claim of the miner; that is, on his possessory right to explore and work the mine under the existing laws and regulations on the subject. Forbes v. Gracey, (1876) 94 U. S. 762, 24 U. S. (L. ed.) 315."

"Relation to R. S. sec. 453.—This section and R. S. sec. 452 (title PUBLIC LANDS) are in pari materia and must be construed together. Lavagnino v. Ulhig, (1903) 26 Utah 1, 71 Pac. 1046, 99 A. S. R. 508."

Sec. 2320. [Length of mining claims upon veins or lodes.] Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen
hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other. [R.S.]


I. In general, 518.
II. Vein or lode, 515.
III. Discovery of vein or lode, 517.
IV. Legal limits of lode, 519.
V. Conflicting lode claimants, 521.

I. IN GENERAL

Purpose of statute.—The object of the law in requiring a discovery to precede the location of a mining claim is to insure good faith on the part of the locator and prevent frauds upon the government. Lange v. Robinson, (C. C. A. 9th Cir. 1906) 148 Fed. 799, 79 C. C. A. 1; Hall v. McKinnon, (C. C. A. 9th Cir. 1911) 193 Fed. 572, 113 C. C. A. 440. This action was not drawn by geologists or for geologists. They were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose.


Scope of section—Placer claims. This section on its face applies only to claims for veins or lodes situated in rock in place; but by R. S. sec. 2329, infra, p. 575, it and all other provisions for the entry, location, and patent of vein or lode claims are made applicable also to placer mine claims. Smith v. Union Oil Co., (1913) 166 Cal. 217, 135 Pac. 966.

Distinction between lode and placer claims.—The distinguishing test which determines whether or not a valuable mineral deposit may be secured by a lode claim or by a placer claim is the form and character of the deposit. If it is in a vein or lode in rock in place, it may be secured by a lode claim, and it may not be by a placer claim. If it is in a vein or lode in rock in place, it may be secured by a placer claim, and it may not be by a lode claim. Webb v. American Asphaltum Min. Co., (C. C. A. 8th Cir. 1907) 157 Fed. 203, 84 C. C. A. 651.

Asphaltum in lodes or veins in rock in place may be entered and patented by means of lode mining claims under this section, and it may not be secured by means of placer mining claims under R. S. sec. 2329, infra, p. 575. Webb v. American Asphaltum Min. Co., (C. C. A. 8th Cir. 1907) 157 Fed. 203, 84 C. C. A. 651.

Definitions.—A “mining claim” is the name given to a location on the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with mining laws, local and statutory. Mt. Diablo Mill, etc., Co. v. Callison, (1879) 5 Savy. 439, 17 Fed. Cas. No. 9,866.

“The word ‘claim,’ used as a noun, has a definite and particular meaning, denoting, when coupled with the name of miner, a particular piece of ground to which that miner had a recognized, vested, and exclusive right of possession for the purpose of extracting precious metals therefrom.” Northern Pac. R. Co. v. Sanders, (C. C. A. 9th Cir. 1892) 49 Fed. 129, 7 U. S. App. 47, 1 C. C. A. 192, affirmed (1897) 166 U. S. 620, 17 S. Ct. 671, 41 U. S. (L. ed.) 1139.

A mining claim is a parcel of land containing precious metal in its soil or rock. A location is the act of appropriating such parcel, according to certain published rules. If a miner has only the ground covered by one location his “mining claim” and “location” are identical, but if by purchase he acquires the adjoining location of his neighbor and adds it to his own, then his mining claim covers the ground embraced by both locations.


The words “other valuable deposits” in the clause “mining claims upon veins or lodes of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits,” in this section, include nonmetalliferous as well as metalliferous deposits. Webb v. American Asphaltum Min. Co., (C. C. A. 8th Cir. 1907) 157 Fed. 203, 84 C. C. A. 651.

The words “location” and “located,” as used in this section, mean and include the posting of a notice, and the recording thereof when required, and the marking of the boundaries, as required by R. S. sec. 2324, infra. Smith v. Union Oil Co., (1913) 166 Cal. 217, 135 Pac. 966.

Prerequisites to valid location—Complete possessory title.—The statute prescribes two prerequisites to the vesting in a competent locator of the complete possessory title to a lode mining claim. They are the discovery upon unappropriated public land of the United States within the limits of his claim of a mineral-bearing lode, and the distinct marking of the boundaries of his claim so that they can be readily traced. No appropriation of the land is made until both these requirements are fulfilled, and until that time the lode and land sought are open to location and appropriation by any competent locator; but when these requirements have been complied with the land is no longer public, but the possession, the right to the possession, and the right
to acquire the title, are irrevocably vested in the locator. There is no requirement in the legislation of Congress that the discovery shall be made before the location, or that the location shall precede the discovery. Erwin v. Perigo, (C. C. A. 5th Cir. 1890) 95 Fed. 696; 35 C. C. A. 482; Sharkey v. Canadiani, (1906) 48 Ore. 112, 85 Pac. 219.

The validity of a location of a mining claim is made to depend primarily upon the discovery of a vein or lode within its limits, and until such discovery, no rights are acquired by location. The other requisites which must be observed in order to perfect and keep alive a valid location are not imperative, except as against the rights of third persons. If the necessary steps outside of discovery are not taken within the time required by law, but are complied with before the rights of third parties intervene, they relate back to the date of location, but not so with discovery; for it is upon that act that the very life of a mineral location depends, and from the time of such discovery only would the location be valid, provided, of course, that others had not previously acquired rights therein. Beals v. Cone, (1900) 27 Colo. 473, 62 Pac. 948, 83 A. S. R. 92.

Possession of the surface of a mining claim location is possession of all veins, lodes, and ledges, the top and apex of which are inside the surface lines, although such veins, lodes, and ledges, as they go downward, may extend outside such surface lines; and the possession of the surface ground protects such veins, lodes, and ledges from the operation of the statute of limitations. Therefore, before the defendants could set up any adverse claim to the Salmon and Cliff extension vein, they ought to have shown that they were in possession of the same at the surface. No adverse possession could become operative by going outside of its boundaries and sinking a shaft upon what they claimed as another location, and stricking in the original location extension, on its dip, and outside of its surface lines, no matter how long continued, if unknown to the original locators. Pardee v. Murray, (1882) 4 Mont. 234, 2 Pac. 16.

A discovery of a vein in a tunnel is like a discovery on the surface. Until one is made there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery. Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co., (1897) 167 U. S. 105, 17 S. Ct. 792, 42 U. S. (L. ed.) 96.

If, on the same vein, there are surface outcroppings within the boundaries of two claims, the one first located necessarily carries the right to work the vein. Argentine Min. Co. v. Terrible Min. Co., (1887) 122 U. S. 478, 7 S. Ct. 1356, 30 U. S. (L. ed.) 1140.

Mere possession.—While no valid location of a mining claim can be made under the mining laws until the discovery of mineral, it does not follow that because no mineral has been discovered the land is unoccupied. The mere possession of a piece of mining ground is only good as against an intruder, but not as against one who subsequently locates the same in compliance with the mining laws. Cosmos Exploration Co. v. Gray Eagle Oil Co., (C. C. A. 9th Cir. 1901) 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230. See also Haws v. Victoria Copper Min. Co., (1895) 160 U. S. 303, 16 S. Ct. 282, 40 U. S. (L. ed.) 438; English v. Johnson, (1869) 17 Cal. 107, 76 Am. Dec. 574.

Parallelism of end lines.—The requirement of parallelism of end lines of lode mining locations which is made by this section cannot be deemed to apply where the location had been made at the time of the passage of that Act, and the proceedings under the Act of July 26, 1866, had then so far advanced as to exclude adverse claims, in view of the various provisions of the later Act for the protection of all rights previously acquired under existing laws, and of the provision of R. S. sec. 2222 that prior locators shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. East Cent. Eureka Min. Co. v. Central Eureka Min. Co., (1907) 204 U. S. 286, 27 S. Ct. 258, 51 U. S. (L. ed.) 476.

When it was contended that title to mines was not acquired under the Act of 1872, but under the Act of 26, 1866, which did not require parallelism of end lines, a federal question was presented, giving the federal Supreme Court jurisdiction. Kennedy Min., etc., Co. v. Argo-naut Min. Co., (1903) 189 U. S. 1, 23 S. Ct. 501, 47 U. S. (L. ed.) 685.

Surface lines.—There is no command that the side lines shall be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co., (1898) 171 U. S. 55, 18 S. Ct. 895, 43 U. S. (L. ed.) 72.

When a mining claim crosses the course of the lode or vein instead of being "along the vein or lode," the end lines are those which measure the width of the claim as it crosses the lode. The side lines,
are those which measure the extent of the claim on each side of the middle of the vein at the surface. In this case the lines which separate the location of the plaintiff from the location of the defendant are end lines, across which, as they are extended downward vertically, the defendant cannot follow a vein, even if its apex or outcropping is within its surface boundaries. Argentine Min. Co. v. Terrible Min. Co., (1887) 122 U. S. 478, 7 S. Ct. 1536, 30 L. S. (L. ed.) 1140.

When the apex of the vein crosses the east and south lines of the boundary, the fact that the apex crosses the east line after the lode extends on its strike in the general course of the location does not make such east line an end line, and a locator is entitled to so much of the lode upon its dip as lies between the south end line and the point of divergence of the apex of the vein across the east line. Del Monte Min. etc., Co. v. New York, etc., Min. Co., (C. C. Colo. 1895) 66 Fed. 212. See also Tyler Min. Co. v. Sweeney, (C. A. A. 9th Cir. 1893) 34 Fed. 254, 7 U. S. App. 463. 4 C. C. A. 329.


When a location as surveyed and certified is intercepted by another valid claim going through it, perpendicularly or obliquely, the end lines are not determined by the intersecting claim but there remains on either side of the intersecting claim unchallenged ground. Cheesman v. Hart, (C. C. Colo. 1890) 42 Fed. 98.

The locator is not compelled to follow the lines of the government surveys, or to make his location in any manner correspond to such surveys. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co., (1898) 171 U. S. 55, 18 S. Ct. 306, 43 U. S. (L. ed.) 72.

If the end lines are substantially parallel, that meets the requirement of the law. Cheesman v. Shreve, (C. C. Colo. 1889) 40 Fed. 787.

The provision 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.

Horswell v. Ruiz, (1885) 67 Cal. 111, 7 Pac. 197.

Strike.—The course of the vein longitudinally, as it passes through the country, is its strike; and where the dip of the vein is vertical, or practically vertical, the line of its ore bodies may mark the line of its strike. In determining the location and strike of a vein, the geological features of the adjacent country, so far as in evidence, will be considered, which the Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 490, 83 Pac. 644.

II. VEIN OR LODE

Definition.—The words "vein," "lode," and "ledge" are used as synonymous terms, in the common parlance of miners, in the laws of Congress. Symmes v. Shaughnessy, (1885) 2 Idaho 122, 7 Pac. 82; Noyes v. Clifford, (1906) 37 Mont. 138, 94 Pac. 842.

"The use of the terms 'vein' and 'lode' in connection with each other in the act of 1866, and their use in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation in the application of the acts, which a scientific definition of any one of these terms might impose. It is difficult to give any definition of the term, as understood and used in the act of Congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same process." San Francisco Chemical Co. v. Duffield, (C. C. A. 9th Cir. 1912) 201 Fed. 830, 120 C. C. A. 160.

In determining what is a "vein," "lode," or "ledge" of rock in place bearing silver or other precious metals, miners themselves must be called in. Such a dispute does not make a federal question. Blue Bird Min. Co. v. Largey, (C. C. Mont. 1892) 49 Fed. 280.
The terms "vein" and "lode" are employed in this statute in the sense in which miners use them, uncontrolled by scientific definitions. Hayes v. Lavagnino, (1889) 17 Utah 185, 53 Pac. 1029. See also Eureka Consol. Min. Co. v. Richmond Min. Co., (1877) 4 Sawy. 392, 8 Fed. 481; Gregory v. Perahbaker, (1887) 73 Cal. 106, 14 Pac. 401.

In general it may be said that a lode or vein is a body of mineral or mineral body of rock, within defined boundaries in the general mass of the mountain. The thinness or thickness of the matter in particular places does not affect its being a vein or lode. If there is a general and pervading continuance of this mineral matter, with a casual and occasional interruption, but pursuing the same general course, bounded by the same rocky material above and below as far as you can trace that until it breaks off totally and is interrupted for a very large distance, it is a vein of rock or mineral matter. Stevens v. Williams, (1879) 1 McCray 490, 23 Fed. Cas. No. 13,413. See also Iron Silver Min. Co. v. Cheesman, (1886) 116 U. S. 529, 6 S. Ct. 481, 29 U. S. (L. ed.) 712; Cheesman v. Shreve, (C. C. Cal.) 40 Fed. 265; Duffield v. San Francisco Chemical Co., (C. C. A. 9th Cir. 1913) 205 Fed. 480, 123 C. C. A. 548; Myers v. Lloyd, (1910) 4 Alaska 263; Gregory v. Perahbaker, (1887) 73 Cal. 106, 14 Pac. 401; Synnett v. Shaughnessy, (1885) 2 Idaho 122, 7 Pac. 82; Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 490, 83 Pac. 648.

A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode. Whatever the boundaries may be, Hyman v. Wheeler, (C. C. Colo. 1886) 19 Fed. 347.

A vein or lode that has never been claimed; that has not been located; that has not been marked out by metes and bounds, and in which there has been no actual development, or, to use the language of the statute, "discovery of a vein or lode within the limits of the claim located,"—is not a vein or lode such as is described in this section. Iron Silver Min. Co. v. Sullivan, (C. C. Colo. 1883) 16 Fed. 829.

A vein or lode cannot be in place, within the meaning of this section, unless it be within the general mass of the mountain. It must be inclosed by, or held within, the general mass of fixed and immovable rock. It is not enough to find the vein or lode lying on the top of fixed or immovable rock, for that which is on top is not within, and that which is without, cannot in principle be said to be within it. Leadville Min. Co. v. Fitzgerald, (1879) 15 Fed. Cas. No. 8,158.

Whether a lode is in place depends upon the position of the ore or vein matter in the earth, as whether the inclosing mass is fixed and immovable, more than upon the character of the ore itself. Whether the ore is loose and friable, or very hard, if the inclosing walls are country rock, it may be located as a vein or lode. If the ore is upon the surface of the ground, or has no other covering than the superficial deposit, which is called alluvium, diluvium, drift, or debris, it is not a lode or vein within the meaning of the Act, which may be followed beyond the lines of the location. Tabor v. Decker, (1878) 23 Fed. Cas. No. 13,723.

Mineralization.—In the absence of defined walls and of mineralization appreciably greater than that contained in the general mass of the mountain, broken, strained, and fissured material, or crushed and brecciated matter, characteristic of the district, cannot be held to constitute a vein or lode, under the statute. In such case the limits of fracturing do not constitute the limits of the vein, and even if there be found an occasional vug or fragment of ore, yet, where it is disconnected from any ore body, and so intermingled with the surrounding country rock that it cannot be regarded as continuous, it does not mark the line of the vein or lode, within the meaning of the law. Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 490, 83 Pac. 648.

Rock or matter of any kind, in order to constitute a vein or lode within the meaning of the statute, must be metalliciferous and contain such mineral value as will distinguish it from the country rock, especially where no well-defined walls appear. Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 490, 83 Pac. 648.

Where a vein, located in sedimentary beds of rock, is formed by replacement, and the mineralization ceases within a short distance of the ore body or ore channel, the limits of the deposition of ore are the limits of the vein; and this is so whether the vein be considered laterally or with reference to the apex. Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 490, 83 Pac. 648.

Sedimentary rock.—The mere fact that sedimentary rock is broken, crushed, seamed, stained, and fissured does neither constitute such material a vein nor an apex of a vein, where no hanging wall nor foot wall appears, where the mineralization ceases, and the crushed material is not appreciably greater than that existing generally throughout the sedimentary area, and where the same kind of crushed and brecciated material exists elsewhere and generally within that area. Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 490, 83 Pac. 648.

Value of filling.—What values the filling or material of a fissure should contain to constitute it a vein, within the
meaning of the Act of Congress, must necessarily depend upon the characteristics of the district or country in which the vein or lode, in any particular instance, is located, and upon the character, as to boundaries, of the vein itself. Values, therefore, of the filling of the vein must be considered with special reference to the district where the vein or lode is found. Grand Cent. Min. Co. v. Mammoth Min. Co., (1906) 29 Utah 490, 83 Pac. 648.

Boundaries ill-defined.—Where the boundaries of what is claimed to be a vein are not well, or not at all, defined, either at the surface or at depth, the value of the material must be so in excess of the country rock as to differentiate it from such rock; else the material cannot be held to constitute a vein. Grand Cent. Min. Co. v. Mammoth Min. Co., (1906) 29 Utah 490, 83 Pac. 648.

Evidence.—Under the Acts of Congress the essential elements of a vein are mineral or mineral-bearing rock and boundaries, and in case of controversy, where one of these elements is well established, very slight evidence may be accepted as to the existence of the other. Grand Cent. Min. Co. v. Mammoth Min. Co., (1906) 29 Utah 490, 83 Pac. 648.

III. DISCOVERY OF VEIN OR LODE


Discovery of a vein or lode must be made within the boundaries of the claim before it can be located. Discoveries made after a location by another may be availed of. Ledoux v. Forester, (C. C. Wash. 1899) 94 Fed. 600. See also Michael v. MHa, (1906) 22 Colo. 439, 45 Pac. 429.

Until discovery is made, no right of possession to any definite portion of the public mineral lands can even be initiated. Until that is done, the prospector's rights are confined to the ground in his actual possession. A notice of location posted upon the surface before discovery is made is an absolute nullity. Gemmell v. Swain, (1903) 28 Mont. 331, 72 Pac. 682, 98 A. S. R. 570.

A location of a mining claim based on a discovery within the limits of an existing and valid location is void. Lockhart v. Farrell, (1906) 31 Utah 155, 86 Pac. 1077.

A discovery becomes a condition precedent to the location. Recording the notice or declaratory statement in the proper county is one of the acts of location, but the statute of the territory provided that before such a record can be made there must have been a discovery of a vein or lode of quartz or ore with at least one well-defined wall. Upton v. Larkin, (1866) 5 Mont. 600, 6 Pac. 66.

A discovery of seams, containing mineral-bearing earth and rock, which were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued development thereof had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value, is sufficient to show a compliance with the statute as to the necessity of a discovery of a vein or lode to make a valid location. Shoshone Min. Co. v. Rutter, (C. C. A. 9th Cir. 1898) 67 Fed. 801, 59 U. S. App. 538, 31 C. C. A. 233, reversed on other points (1900) 177 U. S. 666, 20 S. Ct. 728, 44 U. S. (L. ed.) 984.

Place claims.—Discovery is as necessary to a location of a placer claim as to a location of a lode claim. Steele v. Tanana Mines R. Co., (C. C. A. 9th Cir. 1906) 148 Fed. 676, 78 C. C. A. 412; Hall v. McKimson, (C. C. A. 9th Cir. 1911) 193 Fed. 572, 113 C. C. A. 440.

What constitutes.—To constitute discovery, it is necessary that mineral-bearing rock in place be found, under such circumstances and of such character that a reasonably prudent man, not necessarily a skilled miner, would be justified in expending time and money developing it with the reasonable expectation of finding ore in paying quantities. This implies not only that the conditions warrant a reasonably prudent man in so proceeding, with such reasonable expectation, but that the applicant for a patent has that expectation. U. S. v. Lavenson, (W. D. Wash. 1913) 206 Fed. 755.

To constitute a discovery which will support the location of a gold placer claim as against another mineral claimant it is not necessary that gold should have been found therein in paying quantity, but there must have been such a discovery of gold as gives reasonable evidence that the ground is valuable for placer mining, taking into consideration its character, location, and surroundings. Lange v. Robinson, (C. C. A. 9th Cir. 1906) 148 Fed. 799, 79 C. C. A. 1.

What may constitute a sufficient discovery to warrant a location of a mining claim may be wholly inadequate to justify the locator in claiming or exercising rights reserved by the statute. Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 490, 83 Pac. 648.
What constitutes a discovery that will validate a location is a very different thing from what constitutes an apex to which attaches the statutory right to invade the possession of and appropriate the property which is presumed to belong to the true owner. Grand Cent. Min. Co. v. Mammoth Min. Co., (1906) 29 Utah 490, 83 Pac. 648.

Subsequent discoveries may validate earlier locations, and the latter may then inure to the benefit of the locators as against the United States and all parties whose claims were initiated subsequent to the discoveries. But they would inure to their benefit as of the dates of the discoveries and not as of the dates of the locations, and they would neither destroy nor affect intervening rights. The marking of boundaries and filing of location certificates may precede discovery or discovery may precede them, but no location is valid until both are complete. The earlier Act then inures to the benefit of the locator as of the date of the later, subject to all rights which have intervened between them. Uinta Tunnel Min., etc., Co. v. Creede, etc., Min., etc., Co., (C. C. A. 8th Cir. 1902) 119 Fed. 164, 57 C. C. A. 200; Sharkey v. Canadiani, (1906) 48 Ore. 112, 85 Pac. 219. See also Nevada Sierra Oil Co. v. Home Oil Co., (S. D. Cal. 1899) 98 Fed. 673, in which case the court said: "All of this, however, is based upon the supposition, as is expressly shown in the opinion of the court, that the location has also been made in conformity with any valid state legislation that may exist in the particular state in which the mineral land is situated, and with any valid local rules and regulations of the mining district in which the land may be situated, if any such exist." See R. S. sec. 2324, infra, p. 533.

The discovery of the vein or lode before any other steps are taken to perfect the location is not required by the provision of this section that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located," which means nothing more than that no location shall be considered complete until there has been a discovery. Creede, etc., Min., etc., Co. v. Uinta Tunnel Min., etc., Co., (1905) 196 U. S. 337, 25 S. Ct. 206, 49 U. S. (L. ed.) 501.

**Discovery by sinking shaft.**—It is but just and reasonable to infer that if a mineralized vein or lode is discovered by the sinking of a shaft, its existence was known to the locator before the location was made. Hayes v. Lavagnino, (1898) 17 Utah 185, 53 Pac. 1045; Zellers v. Evans, (C. C. Colo. 1880) 5 Fed. 172.

**Discovery of vein in tunnel.**—The right to a vein discovered in a tunnel is declared to be "to the same extent as if discovered from the surface." See R. S. sec. 2323, infra, p. 532. If discovered from the surface, the discoverer might, under this section, claim "one thousand five hundred feet in length along the vein or lode." The clear import of the language is that if a miner is developing a vein in the tunnel, a right to appropriate fifteen hundred feet in length of that vein. Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co., (1897) 101 U. S. 108, 17 S. Ct. 702, 43 U. S. (L. ed.) 96.

"Willing to spend time and money in developing. — "When a locater of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification, that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found." Bonner v. Meikle, (C. C. Nev. 1897) 82 Fed. 697. See also Book v. Justice Min. Co., (C. C. Nev. 1893) 68 Fed. 106; Montana Cent. R. Co. v. Migeon, (C. C. Mont. 1896) 63 Fed. 811, affirmed (C. C. A. 9th Cir. 1896) 77 Fed. 249, 44 U. S. App. 724, 23 C. C. A. 156; Shreve v. Copper Bell Min. Co., (1891) 11 Mont. 309, 28 Pac. 315; McShane v. Kenkle, (1896) 18 Mont. 208, 44 Pac. 979, 56 A. S. R. 579, 33 L. R. A. 851; Murray v. White, (1911) 42 Mont. 425, 113 Pac. 754, Ann. Cas. 1912A 1297; Muldick v. Brown, (1900) 37 Ore. 185, 61 Pac. 428.

Even as between rival mineral claimants to petroleum lands, there must have been such a discovery, in order to sustain a location, as would justify an adverse person in the expenditure of money and labor in exploitation for petroleum. Chrissman v. Miller, (1905) 197 U. S. 313, 25 S. Ct. 468, 49 U. S. (L. ed.) 770.

An instruction that, to constitute a discovery of gold sufficient to support a location of a gold placer mining claim as against an adverse mineral locator, the gold found must be of such character and quantity and found under such circumstances as to justify a man of ordinary prudence in the expenditure of time and money in the development of the property, is not erroneous; the word "development" as so used being the equivalent of "exploration." Charlton v. Kelly, (C. C. A. 9th Cir. 1907) 156 Fed. 433, 84 C. C. A. 295.

In an action to recover certain land which was a part of the public domain, plaintiff claimed under a placer mining location. The court charged that it was essential to the validity of such location that the discovery of mineral thereon was such that an ordinarily prudent man, not
necessarily a miner, would be justified in expending his time and labor in developing the property, but in the same connection, it is clear that the essential to a recovery by plaintiffs that they prove with reasonable clearness that for the labor and capital expended in working the ground it would yield a reasonable profit. It was held that the latter instruction was not an incorrect interpretation of the correct rule previously charged.

Cascaden v. Bartolis, (C. C. A. 9th Cir. 1906) 146 Fed. 739, 77 C. C. A. 496.

Conclusiveness of patent.—An entry of a lode mining claim, sustained by a patent, though conclusive evidence that at the time of entry there had been a valid location, does not preclude the owner of a tunnel site located across the lode, who claims that his location was prior to any discovery, notwithstanding the provision of this section that “no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located,” which means nothing more than that no location shall be considered complete until there has been a discovery. Creed, etc., Min., etc., Co. v. Uinta Tunnel Min., etc., Co., (1905) 196 U. S. 337, 25 S. Ct. 266, 49 U. S. (L. ed.) 501.

Question of fact.—Whether there has been such a discovery as would sustain a location involves a question of fact. Bonner v. Meikle, (C. C. Nev. 1897) 92 Fed. 697.

Evidence.—Upon an issue as to whether there was a sufficient discovery of mineral in a mining claim to meet the requirement of the statute and support a location, where there was evidence that gold had actually been found within the limits of the claim, sufficient to warrant the submission of the case to the jury to determine whether the discovery was sufficient within the rule which requires it to be such as to justify an ordinary prudent man, not necessarily a miner, in expending his time and money in the development of the property, the locator was entitled to supplement such evidence by showing the situation, character, and value, and mineralogical conditions of adjacent claims, and to prove by the opinions of experienced miners, based upon the facts, that the discovery was sufficient to justify him in developing the claim. Cascaden v. Bartolis, (C. C. A. 9th Cir. 1908) 162 Fed. 267, 89 C. C. A. 247, 15 Ann. Cas. 625.

Evidence that there were seams of minerals on a claim without any showing as to what the minerals were was insufficient to establish a discovery of valuable minerals within the lines of the claim essential to the valid location of a mining claim. Harper v. Hill, (1911) 159 Cal. 250, 113 Pac. 162.

In Lange v. Robinson, (C. C. A. 9th Cir. 1906) 148 Fed. 799, 79 C. C. A. 1, it appeared that the plaintiff located certain gold placer mining claims along a creek in Alaska, and before doing so washed on each a few pans of the sediment deposited along the sides of the creek, and in each found small particles or colors of gold. Placer gold in paying quantities had been found on the bed rock on a tributary to the creek, and within a mile of such locations, and the bed rock at the place of the location was from 125 to 150 feet below the surface. The plaintiff and other experienced miners testified that the gold found was sufficient to reasonably justify the investment of money to sink shafts. It was held that there was a sufficient discovery to support the locations as against another mineral claimant.

Location certificates as evidence of discovery.—Where the validity of a location had been unchallenged for more than five years up to the commencement of ejectment, and the original locators were absent from the country, the certificate of location created a presumption of discovery of mineral and of a valid location, especially on an application for a preliminary injunction depending on affidavits in which plaintiff appeared as a subsequent locator and attached the title of the prior locator and that of his successor in interest. Vogel v. Warsing, (C. C. A. 9th Cir. 1906) 146 Fed. 949, 77 C. C. A. 199.

IV. LEGAL LIMITS OF LODGE

Length of location.—The discoverer is entitled to claim 750 feet of the lode each way from the point of discovery, or in the language of the statute, “1,500 feet in length along the vein or lode.” Ellet v. Campbell, (1894) 18 Colo. 510, 33 Pac. 521.

“On the public domain of the United States a miner may hold the place in which he may be working with all others having no better right. But when he asserts title to a full claim of 1,500 feet in length and 300 feet in width, he must prove a lode extending throughout the claim.” Zollars v. Evans, (C. C. Colo. 1880) 6 Fed. 172.

“Three hundred feet on each side.”—A claim may, if there is no restriction in the local rules, be six hundred feet wide, although the known lode to include which such claim is located is not twelve inches in width. Mt. Diablo Mill, etc., Co. v. Colisson, (1879) 5 Savy. 493, 17 Fed. Cas. No. 9,886.

Exceeding legal limits.—The cases which protect the locator where he exceeds the legal lateral limits are cases where he has marked his point of discovery and lode line and has made what would otherwise be required in making a valid location under R. S. sec. 2324, infra, p. 533. Madeira v. Sonoma Magnesite Co., (1912) 20 Cal. App. 719, 130 Pac. 175.
The mere fact that in establishing his exterior boundaries, the locator has marked out too great a quantity of land, does not necessarily invalidate his location. Where, however, the locator relies upon the corner he has established or has attempted to mark as indicia of the location of the lode or ledge, a different question may arise and a different rule may govern. Madeira v. Sonoma Magnesite Co., (1912) 20 Cal. App. 718, 190 Pac. 176.

Rejection of excess.—The land department has no power to issue a patent for a greater width of land than 300 feet, and a patent is void as to any excess over 300 feet. Lakin v. Roberts, (C. C. A. 9th Cir. 1893) 64 Fed. 461, 7 U. S. App. 596, 4 C. C. A. 435. See also Lakin v. Dolly, (N. D. Cal. 1901) 63 Fed. 323; Price v. McIntosh, (1901) 1 Alaska 292; Hansen v. Fletcher, (1894) 10 Utah 366, 37 Pac. 490. But in Carson City Gold, etc., Min. Co. v. North Star Min. Co. (C. C. A. 9th Cir. 1907) 192 Fed. 453, 48 U. S. App. 754, 28 C. C. A. 323, the court said that every case must be considered with reference to its own peculiar facts. The Lakin cases did not involve any construction of the law pertaining to the extraterritorial rights of the lode patented. The lode in neither its length nor depth was involved; it was only the surface ground that was in dispute. "In this case the plaintiff in error does not claim any right whatever to the surface boundaries of the North Star claim, as patented; and it is a well-settled and elementary principle of law that the possession of this surface ground by the defendant in error is sufficient evidence of title, as against any one not showing any higher or better right thereto. Moreover, even if the principles of the Lakin cases could be considered, remotely or otherwise, as having any application to the present case, still the defendant in error would be entitled to the vein or lode, which was proved and established in this case, and to surface ground four feet on each side of the center of the lode; and this is all that is required to give the party the extra rights which are provided for by the statute." And see Hauswirth v. Butcher, (1882) 4 Mont. 299, 1 Pac. 714; Leggatt v. Stewart, (1883) 5 Mont. 107, 7 Pac. 520.

In McElligott v. Krogh, (1907) 151 Cal. 126, 90 Pac. 823, it was held that though locators did not place a monument at an intervening point on the line between the end monuments, as under their mistaken belief as to the accuracy of the location of the end monuments there could be no validity for it, yet they were entitled to have a line established on the correction of the location of one of the end monuments, which would include the corrected corner, that point, and the original corner not corrected, where no part of such line was more than 300 feet from the middle of the vein. On the correction of this corner, the court was not required to fix the boundary line as a straight line between the corner corrected and the original corner not corrected.

When under the local laws of the mining district, only 200 feet can be appropriated to each locator, the inclusion of a larger number of lineal feet than 200 does not render a location, otherwise valid, totally void, but the excess may be rejected, and the claim held good for the remainder, unless it interferes with rights previously acquired. Richmond Min. Co. v. Rose, (1885) 114 U. S. 576, 5 S. Ct. 1055, 29 U. S. (L. ed.) 273. See also Taylor v. Parenteau, (1887) 23 Colo. 366, 48 Pac. 506, as to state statute limiting width of claims.

Where a mining location made in good faith includes within its boundaries more than this section permits, being 300 feet on each side of the middle of the vein at the surface, it is invalid as to the outer part of the claim. McElligott v. Krogh, (1907) 151 Cal. 126, 90 Pac. 823.

The rule that where a locator has marked his corners so that the side lines lie more than 300 feet from the apex of the vein as located at the time, or otherwise marks a claim larger than allowed by statute, he cannot claim the excess as against a subsequent locator of adjoining ground, does not apply to a case where a claim of the statutory size was originally located in good faith, but by mistake as to the actual location of the vein as evidenced by subsequent exploitation the side lines were not each 300 feet distant from the center thereof. Harper v. Hill, (1911) 159 Cal. 250, 113 Pac. 162.

Inaccuracy in location of vein.—Since the grant of the exclusive right to possession of the ground included within the lines of a location is a present grant, taking effect from the date of the location, a locator, having established his side lines in good faith, is protected against subsequent locators on the land included within the lines as originally located, though it may be subsequently determined by reason of an inaccuracy in the location of the vein or lode when the claim was located that the side lines at the end were more than 300 feet distant from the center thereof. Harper v. Hill, (1911) 159 Cal. 250, 113 Pac. 162.

Essentials of location.—Mere indications of mineral, however strong, are not sufficient to answer the requirements of the statute, which requires, as one of the essential conditions to the making of a valid location of unappropriated public land, a discovery of mineral within the limits of the claim. "If a competent locator actually finds upon unappropriated public land petroleum or other mineral in or upon the ground, and so situated as to constitute a part of it, it is
a sufficient discovery, within the meaning of the statute, to justify a location under the law, without waiting to ascertain by exploration whether the ground contains the mineral in sufficient quantities to pay. The question whether a particular piece of public land is more valuable for mineral than for agricultural purposes is one that does not arise in cases like the present." Nevada Sierra Oil Co. v. Home Oil Co., (S. D. Cal. 1899) 95 Fed. 673.

**Imaginary existence of vein.**—Locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits are not permitted. King v. Amy, etc., Consol. Min. Co., (1894) 162 U. S. 222, 14 S. Ct. 510, 38 U. S. (L. ed.) 419.

**Original discoverer.**—This section does not require that the locator of a claim must be the original discoverer of the vein or lode. If there has been a discovery of a vein, and the knowledge on the part of the locators of metal there, the locators are entitled to make their location, even though the original discovery was made by some one other than the locators. Hayes v. Lavagnino, (1898) 17 Utah 185, 53 Pac. 1026. See also Erwin v. Pergo, (C. C. A. 8th Cir. 1899) 93 Fed. 608, 36 C. C. A. 482.

**Effect of amended location.**—An amended location of a lode mining claim, made because of an error as to the course of the vein when the original location was made, in consequence of which the original side lines became end lines, did not operate as an abandonment of all rights under the original location, where it is expressly stated in the new location notice that such was not the intention; and where the end lines of the amended location do not entirely coincide with the side lines of the original claim, it was not error for the court, in determining collateral rights as among the various lode miners, to lay vertical planes through the side lines of the original claim, which became end lines by operation of law, owing to the course of the vein, and through the end lines of the amended claim, extending both in the direction of the dip of the vein, and to award to the claim extralateral rights in so much of the vein on its dip as lay within both of such extensions; treating as abandoned only so much of the original claim, with its planes so extended, as lay without the extended end-line planes of the amended claim. Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A. 9th Cir. 1904) 131 Fed. 591, 66 C. C. A. 99.

**V. CONFLICTING LODE CLAIMANTS**

**Rule of construction.**—It is the object and policy of the law to encourage the prospector and miner in their efforts to discover mineral, and therefore, as between conflicting lode claimants, the law is liberally construed in favor of the senior location; but where one claims what, prima facie, belongs to another, because of the apex in the claimant's location, a more rigid rule of construction against the claimant prevails. Grand Coit. Min. Co. v. Math et Min. Co., (1906) 29 Utah 960, 83 Pac. 648.

**Overlapping claims.**—A location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire, and works no injury to one who has acquired prior rights. Some confusion may arise when locations overlap each other and include the same ground, for then the right of possession becomes a matter of dispute. "It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein and the discoverer desire to take the entire surface and yet it be impossible for him to do so and make his end lines parallel unless, for the mere purposes of location, he be permitted to place those end lines on territory already claimed by the prior locator." Del Monte Min., etc., Co. v. Last Chance Min., etc., Co., (1888) 171 U. S. 55, 18 S. Ct. 985, 43 U. S. (L. ed.) 72.

A party who is in actual possession of a valid location may maintain that possession and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. These locations are generally made upon lands open, unclosed, and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain, and where the validity of apparent locations is unsettled and doubtful. Under these circumstances it is a common experience that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. While in the adjustment of these conflicts the right of the first locator to the surface within his location, as well as to the veins beneath the surface, is secure, a subsequent location is not void and cannot be ignored as to rights not covered by the first location. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co., (1889) 171 U. S. 55, 18 S. Ct. 985, 43 U. S. (L. ed.) 72.

Where the locators of two association claims, which overlap, are sinking shafts at the same time, the first to discover mineral has priority of right, although the location was staked after the other, if it was made openly and peaceably. Hanson v. Craig, et al. v. Min. Co., (C. C. A. 9th Cir. 1909) 170 Fed. 82, 86 C. C. A. 338.

Where the discovery of mineral-bearing vein is made on land subject to location,
that the corners were not placed on unappropriated land subject to location does not render the location entirely void, but it is valid to the extent that such location is within the marked boundaries and on unappropriated land. McElligott v. Krogh, (1907) 151 Cal. 126, 90 Pac. 823.

Town-site patent.—A grant, by a town-site patent, issued prior to the Act of 1872, carried an absolute fee-simple title to the grantee and a mining claim under it of all land in which "no gold, silver, copper, or cinnabar mine" existed, or in which no valid mining claim or possession was had or held under local authority, or rules, or existing law. See R. S. secs. 2386 and 2392 (title PUBLIC LANDS). The owner of the lot under the patent holds all the ground save that in which the mine is located by fee-simple title, and no one can tunnel under the part of the lot held by this title in fee-simple, except by contract with the owner. On land embraced by such a grant a locator has no right to 300 feet of ground on each side of a quartz ledge. Dower v. Richards, (1887) 73 Cal. 477, 15 Pac. 105.

Rights under prior Act.—Rights in mining property entitled to protection under the Act of May 10, 1872, as previously acquired under existing laws, existed where a lode mining location had been made at the time of the passage of that Act, and the proceedings under the Act of July 26, 1866, had then so far advanced as to exclude adverse claims. East Cent. Eureka Min. Co. v. Central Eureka Min. Co., (1901) 204 U. S. 266, 27 S. Ct. 258, 61 U. S. (L. ed.) 476.

Waiver.—An election by the grantee of a patent for a lode mining claim to abandon rights acquired under the Act of July 26, 1866, cannot be imported from the fact that such patent, in addition to granting such rights, also purports to grant all that would have been acquired by a location under this section. East Cent. Eureka Min. Co. v. Central Eureka Min. Co., (1907) 204 U. S. 266, 27 S. Ct. 258, 61 U. S. (L. ed.) 476.

Sec. 2321. [Proof of citizenship.] Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation. [R. S.]


Further provisions relating to the affidavit were made by the Act of April 26, 1882, ch. 106, § 2, infra, p. 601.

Proof of citizenship.—Where, in an action in support of an adverse claim to a mining location, it was admitted on the trial that, as far as the defendant was concerned, plaintiffs were citizens of the United States when they made their purported location, and a certified copy of the notice of plaintiffs' location was introduced in evidence, with an affidavit of assessment work for the year 1902, which contained evidence showing that each of the plaintiffs was a citizen of the United States at the time of locating the ground in dispute, the proof of citizenship was prima facie sufficient under this section. Stolp v. Treasury Gold Min. Co., (1905) 38 Wash. 610, 80 Pac. 817.

The oath of one of the locators, accompanying the recorded notice of location, as to their citizenship, is prima facie evidence of the fact, and it will be deemed sufficient until doubt is thrown upon the accuracy of his statement. Hammer v. Garfield Min., etc., Co., (1889) 130 U. S. 291, 9 S. Ct. 548, 32 U. S. (L. ed.) 984.

Sufficiency of affidavit.—An affidavit based on information and belief is contemplated by the statute. North Noon-


As to the sufficiency of the form of affidavit, see Dean v. Omaha-Wyoming Oil Co., (1913) 21 Wyo. 153, 128 Pac. 681, 129 Pac. 1093.

Corporation.—Where, in an action on an adverse by a corporation against an application for a patent to a mining claim, the complaint alleged that the plaintiff was a corporation organized under the laws of the state, and the answer admitted the allegation, it was not necessary to prove the citizenship of plaintiff's stockholders. Jackson v. White Cloud Gold Min., etc., Co., (1906) 36 Colo. 122, 85 Pac. 639.


Other modes of proof.—The provision for proof of citizenship by affidavit is not exclusive of other modes of proof. Thompson v. Spray, (1887) 72 Cal. 528, 14 Pac. 182.
Sec. 2322. [Locators’ rights of possession and enjoyment.] The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. [R. S.]


I. In general, 523.
II. Possessory rights, 524.
III. Extralateral rights, 527.
IV. Effect of patent, 532.

I. IN GENERAL

Common-law rule.—The right granted by the mining laws is in direct contravention of the common law. Tyler Min. Co. v. Last Chance Min. Co., (C. C. Idaho 1885) 71 Fed. 848.

The doctrine of the common law, that he who has a right to the surface of any portion of the earth, has also the right to all beneath and above that surface, has but a limited application to the rights of miners. Necessity has compelled a great modification of that doctrine. The well established custom of miners to locate veins of mineral, claiming to follow them with all their dips, spurs and angles, without reference to the occupancy of the surface, has compelled a departure from the common-law rules. Bullion Min. Co. v. Croesus Gold, etc., Min. Co., (1886) 2 Nev. 168, 90 Am. Dec. 526.

The rule of common law that whoever owns the surface is entitled to all beneath the same is not fully applicable to lode mining claims. Montana Co. v. Clark, (C. C. Mont. 1890) 43 Fed. 628.

It will be observed that the lodes, veins, or ledges granted by this section are distinguished from the surface ground and are made the subject of a separate grant and to separate provisions. It may be that Congress, considering the provisions of the common law which reserved in every grant from the crown all precious metals, wished to set this matter at rest in these provisions. Waterloo Min. Co. v. Doe, (C. A. 9th Cir. 1897) 82 Fed. 45, 48 U. S. App. 411, 27 C. C. A. 50.

This section, conferring what is commonly known as the “apex right,” is in derogation of the common law which granted to the owner of lands all veins within the vertical lines of his land to the center of the earth, and it has been generally held in the determination of cases under this statute, that the presumption is with the owner of the claim as to his right to veins and ore bodies within his vertical sidelines. Collins v. Bailey, (1912) 22 Colo. App. 149, 125 Pac. 543.

The statute introduced an important modification of the common-law rule. It gives to the proprietor of a vein a right unknown to the common law, the right to pursue such vein beyond his own lines, outside of that particular segment of the earth embraced within the lines of his claim extending vertically downward; and it is therefore, to that extent, an enlargement of his common-law right. But, on the other hand, inasmuch as the same right is granted to every locator under the statute, each holds his possession subject to the same right in others, and is therefore liable to have his land entered by an adjoining proprietor pursuing his vein in its course beyond his own side lines; and to this extent, therefore, his common-law possession is abridged.
Two points cannot fail to be noticed in this connection: first, that this enlargement of the common-law possessory right is incident only to a claim located in the manner provided by law; and second, that the exercise of such right operates to the abridgment of the possession of every tenement penetrated or intersected by a vein having its top or apex in a superior tenement. Duggan v. Davey, (1856) 4 Dak. 110, 26 N. W. 897. The right to follow the ledge upon its dip between the vertical planes of the parallel end lines extending in their own direction, when it departs beyond the vertical planes of the side lines, is an expansion of the rights which would be conferred by a common-law grant. On the other hand this grant is subject to the right of an adjoining locator to follow his vein upon its course downward beneath the surface included in the grant. In these two respects only do the rights conferred by the statute differ from those held under a common-law grant. Parrot Silver, etc., Co. v. Heinzl, (1901) 25 Mont. 129, 64 Pac. 326, 87 A. S. R. 386, 53 L. R. A. 491. "Except as modified by the statute, no reason is perceived why one who acquires the ownership or possession of such lands should not hold them with and subject to the incidents of ownership and possession at the common law." Doe v. Waterloo Min. Co., (S. D. Cal. 1893) 54 Fed. 935.

State regulations.—A state statute requiring an affidavit to be attached to the location notice of a mining claim is not in conflict with the provisions of this section. Van Buren v. McKinley, (1901) 8 Idaho 93, 66 Pac. 936.

It is a reasonable regulation that the legislature is fully authorized to make. Dunlap v. Patterson, (1895) 4 Idaho 473, 42 Pac. 504, 95 A. S. R. 140. And to similar effect see McBurney v. Berry, (1885) 5 Mont. 300, 5 Pac. 867; McCowan v. McLea, (1893) 16 Mont. 234, 40 Pac. 602; Berg v. Koegei, (1895) 16 Mont. 209, 40 Pac. 605.

II. Possessory Rights

Exclusive right of possession.—The location of mineral ground gives to the locator before discovery, and while he complies with the statutes of the United States and the state and local rules and regulations, the valuable right of possession against all intruders, and this right he can convey to another. Rooney v. Barnet (N. C. 1912) 200 Fed. 700, 119 C. C. A. 118.

The rights of one entering upon the public domain and locating and working a mineral claim are of as high order as those of a settler, each of whom is in possession under rights initiated which may by the observation of precedent conditions ripe into the right to a final patent. Southern California R. Co. v. O'Donnell, (1906) 3 Cal. App. 385, 55 Pac. 932.

"The right of 'exclusive right of possession and enjoyment,' as used in this section, means enjoyment of the surface for mining purposes alone, and hence the location of a mining claim within a forest reserve did not operate to withdraw the land embraced therein from the jurisdiction of the Secretary of Agriculture, nor give to locators having acquired a possessory interest only any authority to use the surface for the erection and maintenance of a saloon without a permit from the Secretary of Agriculture. U. S. v. Rizzinelli, (D. C. Idaho 1910) 182 Fed. 675.

The effect of this section and R. S. secs. 2324 and 2332, infra, pp. 533, 580, is to confer on the mining locator and his assigns something more than a preemption right. The locator acquires under it an exclusive right of possession, which he can transmit to his heirs and assigns, and this possession continues so long as the laws are complied with. Forbes v. Gracey, (1876) 9 Fed. Cas. No. 4924; Worthen v. Sidway, (1894) 72 Ark. 215, 78 S. W. 777.

So long as he locator complies with statutory requirements, he is entitled against all the world, subject to the paramount authority of the United States, to hold and enjoy his possession. He may never apply for nor take out a patent, yet so long as he does the acts required by R. S. sec. 2324, infra, p. 533, he may hold and enjoy perpetually his claim. Gillis v. Downey, (C. C. A. 8th Cir. 1896) 56 Fed. 483, 58 U. S. App. 567, 29 C. C. A. 286.

Mining claims are not open to relocation until the rights of the former locator have come to an end. A locator cannot avail himself of mineral in the public lands which another has discovered until the discoverer has in law abandoned his claim, and left the property open for another to take it up. Belk v. Meagher, (1881) 104 U. S. 279, 26 U. S. (L. ed.) 735.

After a locator has done all that is necessary, under the law, for the acquisition of an exclusive right to the possession and enjoyment of the ground, the claim is thenceforth his property. He needs only a patent of the United States to render his title perfect, and until the patent issues the government holds the land in trust for the locator or his veneree. The ground itself is not afterwards open to sale. Noyes v. Mantle, (1886) 127 U. S. 348, 8 S. C. 1132, 22 U. S. (L. ed.) 168.

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Against trespass.—The exclusive right of possession and enjoyment of all the surface included within the lines of the location given by this section forbids any trespass; that exclusive right is as much the property of the locator as the vein or lode by him discovered and located. Clipper Min. Co. v. Kli Min., etc., Co., (1904) 194 U. S. 220, 24 S. Ct. 632, 48 U. S. (L. ed.) 944. See also Cheesman v. Shreve, (C. C. Colo. 1888) 37 Fed. 36.

From this section it is manifest that Congress intended the locator should hold, be entitled to, and enjoy the profits of all the surface included within the boundary lines of his claim, and, if in possession in person or by agent, no one has a right to enter upon and take therefrom mineral or other valuable substances. Actual possession is sufficient evidence of title to authorize the maintenance of an action to recover damages against a trespasser. Fuller v. Harris, (D. C. Alaska 1887) 29 Fed. 844.

Outfitting timber.—While the location of a mining claim withdraws the land from the public domain so that no rival claimant can successfully initiate any right to it until such location has been avoided and entry canceled, it does not divest the legal title of the United States or impair its right to protect the land and its product, by either civil or criminal proceedings, from trespass or waste, and the occupant has no right to cut timber on the claim prior to the payment to the United States of the purchase price of the land. Teller v. U. S., (C. C. A. 8th Cir. 1901) 133 Fed. 273, 51 C. C. A. 230.

Injunction.—A mere locator is entitled to an injunction against a trespasser. Allen v. Dunlap, (1893) 24 Ore. 229, 33 Pac. 675.

Actual possession.—Actual possession of a mining claim is not necessary for the protection of the title acquired to such a claim by a valid location. Belk v. Meagher, (1861) 104 U. S. 279, 26 U. S. (L. ed.) 735.

Unpatented claim.—A party can show a right to the possession of a mining claim, where no patent has been issued, only by showing an actual possessio pedis as against a mere wrongdoer, or by showing a compliance with the requirements of the statute. R. S. sec. 2324; infra, p. 533. Patchen v. Keeley, (1857) 19 Nev. 404, 14 Pac. 347.


The estate acquired by the locator of a mining claim is an interest in real property, and although the paramount title remains in the government, the courts have universally recognized such interest as a freehold; and in all controversies arising between the locator and other persons as to any right or claim thereto, he is treated as the owner in fee.” Mt. Rose Min., etc., Co. v. Palmer, (1899) 26 Colo. 56, 56 Pac. 176, 77 A. S. R. 246, 60 L. R. A. 259, citing Forbes v. Gracey, (1876) 94 U. S. 762, 24 U. S. (L. ed.) 313; Merced Min. Co. v. Fremont, (1857) 7 Cal. 237, 25 Am. Dec. 282; Merritt v. Judd, (1859) 14 Cal. 59; Hughes v. Devlin, (1863) 23 Cal. 501; Roseville Alta Min. Co. v. Iowa Gulch Min. Co., (1860) 15 Colo. 29, 24 Pac. 920, 22 A. S. R. 373.

Unpatented claims.—Unpatented lode mining claims are “real property,” and as such are subject to the lien of a judgment recovered against their owner when docketed pursuant to a statute making a docketed judgment a lien upon the judgment debtor’s real property, the term being defined by a statute in force when the judgment was rendered and docketed as coextensive with lands, tenements, and hereditaments. Bradford v. Morrison, (1869) 212 U. S. 389, 29 S. Ct. 349, 53 U. S. (L. ed.) 384.

Community property.—The property in a mining claim is the sole property of the locator, his heirs and assigns, and therefore is not community property. Phenix Min., etc., Co. v. Scott, (1890) 20 Wash. 45, 54 Pac. 777.

lien of general judgment.—A locator’s interest in an unpatented mining claim is not such an interest as will support the lien of a general judgment. Phenix Min., etc., Co. v. Scott, (1890) 20 Wash. 45, 54 Pac. 777.

Transfer of claim.—Written conveyance.—A written conveyance is not necessary to the transfer of a mining claim. Union Consol. Silver Min. Co. v. Taylor, (1879) 100 U. S. 37, 25 U. S. (L. ed.) 541. See also Kinney v. Consolidated Virginia Min. Co., (1877) 4 Haw. 382, 14 Fed. Cas. No. 7,873. But see Moore v. Hamerstag, (1890) 109 Cal. 122, 41 Pac. 806, in which case the court said that the interest in a mining claim, given to a locator by this statute, cannot be transferred by parol, or otherwise than in accordance with the statute of frauds.

Rights of being.—Upon the death of the owner of a mining claim, the right of possession is to be deemed and treated as an interest in real estate and must descend accordingly. That the right of possession descends to the administrator cannot be inferred from the use of the term

Unpatented claim. — The possessory right of a locater of a mining claim, who has not applied for a patent nor done anything to obtain title other than to do the required assessment work, is property, and upon his death passes to his heirs by descent, and not directly as the designated donees or beneficiaries of the United States under the mining laws, and hence such rights may be administered upon and sold as other property by his executor or administrator. O'Connell v. Pinnacle Gold Mines Co., (C. C. A. 9th Cir. 1905) 140 Fed. 854, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919, affirming (C. C. Wash. 1904) 131 Fed. 106.

Right of dower.—"The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfill which forfeits the locater's interest in the claim. We do not think that under the federal statute the locater takes such an estate in the claim that dower attaches to it." Black v. Elkhorn Min. Co., (1896) 163 U. S. 445, 18 S. Ct. 1101, 41 U. S. (L. ed.) 221.

Apex of vein.—The apex of a vein, within the meaning of the statute, is the highest point of that vein where it approaches nearest to the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein. If it is merely a swell in the mineral matter, and turns over and goes on down, it is not a true apex. Stevens v. Williams, (1879) 1 McCravy 480, 23 Fed. Cas. No. 13,413.

As to what is the "top" or "apex" of a vein is a question of fact and not of law. Blue Bird Min. Co. v. Largay, (C. C. Mont. 1892) 49 Fed. 286.

The definitions of the word "apex," as used in the statute, reach the one inevitable conclusion that it is the highest point in the vein. But this is only a general definition, and its application to any particular vein or peculiar location may and often will call for further particularity of description. It must be the top or terminal edge of the vein on the surface or the nearest point to the surface, and it must be the top of the vein proper rather than of a spur or feeder, just as the highest point in the roof of a house would be taken to be the apex of the house, and not the chimney or flagstaff. Again, an apex is a point from which the vein is taken up as well as strike or course; else it confers no extralateral right. Stewart Min. Co. v. Ontario Min. Co., (1913) 23 Idaho 724, 132 Pac. 787.

Apex partly within and partly without. — A locator having the apex of a vein entirely within the surface lines of his claim for a portion of its length and the remaining portion partly within and partly without and within the surface lines of another claim, owns the whole lode within the end lines of his claim. Bullion, etc., Min. Co. v. Eureka Hill Min. Co., (1886) 5 Utah 3, 11 Pac. 615. If both the end lines of a location cut a vein, but the apex, in the course of the vein from east to west, should pass out of a side line and then back into the claim, the locator would have no right to any part of the apex which is not within the surface boundaries. Waterloo Min. Co. v. Doe, (C. C. A. 9th Cir. 1897) 82 Fed. 45, 48 U. S. App. 411, 27 C. C. A. 50.

When a secondary or accidental vein crosses a common side line between two mining locations at an angle, and the apex of the vein is of such width that it is for a given distance partly within one claim and partly within another, inasmuch as neither statute nor authority permits a division of the crossing portion of the vein, and the weight of authority favors the senior locator, the entire vein must be considered as apexing upon the junior location until it has wholly passed beyond its side line. St. Louis Min., etc., Co. v. Montana Min. Co., (C. C. A. 9th Cir. 1900) 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725.

Where the apex of a vein is of such width as to extend beyond the side-line of a claim onto a junior claim, the extralateral rights therein belong to the senior claim, within its extended end-line planes. Empire State-Ideal Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A. 9th Cir. 1904) 131 Fed. 591, 66 C. C. A. 90.

The senior location takes the entire width of the vein on its dip, where the apex of such vein is partly within two or more adjacent lode mining claims. Lawson v. Idaho Mining Co., (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.


All veins, lodes, and ledges.—A locator is not confined to the vein upon which he based his location and upon which the discovery was made, but is entitled to all other lodes having their tops or apaxes within the surface boundaries. Calhoun Gold Min. Co. v. Ajax Gold Min. Co., (1901) 188 U. S. 499, 21 S. Ct. 885, 45 U. S. (L ed.) 1200. See also Campbell v. Ellet, (1897) 167 U. S. 116, 17 S. Ct. 765; Chessman v. Shreeve, (C. C. Colo. 1889) 40 Fed. 787; Gilpin v. Sierra Nevada Consol. Min. Co., (1890) 2 Idaho 606, 23 Pac. 1014.
A discovery and location vests in the locator all the unappropriated public land within its limits, and every vein whose apex is found within the boundary lines of the claim extended downward vertically, whether the surface thus secured is all or only a part of the tract within the boundary lines of the claim. Crown Point Min. Co. v. Buck, (C. C. A. 8th Cir. 1899) 27 Fed. 462, 36 C. C. A. 273.

The title to a vein depends on the right to the occupancy or the ownership of its apex within the limits of the right to the occupation of the surface. Gwilliam v. Donnellan, (1885) 115 U. S. 45, 8 S. Ct. 1110, 29 U. S. (L. ed.) 348.

A lode, vein, or ledge containing a valuable mineral deposit is distinguished from the ground in which the same is found. Waterloo Min. Co. v. Doe, (C. C. A. 9th Cir. 1897) 82 Fed. 45, 48 U. S. App. 411, 27 C. C. A. 50.

The end lines of the original veins are the end lines of all the veins found within the surface boundaries. Walrath v. Champion Min. Co., (1898) 171 U. S. 293, 18 S. Ct. 909, 43 U. S. (L. ed.) 170.


Horizontal vein.—The title to a horizontal vein or deposit, "blanket" vein as it is generally called, may be acquired under the sections concerning veins, lodes, etc. Iron Silver Min. Co. v. Mike, etc., Gold, etc., Min. Co., (1902) 143 U. S. 394, 430, 12 S. Ct. 543, 36 U. S. (L. ed.) 201.

Surface locations made prior to the Act of 1872.—It is their essence that the language of the statute reaches the cases of locators who had while the Act of 1866 was in force located claims the surface lines of which included the tops of more than one lode, and confirms their possession to all the surface, and all the lodes included within their lines. Mt. Diablo Mill, etc., Co. v. Callison, (1870) 5 Savy. 439, 17 Fed. Cas. No. 9,886.


Limitation.—"A person who retains the possession of any portion of the surface ground of such mining claim, and occupies the same continuously for a period of ten years or more after the location of such mining claim, and before patent issued therefor, may successfully plead the statute of limitations in resisting the mining claimant's action in ejectment or for possession, and may maintain his action in ejectment even after patent issued, though the ten years required to be pleaded by the statute of limitations have not expired since patent issued, but had in part run before patent and after location." Tyoe Consol. Min. Co. v. Langstedt, (1902) 1 Alaska 467.

III. EXTRALATERAL RIGHTS

Extent of right.—"Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike.

Third, every vein at the top or apex of which lies inside of such surface lines extended downward vertically becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor.

Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along but across the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location." Del Monte Min., etc., Co. v. Last Chance Min., etc., Co., (1898) 171 U. S. 55, 18 S. Ct. 895, 43 U. S. (L. ed.) 72; Work Min., etc., Co. v. Doctor Jack Pot Min. Co., (C. C. A. 8th Cir. 1912) 194 Fed. 620, 114 C. C. A. 392.

The surface side lines extended downward vertically determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines. This means the end lines of the surface location, for all locations are measured on the surface. "The difficulty arising from the section grows out of its application to claims where the course of the vein is so variant from a straight line that the end lines of the surface location are not parallel, or, if so, are not at a right angle to the course of the vein. This difficulty must often occur where the lines
of the surface location are made to control the direction of the vertical planes. The remedy must be found, until the statute is changed, in carefully making the location, and in posteriorly marking any part of its boundaries until explorations can be made to ascertain, as near as possible, the course and direction of the vein. In Colorado the statute allows for this purpose sixty days after notice of the discovery of the lode. Then the location must be distinctly marked on the ground, and thirty days thereafter are given for the preparation of the proper certificate of location to be recorded. Erhardt v. Boaro, (1885) 113 U. S. 527, 533 [5 S. Ct. 590, 28 U. S. (L. ed.) 1113]. Even then, with all the care possible, the end lines marked on the surface will often vary greatly from a right angle to the true course of the vein. But whatever inconvenience or hardship may thus happen, it is better that the boundary lines should be definitely determined by the lines of the surface location, than that they should be subject to perpetual readjustments according to subterranean developments made by mine workings. Such readjustment at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims. The rule, whatever hardship it may work in particular cases, should be settled, and thus prevent, as far as practicable, such uncertainty." Iron Silver Min. Co. v. Elgin Min., etc., Co. (1888) 118 U. S. 196, 6 S. Ct. 1177, 30 U. S. (L. ed.) 98. See also Fitzgerald v. Clark, (1895) 17 Mont. 100, 45 Pac. 273, 52 A. S. R. 665, 30 L. R. A. 803.

The ownership and possession of the surface of a lode mining claim carries with it the ownership and possession of the lode which has its apex therein to the full extent of the extralateral right given by the statute to the owner of the claim. Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A. 9th Cir. 1904) 130 Fed. 379, 377. The owner of a lode mining claim has the right to the ore beneath the surface of his claim in a vein not having its apex there, subject only to the right of the owner of the claim where such vein apaxes to follow it downward on its dip. Mammoth Min. Co. v. Grand Cent. Min. Co., (1909) 213 U. S. 72, 29 S. Ct. 413, 53 U. S. (L. ed.) 702. Compare McElligott v. Krogh, (1907) 151 Cal. 126, 29 S. Ct. 523.

The right given by the location of a lode mining claim in that portion of the vein lying within its surface boundaries and that portion lying beyond them in which the statute gives the owner extralateral rights is integral, and no adverse right can be acquired by the locator of another claim in respect to that portion that could not in respect to the former. Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A. 9th Cir. 1904) 130 Fed. 379, 377.

When the owner is in possession of the surface and apex of a vein, he must be deemed also in possession of all parts of the vein to which he has title, though it departs beyond his side lines, just as he is in possession of that portion of the earth vertically beneath his surface, and when he has followed it he commits no wrong, and is not a trespasser. Montana Ore Purchasing Co. v. Boston, etc., Consol. Copper, etc., Min. Co., (1903) 27 Mont. 536, 71 Pac. 1005.

The object of the Act of 1872 in requiring parallelism of end lines was to give to the claimant of the lode as much of the lode or vein in its downward course as he had at the surface, but no more. Carson City Gold, etc., Min., Co. v. North Star Min. Co., (C. C. A. 9th Cir. 1897) 83 Fed. 658, 48 U. S. App. 724, 25 C. C. A. 35.

This section gives to a locator the right to follow outside of his lines and into adjacent claims all veins or lodes which have their apaxes in his own claim. The statute gives the right to follow the vein but not the right to attempt to reach the vein by tunneling into an adjacent claim. St. Louis Min., etc., Co. v. Montana Min. Co., (C. C. A. 9th Cir. 1906) 113 Fed. 900, 51 C. C. A. 530, 64 L. R. A. 207, affirmed (1904) 194 U. S. 235, 24 S. Ct. 654, 48 U. S. (L. ed.) 953.

If the lode is somewhat below the plane of the horizon, it is within the meaning of the act, as one which may be pursued beyond the side lines of the claim in which its outcrop may be found. Leadville Min. Co. v. Fitzgerald, (1879) 15 Fed. Cas. No. 8,158.

The extralateral rights conferred by this section only apply to rights acquired before other parties acquire interests in the adjacent lands, and do not apply to adjacent agricultural lands obtained before as rights had been acquired for a mining location. Amador Medoc Gold Min. Co. v. South Spring Hill Gold Min. Co., (N. D. Cal. 1888) 36 Fed. 666.

How determined. — The extralateral right conferred by this section is determined by the apex on the surface upon which the prospector makes his location and the dip of the vein, and not upon the levels in the depth of the earth opened and disclosed in the working of the mine. Alameda Min. Co. v. Success Min. Co., (1916) 29 Idaho 616, 161 Pac. 862.

Establishing line on older claim. — The locator of a lode mining claim has the legal right to lay an end line of his claim on the surface of a prior claim, in the absence of objection by the owner; and, as against the government and subsequent locators, such location carries precisely the same rights, both surface and extralateral, as it would if all its lines were
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departure of vein from perpendicular.

—The locator of a mining claim has the right to the surface included within the lines of his claim, and if a vein has its top or apex within the claim, he may follow such vein downward, though it may depart from a perpendicular in its downward course outside "of the vertical side lines" of the location—that is, into adjoining grounds. The length of the side lines and the claim they bound are limited by the end lines, or, as it is expressed in the statute, by vertical planes drawn downward through the end lines. The statute would seem to call for no effort of construction, and the distinction which obtains in the parlance of miners and in the cases, between the strike or course and the dip of a vein, is compelled by the statute, and marks accurately the parallel and extralateral rights of a location. This certainly, as far as any language can do it, expresses the distinction which must be observed, however various may be the natural conditions. In other words, the strike and the dip of the vein must not be confounded nor the rights dependent upon them confused. Stewart Min. Co. v. Ontario Min. Co., (1915) 237 U. S. 350, 36 S. Ct. 610, 59 U. S. (L. ed.) 889.

irregular location.—"A surface location might be made in such an irregular and many-sided shape as to destroy the right to go beyond the surface lines. That consequence, however, would not be because the end lines were not exactly parallel, but because it would be difficult, if not impossible, to tell which were side lines and which were end lines. Doe v. Sanger, (1890) 83 Cal. 203, 23 Pac. 365.

bounded by vertical plane of end line.


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lode crosses side line.—Where a lode enters an end line of a regularly located mining claim, and runs in its course lengthwise, nearly parallel with the side lines of the claim for the greater part of the length of the claim, the owners of the claim are not deprived of the extralateral rights attached to the claim, under the provisions of this section, because the lode or vein crosses a side line before reaching the other end line; the true construction of the statute is that, when the lode or vein crosses a side line before reaching the other end line, the owner's extralateral rights will extend from the end at which the lode enters to the point on the lode at which it crosses the side line. Republican Min. Co. v. Tyler Min. Co., (C. C. A. 9th Cir. 1897) 79 Fed. 733, 48 U. S. App. 213, 25 C. C. A. 178.

patent to adjacent claimant.—The extralateral rights of a mere certificate holder are not taken away by the grant of a patent to an adjacent claimant. Cheeseman v. Hart, (C. C. Colo. 1890) 42 Fed. 98.

purchase of adjoining locations.—A party may purchase all the various locations comprising a certain area, covering one or more lodes or veins, and, being the owner thereof, might obtain a patent covering all the ground embraced in the original locations; and he is not required to show the separate lines of any of the original locations embraced within the surface boundaries of his patented claim, to entitle him to extralateral rights given by the statute. Carson City Gold, etc., Min. Co. v. North Star Min. Co., (C. C. A. 9th Cir. 1897) 83 Fed. 638, 48 U. S. App. 724, 28 C. C. A. 333.

lode or vein must be continuous in the sense that it can be traced through the surrounding rocks, though slight interruptions of the mineral-bearing rock would not be alone sufficient to destroy the identity of the vein. Iron Silver Min. Co. v. Cheeseman, (1888) 116 U. S. 529, 6 S. Ct. 481, 29 U. S. (L. ed.) 712. The case also Fitzgerald v. Clark, (1895) 17 Mont. 100, 42 Pac. 273, 52 A. S. R. 605, 30 L. R. A. 803.

To establish the right to pursue lodes beyond the side lines of a claim, it must be shown that the lode is continuous and in place throughout its whole course from its origin within the boundaries of the claim to the place in which the locator claims it. Leadville Min. Co. v. Fitzgerald, (1879) 15 Fed. Cas. No. 8,158.

the burden is upon the party claiming it to show by a preponderance of evidence that the ore which he extracted from beneath the surface of an adjoining patent belonged to the lode or vein the apex of which was within the surface lines of his own patented ground. Carson City Gold, etc., Min. Co. v. North Star Min. Co., (C. C. A. 9th Cir. 1897) 83 Fed. 659, 48 U. S. App. 724, 28 C. C. A. 333. See also con-

Priority upon two locations.—When two locations have been made in such form and shape as to entitle them to follow the lode in its downward course, their rights depend upon the question of priority. "In cases of controversy where the right exists under each valid location to follow the lode in its downward course it necessarily follows that both locations cannot rightfully occupy the same space of ground, and in all cases where a controversy of this kind arises the prior location must prevail, precisely as in cases of like controversy between locations overlapping each other lengthwise on the course of the lode." Tyler Min. Co. v. Sweeney, (C. C. A. 9th Cir. 1893) 54 Fed. 284, 7 U. S. App. 463, 4 C. C. A. 329. See also Tyler Min. Co. v. Last Chance Min. Co., (C. C. Idaho 1895) 71 Fed. 848.

Rights of junior locators.—So long as no forcible entry is made, a junior locator may project the end line of his claim across the surface of a senior location for the purpose of fixing the extralateral rights to so much of the vein located as is subject to location. Davis v. Shepherd, (1903) 31 Colo. 141, 72 Pac. 57.

The fact that a vein or lode is of such width on the surface as to extend beyond the side line of a claim located thereon does not affect the extralateral rights of such claim as against a junior location. Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A. 9th Cir. 1904) 131 Fed. 579, 66 C. C. A. 299.

Secondary veins.—The extralateral rights in secondary veins depend, inter alia, upon the extent of the apexes within the surface lines, and while the end lines of the claim as fixed by the location are the end lines of all veins apscising within it, where the apexes bounding such veins may be as different as the extent of their respective apexes, though all such planes must be drawn vertically downward parallel with the end lines. There can be but one set of end lines for one location, and these must perform that function not only for the discovery vein, but for all other veins apscising within the surface lines. "This, however, does not mean that all such veins have exactly the same extralateral rights, nor can it be said that only so much of a secondary vein as apscises within that part of the claim where the apex of the discovery vein is found has such rights." Ajax Gold Min. Co. v. Hilkey, (1903) 31 Colo. 131, 72 Pac. 447, 102 A. S. R. 23, 62 L. A. 555. See also Walrath v. Champion Min. Co., (1890) 19 U. S. 293, 18 S. Ct. 909, 43 U. S. (L. ed.) 140.

Agreed boundary between overlapping claims.—An oral agreement between the owners of two overlapping lode mining claims, located on the same day, in accordance with which a monument was built, which it was agreed should be a point on the line between the claims, cannot affect the extralateral rights appertaining to one of the claims which has passed into the hands of other owners, having no knowledge of such agreement, as against third parties owning junior claims, and having no interest in the other claim or privity with the agreement. Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A. 9th Cir. 1904) 131 Fed. 591, 66 C. C. A. 99.

Mineralization essential.—In order to entitle the owner of a mining claim to extralateral rights, it is not sufficient that the vein he seeks to follow outside the boundaries of his claim consists of rock sufficiently mineralized so that a miner can follow it with a reasonable expectation of finding ore; but it is necessary that there should be a ledge or body of mineral or mineral-bearing rock of such value as will distinguish it from the country rock or from the general mass of the mountain. Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 490, 83 Pac. 648.

Course of vein.—Where the end lines of a lode claim cross the surface outcrop- ping of a vein, they determine the extralateral right of the claim, without regard to the angle at which they cross the general course of the vein; its course for that purpose being fixed by the course of the apex on the surface of the claim. Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A. 9th Cir. 1904) 131 Fed. 579, 66 C. C. A. 299.

Where a person owns a mining claim having an apex of a vein within its limits extending through the claim lengthwise, he has, by virtue of the extralateral rights reserved under the statute, a right to follow the vein between vertical planes drawn downward through the end lines of the location, from the apex, on the dip, to the deep, although such vein may so far depart from a perpendicular, in its course downward, as to extend outside of the vertical side lines of the surface of the location into ground belonging to the adjoining owner. Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 490, 83 Pac. 648.

"A claim located in conformity with the provisions of this section would take the form of a parallelogram, if the course or strike of the vein or lode should run in a straight line; but such veins and lodes are often found upon exploration to run in a course deviating at different points from such line. And from the uncertainty sometimes arising in determining the lateral rights of locators. Lines which cross the course of the strike of the vein and do not run parallel with it, are end lines notwithstanding they are marked as side lines. When lines are drawn inaccurately and irregularly, the most that the court can do is to give the miner such rights as his imperfect location warrants, under the statute. Where it finds that what are called sides lines are in fact end lines, the court, in determining its lateral rights, will treat such side lines as end lines and such end lines as side lines; but the court cannot make a new location for him, and thereby enlarge his rights. He must stand upon his own location, and take only what it will give him under the law." King v. Amy, etc., Consol. Min. Co., (1894) 152 U. S. 222, 14 S. Ct. 510, 38 U. S. (L. ed.) 419.

If a location is made in substantial compliance with the intent of the statute, that is, where there are two side lines running along the course of the vein, and two shorter end lines running across it, so that the two sets of lines are distinct and apparent,—such a location is not void, but gives the right to follow a vein laterally, although the original end lines may not be exactly parallel, or although they may differ from a true parallel. A prospector will not lose his location simply because he failed in the first instance to run his end lines on a perfect parallel. Such a locator has the right, and perhaps it is his duty, to make such change as is necessary to parallel his end lines the next day, or the next month, or within any reasonable time, if such change interferes with the substantial property rights of another person. Doe v. Sanger, (1890) 83 Cal. 203, 23 Pac. 365.

Downward course.—In this statute the words "downward course" and "course downward" are used interchangeably. It was undoubtedly intended by the use of the words to signify the course of the vein from the surface downward towards the earth. Sometimes it may happen that the "downward course" of a vein will be perpendicular and the vein will form a vertical plane, but, as a rule, there is a deflection in the downward course of these mineral veins from the perpendicular, which is called their dip; but still the deflection of the dip is always "downward," and when the plane of the vein reaches the horizontal, then there is a blanket vein or lode, and on such a vein a locator has a lateral right. Stewart Min. Co. v. Ontario Min. Co., (1913) 23 Idaho 794, 132 Pac. 787.


Where the strike of the vein passes perpendicularly through the end lines, the mere meanderings of the outer border of the end lines do not absolutely control the question of parallelism; the spirit and reason of the statute require that the settled and permanent course of the vein on its strike, as nature fixed it, should control. Chesman v. Hart, (C. C. Colo. 1890) 42 Fed. 98.

Where the apex of a vein crosses what were originally intended as the side lines of a lode claim, and they are parallel, they become, by operation of law, the end lines. Empire Milling, etc., Co. v. Tombstone Mill, etc., Co., (1904) 131 Fed. 339; Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co., (C. C. A. 9th Cir. 1904) 131 Fed. 579, 66 C. C. A. 290.

Where the vein within a mining claim ran in a northerly and southerly direction, and the location was crosswise of the vein, the side lines were really end lines, considering the direction of the lode on the surface, and the rights of the locators were restricted to the area within the side lines three hundred feet on each side of the vein or lode. Southern California R. Co. v. O'Donnell, (1906) 3 Cal. App. 382, 85 Pac. 932.

When a vein passes in and out of the same line of a location, such line constitutes an end line so as to cut off extra lateral rights. Catron v. Leach, (1897) 23 Colo. 433, 49 Pac. 687, 58 A. S. R. 256.

That the course of a vein is across a claim as located upon the surface instead of in the direction of its length, does not invalidate the patent as to any part of the territory included therein; the side lines become end lines and the end lines become side lines, so far as lateral rights are concerned. Argonaut Consol. Min., etc., Co. v. Turner, (1897) 23 Colo. 400, 48 Pac. 695, 58 A. S. R. 245.

Premise.—An extraneous lode of a lode claim is presumed to own all the ore within planes drawn vertically downward.
to the deep through the boundary lines of such claim, as well as the surface and everything appurtenant to the claim, which presumption continues until some other locator establishes that such deposits belong to another lode having its apex in its ground, so that he is entitled to extralateral rights reserved by this section. Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 490, 83 Pac. 648.

Burden of proof. — Where the defendant, who was the owner of a lode claim, claimed ore underlying plaintiff’s adjoining claim by virtue of extralateral rights, the defendant was bound to show, not only that the apex and strike of the vein were within the boundaries of defendant’s claim, but that between planes drawn vertically downward through the end line of plaintiff’s claim and a certain parallel line the vein from its apex on its dip was continuous, that the continuity extended to and through plaintiff’s ground, and that the ore bodies claimed formed a part of such vein. Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 490, 83 Pac. 648.

Jury trial. — In a suit to determine extralateral mining rights, the parties are not entitled, as matter of right, to a trial by jury. Hickey v. Anaconda Copper Min. Co., (1905) 32 Mont. 46, 81 Pac. 806.

IV. Effect of Patent

Effect of patent. — The owner of a fee in a patented lode mining claim is presumed to be in possession of the surface included within the lines of the location, and the burden of proof rests on one claiming any part thereof by adverse possession. Original Consol. Min. Co. v. Abbott. (C. C. Mont. 1908) 167 Fed. 881.

A patent for a lode claim takes the sub-surface as well as the surface, and there is no other right to disturb the sub-surface than that given to the owner of a vein apexing without its surface but descending on its dip into the sub-surface to pursue and develop that vein. St. Louis Min., etc. Co. v. Montana Min. Co., (1904) 194 U. S. 235, 24 S. Ct. 654, 48 U. S. (L. ed.) 953. But see New Dunderberg Min. Co. v. Old, (C. C. A. 8th Cir. 1897) 79 Fed. 398, 49 U. S. App. 201, 25 C. C. A. 116.

The patent, when issued, is for the land, and conveys to the patentee not only the common-law right to the full enjoyment of the surface and all below it, but also the right, in the case of a vein, to pursue that vein throughout its entire depth, even though it may pass beyond the vertical side lines of the surface location. Hawke v. Deffebach, (1855) 4 Dak. 20, 22 N. W. 480.

The rights of a patentee are to be determined by the terms of his patent, and when the description in a patent gives it parallel end lines, and grants the right to follow all lodes on their dip outside of the side lines whose apex is within the surface lines of the claim, the courts cannot go behind it in a collateral proceeding, though the end lines are not in fact parallel. Waterloo Min. Co. v. Doc. (C. C. A. 9th Cir. 1897) 82 Fed. 45, 48 U. S. App. 411, 27 C. C. A. 50.

Sec. 2323. [Owners of tunnels, rights of.] Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel. [R. S.]


"To the same extent" obviously refers to the length along the line of the lode or vein. The discovery of the vein in the tunnel, worked according to the provisions of the statute, gives a right to the possession of the vein to the same length as if discovered from the surface, and a location on the surface is not essential to a continuance of that right. Campbell v. Ellet, (1897) 167 U. S. 116, 17 S. Ct. 765, 42 U. S. (L. ed.) 101.

The right to a vein discovered in a tunnel may be exercised by locating the claim the full length of 1,500 feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire. Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co., (1897)
Rights as against surface locator.—This section contemplates that tunnels may be run for the development of veins or lodes or for the discovery of mines, gives a right of possession of such veins or lodes if not previously known to exist, and makes locations on the surface after the commencement of the tunnel invalid. There is no implication of a displacement of surface locations made before the commencement of the tunnel. There can be no implication of a conflict with the rights given by R.S. sec. 2322, supra, p. 535; those rights are exclusive, and a tunnel can only be run in subordination to them. Calhoun Gold Min. Co. v. Ajax Gold Min. Co., (1901) 182 U. S. 499, 21 S. Ct. 885, 45 U. S. (L. ed.) 1200.

The effect of this section is to withdraw from exploration for lodes not appearing on the surface so much of the public domain as lies upon the face of a tunnel, and to reserve such for the benefit of the proprietor of the tunnel so long as he prosecutes his work thereon with reasonable diligence, and gives him the right of possession for this purpose, and such tunnel locator may avail himself of the provisions of R.S. sec. 2326, infra, p. 563. Back v. Sierra Nevada Consol. Min. Co., (1885) 2 Idaho 420, 17 Pac. 83.

When a party has discovered a lode not appearing on the surface and not previously known to exist, which lies in such position in relation to a tunnel that the same may be discovered therein, and taken by the tunnel claimant, he can be restrained from acquiring such lode while the tunnel claimant is prosecuting his tunnel according to law. Hope Min. Co. v. Brown, (1901) 11 Mont. 370, 28 Pac. 732.

Rights of prior surface locator.—A person does not acquire by virtue of a tunnel and tunnel-site location the ownership and right to the surface by virtue of its location therein, to wit, veins or lodes not appearing on the surface, and not known to exist prior to the date of location of said tunnel site, as against a prior surface location embracing within its boundaries the apex of such blind vein. Calhoun Gold Min. Co. v. Ajax Gold Min. Co., (1899) 27 Colo. 1, 50 Pac. 607, 83 A. S. R. 17, 50 L. R. A. 209.

Rights prior to passage of mining law.—Where a location was made prior to the passage of any general mining law, the limit of the length of the tunnel would be determined by the local rules and customs in force at the time of the location. Glacier Mountain Silver Min. Co. v. Willis, (1888) 127 U. S. 471, 8 S. Ct. 1214, 32 U. S. (L. ed.) 172.

Location for discovery.—The privilege granted by this section applies to one who locates a tunnel for discovery purposes as well as for development purposes. Fissure Min. Co. v. Old Susan Min. Co., (1900) 22 Utah 438, 63 Pac. 587.


The discovery of a vein in a tunnel gives to the discoverer rights therein though he proceeds with the tunnel, and after finishing work on the tunnel does not immediately commence to develop it. Iron Silver Min. Co. v. Mike, etc., Gold, etc., Min. Co., (1892) 143 U. S. 394, 430, 12 S. Ct. 543, 36 U. S. (L. ed.) 201.

The “line” of the tunnel designates a width marked by the exterior or sides of the tunnel. Corning Tunnel Co. v. Poll, (1878) 4 Colo. 507. See also Hope Min. Co. v. Brown, (1888) 7 Mont. 550, 19 Pac. 218.

Discovery within 300 feet of line of tunnel.—Third persons have a right to locate any veins or lodes within a distance of 300 feet on either side of the line of the tunnel, but not on the line of the tunnel. Any locations so made are at the risk of the locators, for upon the discovery of the vein or lode in the tunnel, all locations made subsequent to the commencement of the tunnel be invalid, if they are within 300 feet of the vein or lode, and within 1,500 feet as located along the vein or lode discovered. Hope Min. Co. v. Brown, (1888) 7 Mont. 550, 19 Pac. 218.

Excess claim.—If a tunnel is 5,000 feet in length the claim would not be void, but the location would be good to the extent of 3,000 feet. Glacier Mountain Silver Min. Co. v. Willis, (1888) 127 U. S. 471, 8 S. Ct. 1214, 32 U. S. (L. ed.) 172.
that its boundaries can be readily traced. All records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two. [R. S.]


This section was first amended by Act of June 6, 1874, ch. 220, 18 Stat. L. 61, by providing "that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five."

It was again amended by Act of Nov. 3, 1893, ch. 12, 28 Stat. L. 6, by providing that the provision requiring an annual expenditure "be suspended for the year eighteen hundred and ninety-three so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year eighteen hundred and ninety-three: Provided, That the claimant or claimants of any mining location, in order to secure the benefits of this act shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they, in good faith intend to hold and work said claim: Provided, however, That the provisions of this act shall not apply to the State of South Dakota."

A similar provision was made by the Act of July 18, 1894, ch. 142, 28 Stat. L. 114, as to the annual expenditure for the year 1894.

The section was again amended by an Act of Feb. 11, 1875, ch. 41, infra, p. 598. See the notes to said Act.

The last proviso of this section was added by an Act of Jan. 22, 1889, ch. 9, § 2, 21 Stat. L. 61.
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Provisions releasing owners of mining claims who enlisted in the military or naval service for duty in the war with Spain from performing assessment work during such term of service were made by the Act of July 2, 1898, ch. 563, infra, p. 605. See the notes to section 1 of said Act.

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I. IN GENERAL

Miners' regulations.—This section gives to the miners of a mining district and the state or territory in which the district is situated the power to make regulations "governing the location" of a mining claim, subject to certain requirements. These requirements may not be dispensed with, but they may be supplemented. Clason v. Matko, (1912) 223 U. S. 646, 32 S. Ct. 392, 56 U. S. (L. ed.) 588.


Evidence of regulation.—A local regulation may be evidenced by a written rule or by an observed custom in the district not in writing. Doe v. Waterloo Min. Co., (C. C. A. 9th Cir. 1895) 70 Fed. 455, 44 U. S. App. 204, 17 C. C. A. 190.

Order of steps to complete locations.—When every act necessary to complete a mining location has been performed before an adverse claim has accrued, the order in which the acts have been performed is immaterial. McCleary v. Broadus, (1910) 14 Cal. App. 60, 111 Pac. 125; Healey v. Rupp, (1906) 37 Colo. 25, 86 Pac. 1015.

In Sutherland v. Purdy, (C. C. A. 9th Cir. 1916) 234 Fed. 600, 148 C. C. A. 366, it appeared that the location was made by an attorney in fact prior to the recordation of the power of attorney, and it was contended that for such reason the location was void. The court said: "It is undoubtedly well settled that the order in which the several acts required by this general law of Congress [the text section] are to be performed is nonessential in the absence of intervening rights."

Forfeiture of location.—Every reasonable doubt will be solved in favor of the validity of a mining claim as against the assertion of a forfeiture. Thornton v. Kaufman, (1910) 40 Mont. 282, 106 Pac. 361, 135 A. S. R. 618.

Interest of owner by co-owner.—Where a person interested with others in the location of a mining claim abandons his interest in the claim it does not revert to the government, as the other cotenants may acquire the entire claim by compliance with the statute. Worthen v. Sidney, (1904) 72 Ark. 215, 79 S. W. 777.

Intent to abandon.—Where a valid location of a mining claim has been made and work done thereon in good faith, possession maintained, and no evidence appears from which an intention to abandon may be inferred, the courts should construe the law liberally to prevent forfeiture. Emerson v. McWhirter, (1901) 133 Cal. 510, 65 Pac. 1036.

Actual possession.—After a valid mining location is made, the locator need not keep actual possession of the claim, but his right of possession continues until he in fact abandons or forfeits it by failure to do the work required by law. Gear v. Ford, (1906) 4 Cal. App. 556, 88 Pac. 690; Holdt v. Hazard, (1906) 10 Cal. App. 440, 102 Pac. 540.

Presumption from possession.—Possession and improvement alone give no value to a mining claim, but raise a prima facie presumption that the possession is rightful, and prevent the land being subject to original location as wild and unappropriated land. Ware v. White, (1907) 81 Ark. 220, 108 S. W. 831.

Conclusiveness of prior entry and patent.—Priority of entry and patent does not conclusively establish seniority of location, so as to give the holder of a lode mining claim under such patent the right to the entire width of the vein on its dip, where part of the apex of such vein is within such claim and part within an adjoining claim. Lawson v. U. S. Mining Co., (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

Government recognition of validity of location.—Acceptance by the government of lode mining location notices given before the Act of July 26, 1906, 14 Stat. L. 251, ch. 265, recognizing the rights of locators who have proceeded in conformity to local customs or rules, and the issue of patents thereon, is a recognition by the Land Department of the conformity of the proceedings to the local rules and customs of the district, and such ruling is not open to challenge by third parties claiming rights arising subsequently to the notice. Lawson v. U. S. Mining Co., (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

Rights under occupancy without location.—Where the person in possession and occupancy of mineral lands does not claim government title under the land laws, his rights are those of a mere licensee of the government, and he must give way at the instance of one who makes a valid entry of the land under the public land laws: but until a valid entry is made, only the

Placer claims.—The provisions of the statute concerning the marking of boundaries, the recording of claims, and the performance of annual labor to the extent of one hundred dollars on each claim, refer specifically to placer claims as well as to lode or vein claims. Sweet v. Webber, (1884) 7 Colo. 443, 4 Pac. 752. See also Carney v. Arizona Gold Min. Co., (1884) 65 Cal. 40, 2 Pac. 734; Morgan v. Tilfottson, (1887) 73 Cal. 520, 15 Pac. 88.


II. LOCATION MUST BE DISTINCTLY MARKED

In general.—A party can insure a right to the possession of a mining claim only by showing a compliance with the requirements of the statute as to definitely marking the location. Funk v. Sterrett, (1881) 59 Cal. 613. See also Phillips v. Smith, (1908) 11 Ariz. 309, 95 Pac. 91; Holland v. Mt. Auburn Gold Quartz Min. Co., (1878) 53 Cal. 149; McCleary v. Broadus, (1910) 14 Cal. App. 60, 111 Pac. 125.

In Donahue v. Meister, (1891) 88 Cal. 121, 25 Pac. 1096, 22 A. S. R. 283, the court, in commenting upon this requirement of the statute, declared that it is the “main act of original location.”

The ultimate fact in determining the validity of a location is the placing of such marks on the ground as to identify the claim or, to use the language of the statute, of such a character that the boundaries can be readily traced. Eaton v. Norris, (1901) 131 Cal. 561, 63 Pac. 856.

Requirement mandatory.—The provision of this section that location of mining claims shall be distinctly marked on the ground so that the boundaries can be readily traced, and the location notice filed shall contain a description of the property by which it can be identified, is mandatory, and must be complied with in order to secure a valid location. Ware v. White, (1907) 81 Ark. 220, 108 S. W. 831.

Method and manner of marking.—No particular method of marking is required, and what is sufficient may depend on the topography of the ground; it being a question of fact in each case whether the lines are so marked that they can be readily traced by a person making a reasonable effort to do so. Charlton v. Kelley, (C. C. A. 9th Cir. 1907) 156 Fed. 463, 84 C. C. A. 295, 15 Ann. Cas. 518.

The statute does not say that the boundaries shall be indicated by physical marks or monuments, nor in any particular or designated manner. Any marking on the ground, whether by stakes, monuments, mounds, or written notices, whereby the boundaries of the location can be readily traced, is sufficient. Oregon King Min. Co. v. U. S., (9th Cir. 1902) 119 Fed. 48, 55 C. C. A. 626.

That degree of certainty with which the final survey for a party fixes the locus and boundaries of the subject-matter of the grant is not required in the original location to be made by the discoverer of the lode. Drummond v. Long, (1896) 9 Col. 538, 13 Pac. 543.

The boundary should be marked upon the ground so that any person of reasonable intelligence could go upon the ground either with or without a copy of the notice of location and readily trace the claim out and find its boundaries and limits. Wilfred v. Bell, (Cal. 1897) 49 Pac. 6.

Liberal application of statute.—In accomplishing the purposes of this section, courts are inclined to be liberal with those marking mining locations and are not inclined to defeat the claim of one who has in good faith attempted to comply with the requirements of the law by technical criticism of the acts relied upon to constitute a valid location. Gold Creek Antimony Mines, etc., v. Perry, (1917) 94 Wash. 624, 162 Pac. 996.

Effect of marking.—It is evident from the provisions of this section that the location as made and defined must control not only the rights of the claimant to the vein or lode within its surface lines, but also any lateral rights. King v. Amy, etc., Consol. Min. Co., (1894) 162 U. S. 222, 14 S. Ct. 510, 38 U. S. (L. ed.) 419.

The location of a vein or lode as running in a certain direction, not marked on the ground, nor developed, but simply indicated by a notice, cannot prevail against a claim subsequently located by another party on ground different from that thus indicated, after the latter has been developed by years of labor and large expenditures, without objection by the first locators, because subsequent explorations by them disclose the fact that their vein runs in a different direction from what they supposed, and in its true course covers the subsequent claim. O'Reilly v. Campbell, (1886) 116 U. S. 418, 6 S. Ct. 421, 29 U. S. (L. ed.) 669.

Claim outside mining district.—A mining claim not within any mining district is governed by the general provisions of this section as to marking the boundaries. Howeth v. Sullenger, (1896) 113 Cal. 547, 45 Pac. 861.

Posting notice.—Posting of notice not required.—This section merely requires that the locations shall be distinctly marked on the ground, so that their boundaries can be readily traced. It does
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Posted notices as aid in marking.—Posted notices cannot be regarded as the marking, but they may be an aid in determining the situs of the monuments. They therefore constitute a part of the marking as does every other object placed on the ground for the purpose of marking it or otherwise, if it in fact does help to mark it. Eaton v. Norris, (1901) 131 Cal. 661, 63 Pac. 856.

Time to mark boundaries.—The marking of the boundaries of the claim may precede the description, or the description may precede the marking. If both are completed before the rights of others intervene, the earlier act will inure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date. Erwin v. Perego, (C. C. A. 8th Cir. 1896) 93 Fed. 609, 36 C. C. A. 492.

As to time of discovery.—In the absence of some local rule of miners or legislative regulation allowing some time for exploration, the discoverer of a lode or vein must immediately locate his claim by distinctly marking the same on the ground in order to hold it against a subsequent valid location peaceably made. Patterson v. Tarbell, (1894) 26 Ore. 29, 37 Pac. 76.

It is not essential to the validity of a location that the discovery should have preceded or shall consist with the posting of the notice and the demarcation of boundaries. The discovery may be made subsequently and when made operates to perfect the location against all the world saving those whose bona fide rights have intervened. One who thus in good faith makes his discovery, possession, and with due diligence prosecutes his work toward a discovery, is fully protected against all forms of possible fraudulent, surreptitious, or clandestine entries and intrusions upon his possession. Miller v. Chisman, (1902) 140 Cal. 440, 72 Pac. 1063, 74 Pac. 444, 98 A. S. R. 63, an action to quiet title to the location of an oil claim, under the Act of Feb. 11, 1897, ch. 216, infra, p. 602.

Reasonable time.—No exact time is limited within which the marking of the boundaries shall be done; a reasonable time therefor is impliedly given. It was held that eight days under the circumstances was not an unreasonable time, in Union Min., etc., Co. v. Leitch, (1901) 24 Wash. 586, 64 Pac. 829, 85 A. S. R. 961. See also State v. Wilson White Min. Co., (1878) 13 Nev. 442.

In Doe v. Waterloo Min. Co., (C. C. A. 9th Cir. 1896) 70 Fed. 455, 44 U. S. App. 204, 17 C. C. A. 190, it was held that under the circumstances twenty days was a reasonable time to allow for the completion of the location.

Removal or obliteration of marks.—When a locator has distinctly marked the boundary lines, and has acquired the right of possession, the right of the locator by the removal or obliteration of the stakes, monuments, marks, or notices, without the act or fault of the locator, during the time he continues to perform the necessary work upon the claim and to comply with the law in all other essential respects. Walsh v. Erwin, (N. D. Cal. 1902) 115 Fed. 531. See also Jupiter Min. Co. v. Bodie Consol. Min. Co., (C. C. Cal. 1881) 11 Fed. 666; Smith v. Newell, (C. C. Utah 1898) 86 Fed. 66.

Against undisputed evidence that stakes were placed upon a location, evidence to the effect that the stakes could not be found several years after raises no presumption. Tenesque Oil Min., etc., Co. v. Salcido, (1902) 137 Cal. 211, 69 Pac. 1010.

Marking second location.—When a locator has placed stakes with mound of rock, etc., at each corner of the surface ground and at the center of the end lines and some time thereafter concludes to make a second location, the second location is sufficient in making use of the stakes standing on the ground without putting new stakes to mark the boundaries. Conway v. Hart, (1900) 120 Cal. 480, 62 Pac. 44.


Sufficiently marked.—A blazed tree at the point where a notice is posted and on one of the boundary lines, and three corner stakes at stated distances from the notice and from each other, would enable a surveyor without difficulty to ascertain the exact limits of the location, and a prospector could easily ascertain the lines of the ground staked off. Walsh v. Erwin, (N. D. Cal. 1902) 115 Fed. 531.
Where notices were posted upon each
mineral claim located on public domain,
designating the place of posting as the
starting point, which notices contained
calls and distances to certain stakes at
the four corners of each claim, the area
of which was 600 feet by 1,500 feet, and
the stakes thus called for were set and
in some cases stones piled around them,
there was a sufficient marking of the
App. 440, 102 Pac. 540.

Substantial stakes were placed at each
corner of the claim about four feet high
and four inches in diameter; similar
stakes were also placed at the discovery
point of the claim and at a point on the
northwest side line and a point on the
southeast side line thereof. The shape
of the claim as marked was approximately
a parallelogram. On a discovery stake
and on a tree about twenty feet therefrom
were nailed notices of location, written on
paper which contained the name of the
claim, the date of location, the names of
the locators, and an attempted description
of the claim; the claim was on a ridge,
and while there were some trees on it, it
did not appear that they were thick or
that there was any difficulty in seeing the
corner stakes. It was held that the claim
was sufficiently marked. Smith v. Newell,
(C. C. Utah 1898) 86 Fed. 56.

Two recorded notices of mining loca-
tions, each contained the name of the
claim, the signature of the locator, the
date of location and of record, and the
county and mining district where located.
One of them described the claim as com-
mencing at discovery, and running 750 feet
in a northeasterly direction and 750 feet
in a southwesterly direction. "marking
the exterior ends by lawful stakes, 1, 2, 3,
and 4, a claim 300 feet on each side of the
centre." The other was described as com-
mencing at discovery, and claiming 300
feet on each side of the center of the vein,
together with all dips, spurs, angles, and
variations, running in a southwesterly di-
rection, and 750 feet in a northeasterly
direction from discovery, "marked by law-
ful stakes on both ends and corners 1, 2, 3,
and 4." There was proof that the descrip-
tions and markings indicated in each case
were true; that a stake and notice were
posted at each discovery, and that a stake
three or four inches in diameter and four
to four and one-half feet high was marked
and set up in each corner, except that at
one corner a stump was marked; and that
surveys for patents were made, covering
the ground practically as originally lo-
cated and staked. It was held that such
notices substantially complied with this
section, requiring the locations to be dis-
tinctly marked on the ground so that their
boundaries may be readily traced, and were
not void for uncertainty of description.
Bonanza Consol. Min. Co. v. Golden Head
Min. Co., (1903) 29 Utah 159, 80 Pac.
736.

If the center line of the location of a
lode claim lengthwise along the lode be
marked by a prominent stake or monu-
ment at each end thereof, upon one or
both of which is placed a written notice
showing that the locator claims the length
of said line upon the lode from stake to
stake, and a certain specified number of
feet in width on each side of said line,
such location of the claim is so marked
that the boundaries may be readily traced:
and, so far as the marking of the location
is concerned, is a sufficient compliance
with the law. North Noonday Min. Co. v. Ori-
522. See also Moore v. Steelmanith, (1901)
1 Alaska 137; Gleeson v. Martin White

In Eaton v. Norris, (1901) 131 Cal. 561,
63 Pac. 556, it was held that two adjoining
claims were sufficiently marked when
they were each marked at the corners by
four oak stakes about one and one-half
feet in length flattened on two sides and
driven into the ground at an angle of
two of the stakes being at the ends of the
dividing line and common to both claims.
In the middle of the dividing line was an
oak tree blazed on two sides on which the
notices of location were posted. In these
notices the two claims were described re-
spectively by course and distance running
from the tree to a stake and from stake
to stake at the point of beginning.

When corners only are established and
no side or end lines are in any way
laid down the boundaries are sufficiently
marked when the stakes and mounds at
the corners are prominent and permanent
monuments, by which, and the descrip-
tions in the notices, the claims can be
identified. Du Prat v. James, (1884) 85
Cal. 55. 4 Pac. 682.

Where the notice of location gives the
length and breadth of the claim from the
discovery monument and three corners are
properly marked and the centers of both
end lines are also properly marked, there
ought to be no difficulty in tracing the
entire boundary under ordinary circum-
stances. Warnock v. DeWitt, (1895) 11
Utah 324, 40 Pac. 205.

Insufficiently marked.—The law is mand-
atory in requiring that mining claims
must be so marked upon the ground that
the boundaries thereof can be readily
traced. This requirement is not fulfilled
by simply setting a post at or near the
place of discovery, and setting stakes at
each of the corners of the claim and at
the centers of the end lines, unless the
topography of the ground is such that a
person accustomed to tracing the lines of
mining claims can, after reading the de-
scription of the claim in the posted notice
of location, by a reasonable and bona fide
method, follow all of the stakes and
thereby trace the lines. Ledoux v. For-
ester, (C. C. Wash. 1899) 94 Fed. 600.

A notice of location posted on a stake,
claiming 500 feet one way and 1,000 feet
in another way on the vein discovered, with 300 feet on each side of the same, was held not to be a compliance with the marking of the boundaries in Doe v. Waterloo Min. Co., (C. C. A. 9th Cir. 1895) 70 Fed. 455, 44 U. S. App. 204, 17 C. C. A. 190, wherein the court said that since the Act of 1872 it has generally been held that in some way 300 feet have been made in the form of a parallelogram, and so marked that its boundaries can be readily traced. See also Gelech v. Moriarty, (1875) 53 Cal. 217.

Setting stakes at one end of a claim, and failing to set stakes at the other end because of the impossibility of getting over the mountain on the line of the claim at the time the survey was made, was held not to be a compliance with the statute, when it appeared that the other end of the claim was not inaccessible from the other side of the mountain. Crouse v. Min., etc., Co. v. Colorado Land, etc., Co., (C. C. Colo. 1884) 19 Fed. 78.

A posted notice merely referring to the legal subdivision where property has extended over the land does not dispense with the statutory requirement as to marking off the boundaries. White v. Lee, (1889) 78 Cal. 593, 21 Pac. 363, 12 A. S. R. 115.

Marking out ground.—Where the boundaries of a mining claim were not marked on the ground, the location was invalid. Harper v. Hill, (1911) 159 Cal. 250, 113 Pac. 162.

Amendment of location.—Where one has possession of a mining claim and has done the actual physical work required, such work being there as evidence of possession, and there are no intervening rights, he may amend his location and thereby perfect his entry, and his right cannot be defeated by one who has made no peaceful entry and possession of the land, nor done any work thereon. White v. White, (1907) 81 Ark. 220, 108 S. W. 531.

Estoppel.—Where certain of plaintiffs in possession of mining claims were experienced miners, and knew the method generally adopted of marking on the ground the boundaries of mining claims, of which defendant was ignorant, and for eighteen months saw defendant working on an adjoining and conflicting claim, congratulated him on his progress, and made no objections until he had expended about $900 for a productive ore, when it was found he was trespassing on plaintiffs' claims, it was held that an estoppel might arise; the means of information not being equal to the respective parties to prevent plaintiffs from asserting their right to the premises in conflict on the ground of abandonment. Shaikv v. Can- diani, (1906) 46 Ore. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791.

State laws.—The requirements of a state statute that before filing a location certificate the discoverer shall locate his claim by posting a notice on such claim, and marking the surface boundaries with substantial posts at each angle of the claim, are not invalid as in conflict with the federal statute, but merely add to its general terms, as by inference it had the right to do by R. S. sec. 2332, supra, p. 593, and the text section. Sexton v. Perry, (1910) 47 Colo. 263, 103 Pac. 281. Of similar effect, see Wright v. Lyons, (1904) 45 Ore. 167, 77 Pac. 81.

III. Natural Object or Permanent Monument

Purpose of provision.—The object of the law in requiring the location of mining claims to be made with reference to some natural object or permanent monument is for the purpose of directing attention, in a general way, to the vicinity or locality in which the mining claim was to be found. Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co., (1908) 14 Idaho 516, 95 Pac. 14.

These provisions, as appear on their face, are designed to secure a definite description—one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose. Of course this section means when such reference can be made. Mining lode claims are frequently found where there are no permanent monuments or natural objects other than rocks or neighboring hills. Stakes driven into the ground are in such cases the most certain means of identification. Hammer v. Garfield Min., etc., Co., (1890) 130 U. S. 291, 9 S. Ct. 548, 32 L. S. (L. ed.) 964. See also Bennett v. Harkreader, (1895) 168 U. S. 441, 15 S. Ct. 363, 39 U. S. (L. ed.) 1046.

Sufficient permanent monuments.—Natural objects or permanent monuments referred to are not required to be on the ground located, although they may be, and the natural object may be any fixed natural object, and such permanent monument may consist of a prominent post or stake firmly planted in the ground or of a shaft sunk in the ground. North Noomday Min. Co. v. Orient Min. Co., (C. C. Cal. 1880) 1 Fed. 622; Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co., (1908) 14 Idaho 516, 95 Pac. 14. See also Jackson v. Dines, (1889) 13 Colo. 90, 21 Pac. 918, as to a reference to the direction of a claim from mountain peaks. A prospect hole, rock monument, and stakes are, within the meaning of the law, permanent monuments. Hansen v. Fletcher, (1894) 10 Utah 266, 37 Pac. 480.

A location with monuments consisting of a pile of rocks on a section surveyed by the government surveyor, and stakes two or three inches in diameter standing a foot above the ground set at each corner of lines run from the pile of rocks, is a sufficient compliance with this section.
Tenn.-cal Oil Min., etc., Co. v. Saleido, (1962) 137 Cal. 211, 69 Pac. 1016. 
Blazed trees, stumps, and bushes of small trees, the bodies of the trees being cut off from four to six feet above ground and the stumps squared, were held to be sufficient artificial monuments. Allen v. Dunlap, (1963) 24 Ore. 229, 33 Pac. 673.

Posts, from five to seven inches in diameter, firmly planted in the ground, and standing not less than five feet above ground, are permanent monuments within the meaning of this statute. Credo Min., etc., Co. v. Highland Min., etc., Co., (C. C. Wash. 1899) 95 Fed. 911.


A description by reference to an adjoining mining claim is a sufficient reference to a permanent monument to allow the notice of location to be introduced in evidence, and it then becomes a matter of proof as to whether the adjoining claim is a permanent monument. If not patented, it is not a well-known and permanent monument. Riste v. Morton, (1887) 20 Mont. 139, 49 Pac. 656. See also Gilson v. Bayliss, (1891) 11 Mont. 171, 27 Pac. 725.

Locating and describing the boundaries of mines by a locally well-recognized and established system of surveys, having the discovery or first claim as the base line, is sufficient when no evidence is produced answering that a proximate claim referred to is not a well-known natural object or permanent monument. "These matters are so widely known to miners and accepted by them, and are so commonly used and depended upon in making locations, that, if the court failed to recognize them and follow them, it would disorganize the entire mining system in this territory, and render titles void and insecure which have been acquired in good faith in full reliance upon this system." Butler v. Good Enough Min. Co., (1901) 1 Alaska 250.

Mountain peaks.— The description of a claim by reference to its direction from "mountain peaks" without naming or describing them, or stating the distance therefrom, may be insufficient. Jackson v. Dines, (1889) 13 Colo. 90, 21 Pac. 918.

But where the description is made by reference to specific mountain peaks, by giving their course or bearing from the discovery shaft in degrees and minutes, it is prima facie sufficient, taken in connection with the balance of the description, to identify the claim. If other mountain peaks exist in the same vicinity, visible from the same point, or any other reason none of the peaks mentioned in fact serve to identify the claim, it must be shown by proper proofs. Craig v. Thompson, (1887) 10 Colo. 517, 16 Pac. 24.

Reference to "discovery claim."— Where it was shown that under the system of locating placer mining claims in Alaska the one first discovered upon a gulch or creek is generally called "discovery claim," and other claims are numbered from such claim up or down the gulch or stream, and that it is customary in a certain locality to give to side or bench claims the same numbers as those upon the creek, with the addition of a letter of the alphabet, as "A," "B," or "C," to designate the tiers back from the creek claims, it was held that recorded notice of location of a claim in such locality, which describes it as "13 A, below discovery, on Cleary creek," is sufficient under this section. Smith v. Cascaden. (C. C. A. 9th Cir. 1906) 148 Fed. 792. 78 C. C. A. 458.

A description in a notice of location, "commencing at a monument at the center of the west end line, thence running northerly three hundred feet to a stone monument at the N. W. corner, thence fifteen hundred feet easterly to a stone monument, being the N. E. corner, thence southerly three hundred feet to a stone monument, being the centre of the east end line, thence southerly three hundred feet to a stone monument, being the S. E. corner, thence westerly fifteen hundred feet to a stone monument, being the S. W. corner, thence northerly three hundred feet to the point of beginning," shows a compliance with the statute as to permanent monuments. Talmadge v. St. John, (1900) 129 Cal. 430, 62 Pac. 79.

Variation between monument and courses.— Where a variation exists between the monument and the courses and distances of the location certificate it is necessary prior to patent for the locator as against subsequent locators to keep up his monuments to an extent that gives fair and reasonable notice. Pollard v. Shively. (1880) 5 Colo. 309.

Conclusiveness of certificate.— A reference to a natural object or permanent monument in a mining location certificate is not conclusive that the law has been complied with requiring such a reference to natural objects or permanent monuments as will identify the claim, but evidence is admissible that one could not take the description therein, and by referring to the natural objects or permanent monuments therein mentioned, find the premises claimed. Londonderry Min. Co. v. United Gold Min. Co., (1900) 38 Colo. 480, 88 Pac. 456.
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IV. NOTICE OF LOCATION

Purpose of provision.—The object and purpose of a location notice is to give notice to subsequent locators; and if there be a defect in the notice, and the subsequent locater has actual notice of the prior location, he will be bound thereby, at least so far as defects are concerned. Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co., (1906) 14 Idaho 516, 95 Pac. 14.

The object of the law, in requiring the location of mining claims to be made with reference to some natural object or permanent monument, is for the purpose of directing attention, in a general way, to the vicinity or locality in which the mining claim was to be found. Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co., (1908) 14 Idaho 516, 95 Pac. 14.

Liberal construction.—Where it appears that the location of a mining claim is made in good faith, the court will not hold the locator to a very strict compliance with the law in respect to his location notice; and if by any reasonable construction, in view of the surrounding circumstances, the language employed in the description will impart notice to subsequent locators, it is sufficient. Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co., (1908) 14 Idaho 516, 95 Pac. 14.

With just how much accuracy the description of a mining claim in reference to a natural object or permanent monument must be stated in the notice of location, or in the statute, and where the location is evidently made in good faith, a locator will not be held to a very strict compliance with the law with respect to his location notice. If by reasonable construction in view of the surrounding circumstances the language employed in the description will impart notice to subsequent locators, it is sufficient. Farmington Gold Min. Co. v. Rhyneay Gold, etc., Co., (1899) 20 Utah 365, 68 Pac. 822, 77 A. S. R. 913. See also Duryea v. Boucher, (1895) 77 Cal. 141, 7 Pac. 421.

But, while mining notices and records should receive a liberal construction, to the end of upholding a location made in good faith, where the description and reference to a natural object or permanent monument is of such a character that a mining engineer could not find the claim from the location notice, and where it is such that the claim may be floated anywhere to suit the ground or to cover ore that may have been since discovered, it is clearly such a notice as cannot furnish a foundation for a valid location. Brown v. Levan, (1896) 4 Idaho 794, 46 Pac. 861. See also Walton v. Wild Goose Min. etc., Co., (C. C. A. 9th Cir. 1903) 123 Fed. 209, 60 C. C. A. 165; McCann v. McMillan, (1900) 129 Cal. 350, 62 Pac. 31.

Error in notice.—An error in the location notice of a mining claim in its reference to the location of a permanent monument is not material in an action between the locators and a subsequent locator, where the claim was properly marked by stakes, and especially where the subsequent locator never saw the notice and could not have been misled thereby. Sturtevant v. Vogel, (C. C. A. 9th Cir. 1909) 167 Fed. 448, 93 C. C. A. 84.

And if there be a defect in the notice, and the subsequent locater has actual notice of the prior location, he will be bound thereby, at least so far as the defects are concerned. Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co., (1908) 14 Idaho 516, 95 Pac. 14.

Omission of date.—The failure in a location notice to state the date of location is not material unless adverse rights were claimed to attach prior to the recording of the notice. Jualpa Co. v. Thordyke, (1910) 4 Alaska 207.

Mistake in date.—Where the location of a mining claim in controversy by defendant’s grantor was in fact made before plaintiff’s entry on the land, the location notice being there visible and the boundaries of the claim properly marked, the defendants were not bound by an erroneous date in the location notice, the date recited in the location being only prima facie evidence of the actual date of the location. Webb v. Carlon, (1906) 148 Cal. 555, 83 Pac. 905, 113 A. S. R. 305.

Interim notice.—During the intermediate period, from the beginning of the claim to the vein to its excavation, a general designation of the claim by notice, posted on a stake placed at the point of discovery, stating the date of the location, the extent of the ground claimed, the designation of the lode and the names of the locaters, will entitle them to such possession as will enable them to make the necessary excavations and prepare the proper certificate for record. Erhardt v. Boaro, (1885) 113 U. S. 527, 5 S. Ct. 600, 28 U. S. (L. ed.) 1113.

Location notice on relocation.—See annotation under subdivision IX, Relocation of Claims, infra, this note, p. 552.

Who may raise objection.—One who attempts to relocate a mining claim on the theory that the required amount of annual assessment work has not been done, with full knowledge of the location and boundaries of the claim, cannot assert a forfeiture of title for failure, on the part of the original locaters, to comply with the mining rules respecting notices

Effect of notice as evidence.—The location notice or certificate, when recorded, is prima facie evidence of all the facts the statute requires it to contain, and which are therein sufficiently set forth; and the affidavit of the locator attached to the notice, setting forth the fact that the ground was unoccupied mineral land of the United States at the time of his location, when introduced in evidence in an adverse suit, makes a prima facie case of such fact. Such notices are prima facie evidence of all the facts required by the statute to be stated therein which are in fact sufficiently stated therein. Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co., (1908) 14 Idaho 516, 95 Pac. 14.

Sufficient notices.—Ordinarily a notice of the location of a mining claim which is in fact sufficiently marked the boundaries of the claim is sufficient to hold the claim for a reasonable time in which to mark the boundaries, in the absence of an adverse prior discovery and a prior marking of boundaries. McCleary v. Broadus, (1910) 14 Cal. App. 90, 111 Pac. 125.

Where a mining claim location notice described the claim by metes and bounds and with reference to stakes set in the land, adding that the claim lay "about a mile from Anvil Mountain in a south-easterly direction," the notice was not defective for failure to point out a particular portion of Anvil Mountains as the beginning point. Vogel v. Waring, (C. C. A. 9th Cir. 1906) 146 Fed. 949, 77 C. C. A. 189. See also Bismarck Mountain Gold Min. Co. v. North Sunbeam Gold Co., (1908) 14 Idaho 516, 95 Pac. 14.

Notice described each of two locations as "a placer mining claim 1,500 feet, running with the creek, and 300 feet on each side from centre of creek known as "McKinley Creek," in Porcupine mining district." It was held that these notices, which were written upon a stump or snag in the creek, constituted a sufficient location. The creek was identified, and between it and the stump there was a definite relation, which, combined with the measurements, enabled the boundaries of the claim to be readily traced. McKinley Creek Min. Co. v. Alaska United Min. Co., (1902) 183 U. S. 563, 22 S. Ct. 84, 46 U. S. (L. ed.) 331.

A recorded notice, describing the claim by reference to posts at each of the four corners, and at the centers of both end lines, and for the purpose of indicating the approximate situation of the claim, referring to a lake and a river, giving merely the distances and directions therefrom to the claim, was held to be a sufficient description. Credo Min., etc., Co. v. Highland Min., etc., Co., (C. C. Wash. 1899) 95 Fed. 911.

A recorded notice describing the claim as "1500 linear feet ... situate in Silver Bow basin, Harris mining district, district of Alaska, commencing at this notice and monument ... to lode line monument and place of beginning, containing an area of 29.66 acres ... and bounded on the northeast and northwest by unknown claims and on the southwest by the Lady Corson and Bear lodes and on the southeast by Solo No. 1 lode," was held to be a sufficient description. Quigley v. Torndyke, (1910) 4 Alaska 207.

Insufficient notices.—A certificate of location which states that the claim is "situated on the north side of Iowa Gulch, about timber line, on the west side of Bald Mountain; said claim is staked and marked as the law directs," and which does not refer to a natural object or permanent monument from which the claim may be identified, is insufficient. Faxon v. Barnard, (C. C. Colo. 1889) 27 Fed. 379.


A location notice was held to be insufficient, in a case in which the court said that an officer armed with a writ of restitution could not, from the description given, put parties in possession of the claim. Darger v. Le Sueur, (1892) 8 Utah 160, 30 Pac. 365.

Stating courses and distances.—A certificate of location is defective which does not correctly give the course and distance and contains no reference to a natural object or permanent monument as required by this section. McIvor v. Hyman, (C. C. Colo. 1885) 25 Fed. 596; Mutchmor v. McCarty, (1906) 149 Cal. 603, 87 Pac. 85. Permanent monuments may exist before the location, or may be erected for the purpose of tying the claim to them; but then courses and distances from them to discovery stake or corner stakes or some other object on the ground must be stated with reasonable accuracy. Brown v. Levan, (1896) 4 Idaho 794, 46 Pac. 661.

Question of fact.—Whether the notice and description of the claim were sufficient to apprise other prospectors of its precise location is a question of fact and not of law. Eilers v. Boatman, (1884) 111 U. S. 366, 4 S. Ct. 432, 28 U. S. (L. ed.) 454.

When the court cannot say from an inspection of the notice that the description is an impossible or uncertain one, it may be admitted in evidence, but is not conclusive and may be subjected to

Aiding by evidence aliume.—The insufficiency of a location certificate in respect to the indefiniteness of the reference to either a natural object or a permanent monument cannot be aided by evidence aliume. The effect of the omission is to leave the certificate void. Location void. Drummond v. Long, (1896) 9 Colo. 538, 13 Pac. 543. See also Gilpin County Min. Co. v. Drake, (1885) 8 Colo. 586, 9 Pac. 787.

Variances.—The fact that the clause in the notice called for stakes whereas, in fact, instead of stakes, trees were blazed, squared up and marked, was held an immaterial variance, because it had no tendency to mislead. Hansen v. Fletcher, (1884) 10 Utah 266, 37 Pac. 480.

Follow local statutes.—This statute does not require that a notice shall be recorded nor does it require that a notice shall be posted on the claim; it leaves those matters to the regulation of the local laws, but even in the absence of such a requirement it would be a very proper aid to the description. Carter v. Bacigalupi, (1890) 83 Cal. 187, 23 Pac. 361; Anderson v. Caughey, (1906) 3 Cal. App. 22, 34 Pac. 223; McCleary v. Broadus, (1910) 14 Cal. App. 66, 111 Pac. 123. See also Haws v. Victoria Copper Min. Co., (1895) 160 U. S. 303, 16 S. Ct. 283, 40 U. S. (L. ed.) 436. This section does not require a discovery of the claim to be included in the notice of location nor demand more than that the claim shall be distinctly marked upon the ground so that its boundaries can be regularly traced. Local statutes and regulations with respect to posting notice of location must be followed. Sanders v. Noble, (1899) 22 Mont. 110, 55 Pac. 1037. See also Denny v. Diemer, Milling Co., (1902) 11 N. M. 279, 67 Pac. 424.

Effect of Act of May 17, 1884.—In Bennett v. Harkrader, (1895) 155 U. S. 441, 15 S. Ct. 963, 39 U. S. (L. ed.) 1046, it was held that the rights claimed by the defendant as obtained by an attempted location of a mining claim in Alaska, of which locations the description had been imperfect, were protected by section 8 of the Act of May 17, 1884, ch. 53, 23 Stat. L. 24 (title ALASKA, vol. 1, p. 316).

V. ANNUAL ASSESSMENT WORK

1. In General

Liberal construction.—A liberal construction must be given to the provision requiring annual assessment work. The labor and improvements should be deemed to be done when the labor is performed or improvements made for the purpose of prospecting or developing the mining ground embraced in the location, or for the purpose of facilitating the extraction or removal of the ore therefrom. Mc-

Culloch v. Murphy, (C. C. Nev. 1903) 125 Fed. 147. See also Argentine Min. Co. v. Benedict, (1898) 18 Utah 183, 56 Pac. 569.

Local statutes and rules.—Neither a rule of miners nor a state statute can authorize less than an annual expenditure of one hundred dollars without being in conflict with the statute and therefore void. Sweet v. Webster, (1854) 7 Colo. 443, 4 Pac. 792. See also Penn v. Oldhauber, (1900) 24 Mont. 287, 61 Pac. 649.

This section was intended to prescribe the minimum amount of expenditure in labor or improvements which was exacted by the United States within a maximum period and to leave to state legislatures or local mining districts the power to make such reasonable regulations as they might deem advisable, within the prescribed limits. See also state legislature nor local mining regulations may grant more favorable terms than those which are demanded by the statute, but no limit is placed upon the amount of work above one hundred dollars which may by local mining regulations be required from the locator. Northmore v. Simmons, (C. C. A. 9th Cir. 1899) 97 Fed. 388, 38 C. C. A. 211.

In Original Co. of Williams, etc. v. Winthrop Min. Co., (1892) 60 Cal. 631, it was held that a local regulation which required “that work shall be done every sixty days on the claim,” was in conflict with the Act of Congress as to the amount of work to be done each year.

Proviso — Purpose.—The object of the proviso was to make a uniform period for the annual work on all claims located since May 10, 1872, and fixed the first of January next succeeding the date of location as the time of its commencement. Slavonian Min. Co. v. Persaich, (C. C. Nev. 1881) 7 Fed. 333.

Not retrospective.—The proviso did not act retrospectively so as to save a locator from the consequences of a failure to perform the annual work for the year 1879. Slavonian Min. Co. v. Persaich, (C. C. Nev. 1881) 7 Fed. 333.

This statute could not be retroactive so as to divest a right a locator had already acquired under the law. It must be construed to operate as an extension and not as an abridgment of the locator’s time. Hall v. Hale, (1885) 8 Colo. 351, 8 Pac. 580. See also Ginns v. Egbert, (1884) 8 Colo. 41, 5 Pac. 632.

Burden of proof.—The proviso of this section calls for an affirmative showing by the original locator. McKnight v. El Paso Brick Co., (1911) 18 N. M. 721, 120 Pac. 694, Ann. Cas. 1912D 1306.

Effect of Act of Feb. 11, 1875.—The Act of Feb. 11, 1875, infra, p. 598, does not affect the character of the work to be done or improvements to be made according to the law as it stood before, except as it


2. Work, Labor and Improvements

The terms "work" and "labor" are not synonymous with the term "improvements." The former has reference to prospecting and excavating for the purpose of development, while the latter, though comprehensive enough to include everything signified by the former, has reference also to structures put in place or erected for the purpose of developing the property and extracting minerals contained in it; therefore, the pleading of a relocator that one hundred dollars' worth of labor had not been done during the year and establishing this by proof is not sufficient to warrant a finding of forfeiture. Power v. Sla, (1900) 24 Mont. 243, 61 Pac. 468.

The word "improvement" means such an artificial change of the physical conditions of the earth in, on, or so reasonably near a mining claim as to evidence a design to discover mineral therein, or to facilitate its extraction, and in all cases the alteration must be reasonably permanent in character. Fredricks v. Klauser, (1908) 52 Ore. 110, 96 Pac. 679.

Effect of compliance with statutory requirement.—So long as the locator complies with the statutory requirements and performs the hundred dollars' worth of work in each year, he is entitled against all the world, subject to the paramount sovereignty of the United States, to hold and enjoy his possession. He may never apply for nor take out a patent, yet, so long as he does the act required by this section, he may hold and enjoy perpetually his claim. Gillis v. Downey. (C. C. A. 8th Cir. 1898) 85 Fed. 483, 56 U. S. App. 667, 29 C. C. A. 256. See also Chapman v. Toy Long. (1876) 4 Sawy. 28, 5 Fed. Cas. No. 2610.

Possession of locators.—"Locators of mining claims have the exclusive right of possession of all the surface included within the exterior limits of their claims so long as they make the improvements or do the annual assessment work required by the Revised Statutes, § 2324. The law, however, provides (Rev. Stats., §§ 2325, 2333) a means by which the locator can pay the purchase price fixed by statute and convert the defeasible possessory title into a fee simple. Sixty days' notice must be given in order that all persons having any adverse claim may be heard in opposition to the issue of a patent. That notice is tripled. It must be given by publication in the nearest newspaper, by posting in the land office, and by posting on the land itself, and it is provided in the statute that this latter fact may be proved by the affidavit of two persons believing that an officer residing within the land district (Rev. Stat., § 2335). All persons having adverse claims under the mining laws may be heard in objection to the issuance of a patent. But (§ 2325) "if no adverse claim shall have been filed ... it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third persons to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter [relating to mineral lands]." El Paso Brick Co. v. McKnight, (1914) 253 U. S. 250, 34 S. Ct. 498, 58 U. S. (L. ed.) 943, L. E. A. 1913A 1113.

Effect of failure to comply with requirement.—As between locator and general government.—As between the locator and the general government the failure to do the annual assessment work does not result in forfeiture. It is not necessary to perform the annual labor except to protect the rights of the locator against parties seeking to initiate title to the same premises. It is the location by a new claimant and not a mere lapse of time which determines the right of the original locator. Beals v. Cone, (1900) 27 Colo. 473, 62 Pac. 948, 83 A. S. R. 92.

As between rival claimants.—The annual expenditure of $100, in labor or improvements, required by this section, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts, and not to the land department. In this respect, the requirement is essentially different from that made by R. S. sec. 2325, infra, p. 555, which makes the expenditure of $500, in labor or improvements, a condition to the issuance of patent, and therefore a matter between the applicant for patent and the government, the determination of which is committed to the land department. Poore v. Kaufman, (1911) 44 Mont. 248, 119 Pac. 785.

Locators prevented from performing work.—Where the defendants wrongfully held possession of a mining claim adversely to the plaintiff, who had made a prior location thereon, and prevented him from performing the required assessment work thereon, it was held that they could not set up his failure to do the work to support their title as against him. Field v. Tanner, (1904) 39 Colo. 278, 75 Pac. 916.

Possession for the statutory period, under R. S. sec. 2332, infra, p. 580, does not relieve the possessor from doing the annual assessment work required by this section, and upon his failure to do such work in
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any one year the land becomes subject to relocation, notwithstanding he may have occupied it for more than the statutory period preceding such relocation. Upton v. Santa Rita Min. Co., (1907) 14 N. M. 96, 89 Pac. 275.

Effect of application for patent—Suspension of requirement.—One who has made application to the proper land office for a patent to a mine, paid the price required by law, and obtained the ordinary certificate of purchase, has a complete equitable right, and there is no obligation to do any further annual work. Benson Min., etc. Co. v. Alta Min., etc. Co., (1892) 145 U. S. 428, 12 S. Ct. 877, 36 U. S. (L. ed.) 782. See also Aurora Hill Consol. Min. Co. v. Day Min. Co., (C. C. Nev. 1888) 24 Fed. 515.

But the filing of an application for a patent does not suspend the obligation to keep up the required work if the claimant, without paying the purchase money, permits his application to lapse. Gillis v. Downey, (C. C. A. 9th Cir. 1888) 85 Fed. 483, 50 U. S. App. 567, 59 C. C. A. 286.

Receipt obtained by fraud.—When a receipt has been obtained from the land office by fraud, the party is not relieved from the necessity of doing the representation work. Murray v. Poligase, (1909) 23 Mont. 401, 59 Pac. 430.

Character of work required.—This section does not specify the kind of labor, and labor expended in extracting ore from the claim is within the requirement. It is only when labor is performed without the boundaries of the claim that its character becomes material, and in that case it must tend to the development or improvement of the claim or it will not count. Wailers v. Davies, (C. C. Nev. 1907) 158 Fed. 667, affirmed (C. C. A. 9th Cir. 1908) 164 Fed. 397, 90 C. C. A. 385.

Discretion as to method of work.—Where a mining locator does work in good faith for the purpose of developing a mine, in strict compliance with the statute, a court cannot substitute its own judgment as to the wisdom and expediency of the method employed in the development in place of the owner's. Gear v. Ford, (1906) 4 Cal. App. 556, 88 Pac. 600.

Valuation of work.—The amount of money paid is not the only method of establishing the fact that the annual assessment work, as required by law, has been fully performed, but it is an important factor in that direction, and is admissible in evidence, and tends directly to show the good faith of the party. Whalen (Consol. Copper Min. Co. v. Whalen, (C. C. Nev. 1904) 127 Fed. 611.

Where, in an action in support of an adverse claim to a mining location, qualification for which was based on the fact that the reasonable value of assessment work done by plaintiffs for the year 1902 was at least $100, it was held that such proof was not nullified by other evidence that the work was done in seven and one-half days by three men, working together; that the going wages for such work was five dollars per day per man; and that miner's wages were $5.50 per day. Stolp v. Treasury Gold Min. Co., (1908) 23 Wash. 619, 80 Pac. 817.

The labor must really and actually be of the value of one hundred dollars. Twenty days' work under a local regulation providing that "in doing all assessment work in this district there shall be allowed five dollars per day," was held to be insufficient when the labor performed was shown to have been really worth an amount greatly less than one hundred dollars. Woody v. Bernard, (1901) 69 Ark. 579, 55 S. W. 100. See also Penn v. Oldhauber, (1900) 24 Mont. 287, 61 Pac. 649.

That $400 had been paid for excavating shafts on four claims, was held a compliance with the statute, when it appeared that the shafts exceeded in dimensions the requirements of the local rules as to what work should constitute the regular assessment work of the district, and that the remoteness of the mines and lack of facilities for doing the work would increase the expense and trouble, when there was nothing in the evidence justifying the inference that there was any intention to evade the law or come short of its requirements by the mine owner or by the men whom he employed to do the work. Wright v. Killian, (1901) 152 Cal. 56, 94 Pac. 98.

More proof of the expenditure of $100 is not of itself sufficient, but it furnishes an element tending strongly to establish the good faith of the owner. One of the main tests of determining this question is not what was paid for work, or the contract price, but whether or not the labor, work, and improvements were reasonably worth the said sum of one hundred dollars." McCulloch v. Murphy, (C. C. Nev. 1903) 125 Fed. 142.

Claims held in common.—When several claims are held in common, necessary work to keep them all alive may be done on one of them. The expenditure of labor or money must equal in value that which would be required if all the claims were separate or independent, and the claims must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them. Chambers v. Harrington, (1884) 111 U. S. 350, 4 S. Ct. 428, 28 U. S. (L. ed.) 452. See also St. Louis Smelting, etc. Co. v. Kemp, (1881) 104 U. S. 636, 26 U. S. (L. ed.) 875; Jackson v. Roby, (1883) 109 U. S. 440, 3 S. Ct. 301, 27 U. S. (L. ed.) 990; Mt. Diablo Mill, etc., Co. v. Callson, (1879) 5 Sawy. 439, 17 Fed. Cas. No. 9,886; Gird v. California Oil Co., (S. D. Cal. 1894) 60 Fed. 531;

Work can be performed on one claim for the benefit of several when there is a community of interest in all the claims for the benefit of which such work is done. Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co., (1902) 30 Colo. 431, 71 Pac. 389.

Where sufficient annual assessment work is done on a particular claim to represent such claim, and contention is made by a junior locatior that the work was done for the purpose of representing several claims, and the court finds that it was sufficient to represent the particular claim, in determine the sufficiency of the work, the court will apply the labor shown to have been done to the particular claim upon which the work was done. Swanson v. Kettler, (1910) 17 Idaho 321, 105 Pac. 1059.

Improvements placed upon one of a group of contiguous claims for the purpose of aiding in the development of all and tending to such result may be considered in determining whether the annual labor for a given year has been done upon any one of such group. Before, however, such testimony can be considered in aid of any one claim, there must be sufficient testimony as to the other claims to enable the jury to determine what proportion of such benefit is referable to the claim in question. Upton v. Santa Rita Min. Co., (1907) 14 N. M. 96, 89 Pac. 275.

When the testimony tends to show that several claims were selected and worked for development purposes, and that work on a tunnel and shaft was done to apply on the respective claims, and that the development work was a benefit to all the claims, it sustains a finding that the work done on the tunnel and shafts was beneficial to all the claims and a compliance with the statute. Fissure Min. Co. v. Old Susan Min. Co., (1900) 22 Utah 438, 63 Pac. 587.

The agreement of a covenat to bear his proportionate share of the expenses is not a representation and does not relieve him from the consequences of a failure to represent in order to protect the claim from relocation after the time for representation has expired. Saunders v. Mackey, (1885) 5 Mont. 223, 6 Pac. 381.

Work done by claimant's grantor.—Work done by any one of the grantors of a claimant, whether holding the legal or equitable title during the performance of the work done in the interest of the claim, is available to preserve the claim. Jupiter Min. Co. v. Bodie Consol. Min. Co., (C. C. Cal. 1881) 11 Fed. 666.

Work done by stockholder of corporation.—A stockholder in a mining company has such a beneficial interest in the corporate property that any mining work done by him on unpatented claims of the company must be counted as representation work, and if sufficient in amount, and done at the proper time, will prevent a forfeiture of the claims. Wailes v. Davies. (C. C. Nev. 1907) 135 Fed. 667, affirmed (C. C. A. 9th Cir. 1908) 164 Fed. 397, 90 C. C. A. 385.

Work done by receiver by order of court. —It appearing from the testimony that, during the year in which it was alleged that there had been a failure to do the necessary amount of work, the property involved was in litigation; that a receiver was appointed by the court to take possession; that an order was made pending the proceedings, authorizing and directing the receiver to borrow $1,500 for the purposes of preserving the property by performing the annual assessment work thereon for that year; that this money was obtained by the receiver, and expended for that purpose; that his report was presented to the court and an order was made approving the report of the receiver, it was held that the action of the court made out a prima facie case of a compliance with the statute. Whalen Consol. Copper Min. Co. v. Whalen, (C. C. Nev. 1904) 127 Fed. 611.

Work done by a mere trespasser or a stranger to the title will not inure to the benefit of the locator, but when parties at the instance of a co-owner have, in good faith, performed one hundred dollars' worth of labor or improvements, the mine cannot be subject to a relocation although it might result from judicial investigation that such parties had no legal or equitable title to any interest therein. Neabitt v. Delamar's Nevada Gold Min. Co. (1898) 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 71 A. S. R. 807, writ of error dismissed (1899) 177 U. S. 522, 20 S. Ct. 715, 44 U. S. (L. ed.) 872.

Work contributed gratuitously to the improvement of a mining claim by one who has no enforceable interest therein is properly computed in determining whether the requisite assessment work has been done or not. Anderson v. Caughy, (1906) 3 Cal. App. 22, 84 Pac. 223.

Work done outside of the claim or outside of any claim if done for the purpose and as a means of prospecting or developing the claim as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the bounds of the claim as shown. Mt. Diablo Mill, etc., Co. v. Callison, (1879) 5 Sawy. 439, 17 Fed. Cas. No. 8,886. See also Power v. Sla. (1900) 24 Mont. 243, 61 Pac. 468.
To "resume work," within the meaning of this section is to actually begin work anew with the bona fide intention of prosecuting it as required. McCormick v. Baldwin, (1894) 104 Cal. 237, 37 Pac. 902.

There must be a substantial effort to diligently complete the assessment work, after resuming work before relocation, to defeat a forfeiture in favor of the relocator. Hirschler v. McDermid, (1895) 18 Mont. 211, 40 Pac. 290. See also Honaker v. Martin, (1891) 11 Mont. 91, 27 Pac. 307.

Illustrations — The price paid for tools used in the development work of a mining claim cannot be considered as development work, although a reasonable compensation for their use may be so considered. Fredricks v. Klauer, (1908) 52 Ore. 110, 96 Pac. 679.

Service of watchman. — Where the original locator of a mining claim suspended work from 1900 until 1904, when an adverse location was made, it was held that money expended by such locator in employing a watchman for the premises was not a compliance with this section, requiring not less than one hundred dollars' worth of work to be performed or improvements made during each year. Gear v. Ford, (1906) 4 Cal. App. 556, 85 Pac. 600.

Where there was no machinery or fixtures at a mining claim which necessitated the employment of a watchman after the development work ceased, it was held that the worth of the actual labor of an employee in making an honest effort to discover minerals on the claim was the only credit to which the locator was entitled, but credit should be allowed for the actual labor which the employee performed. Fredricks v. Klauer, (1908) 52 Ore. 110, 96 Pac. 679.

Cutlery, dishes, tinware, groceries, provisions, tobacco, and bedclothing do not constitute an improvement of a mining claim, though candles included in the items and used at a tunnel on the claim may be credited as an expenditure. Fredricks v. Klauer, (1908) 52 Ore. 110, 96 Pac. 679.

Drainage. — Work done on a mining claim to withdraw water from the mine so that it could be examined by a prospective purchaser, not operating to develop or improve the mine, or to enable the co-owners performing the work to work the mine, was not assessment work required by this section to preserve the co-owners' right to the claim. Evalina Gold Min. Co. v. Yosemite Gold Min., etc., Co., (1911) 15 Cal. App. 714, 115 Pac. 946.

Iron rails for tunnel. — A locator of a mining claim provided iron rails and a part of which were used in laying a track in a tunnel on the claim, and the remaining rails were taken to another mine, under an agreement that they should be returned on demand. The cost of hauling the rails
used on the claim could not be segregated from the payment made. It was held that the value of the rails used on the claim must be estimated in determining the worth of the development work performed. The worth of rails laid on ties in a tunnel on a mining claim will be estimated in determining the value of the development work on the claim, but the payment for the rails will be disregarded. Fredricks v. Klausen, (1908) 52 Ore. 110, 96 Pac. 679.

The value of powder, fuse, candles, etc., used in development work of a mining claim will be estimated in determining the worth of the work. Fredricks v. Klausen, (1908) 52 Ore. 110, 96 Pac. 679.

Sharpening picks.—There may be circumstances that would justify the expense of sharpening picks as part of the costs of representation, but when counsel refused to inform the court whether he wished to show that the picks had been sharpened on the mining premises which were being worked, or whether they had been sharpened before they were taken to the premises, evidence of any such expense was properly rejected. Hirschler v. McKendricks, (1986) 16 Mont. 211, 40 Pac. 290.

The reasonable value of meals furnished men employed in doing development work on a mining claim, who received board in addition to their wages, should augment the earnings of the men employed, but the money expended in transporting the supplies is not a proper charge for development work. Fredricks v. Klausen, (1908) 52 Ore. 110, 96 Pac. 679.

Services and cost of horses.—While the reasonable compensation for the daily services of horses used in development work of a mining claim may be treated as labor performed in the development, the same is not true for the purchase of horses cannot be so viewed. Fredricks v. Klausen, (1908) 52 Ore. 110, 96 Pac. 679.

Personal expenses of the locator and the value of his time making unsuccessful efforts to obtain water to operate the mill, are not expenditures and value in the labor performed on the mine. Du Prat v. James, (1884) 65 Cal. 555, 4 Pac. 562.

Picking rock from the walls of a shaft or from the side or outcroppings of a ledge, in small quantities, from day to day, in making tests for the purpose of sampling it, breaking and examining it under a glass, crushing it in a mortar and baking it, and carrying it away and making assays of it, are not such work as the law will permit the claimant to be credited with upon his account for annual labor performed. Bishop v. Baisley, (1895) 28 Ore. 119, 41 Pac. 936.

The labor of a custodian in caring for and protecting a mine, and the value of the improvements thereof, from deterioration, loss, or injury while the mine is idle, may be included in the expenses for annual labor. Lockhart v. Rollins, (1889) 2 Idaho 540, 21 Pac. 413.

The building of a house off the claim, for the use of the miners while working the claim, cannot be considered as part of the annual labor or improvements. Remington v. Baudot, (1886) 6 Mont. 138, 9 Pac. 819.

Suspension of work.—On the 28th day of December, 1899, the original locators of the claim commenced to do the assessment work for that year. Laborers, provided with suitable tools for the purpose, worked continuously during the usual working hours of each day from the 28th of December up to Saturday evening, December 30th, when they left off work, leaving their tools on the ground intending to resume work Monday morning, which they did, and thereafter prosecuted it diligently until largely more than the assessment work required by law had been done. Acting on the assumption that the original location of the claim was forfeited, and that it was open to relocation, because the full amount of the assessment work for the year 1899 had not been done before the expiration of the year, the plaintiffs in error, a few minutes past midnight on the last day of December, 1899, entered upon and relocated the claim. It was held that there was no suspension of the work during this time and that there was no period of time during which the plaintiff could enter and make a valid location. Fee v. Durham, (C. C. A. 8th Cir. 1903) 121 Fed. 468, 57 C. C. A. 584; Plough v. Nelson, (Utah 1916) 161 Pac. 1154.

3. Forfeiture of Claim

The term "forfeiture" does not appear in the statute, but the courts employ it as a comprehensive word indicating a legal result flowing from a breach of condition subsequent, subject to which the locator acquires his title. The courts do not incline to the enforcement of this class of penalties, which have always been deemed, in law, odious. A forfeiture does not ensue from the mere failure to comply with the law. It requires the intervention of a third party and a relocation of the ground before any forfeiture can arise. When thereby such forfeiture becomes effective, the estate of the original locator is hopelessly lost, and there is no possibility of its being restored. Florence-Rae Copper Co. v. Kimbel, (1915) 85 Wash. 162, 147 Pac. 81.

Forfeiture of claim, through failure to do the proper annual assessment work, must be set up in the pleadings before it can be insisted upon. Cache Creek Min. Co. v. Brahenberg, (C. C. A. 9th Cir. 1914) 217 Fed. 240, 133 C. C. A. 234, wherein the allegations of forfeiture, although meagerly and imperfectly stated, were held sufficient to support a verdict and judgment.
VI. NOTICE TO CO-OWNER

Procedure.—When one cotenant asserts that he has divested his cotenant of his interest in the common property, the courts make examination of the circumstances under which the alleged divestiture has been brought about, and deny the claim, unless the facts exist authorizing the invocation of the provision, and the personal or constructive notice prescribed has been given in strict conformity with its requirements. O’Hanlon v. Ruby Gulch Min. Co., (1913) 48 Mont. 65, 135 Pac. 913.

When co-owner has not failed to contribute.—Publishing a forfeiture notice against a co-owner does not divest such co-owner of his title when it is not true that the alleged forfeiting owner has failed to contribute his proportion of the expenditures. Brundy v. Mayfield, (1895) 15 Mont. 201, 38 Pac. 1067.


As to money spent on two claims.—A notice of a co-owner is defective which does not specify the amount of money spent upon each of two claims nor the fact which might excuse expenditure upon each claim. Haynes v. Briscoe, (1901) 29 Colo. 137, 67 Pac. 156.

After the death of a co-owner a notice of forfeiture addressed to the deceased, “his heirs, administrator, and to all whom it may concern,” was held to be a sufficient notice to all parties interested. Elder v. Horseshoe Min., etc., Co., (1897) 9 S. D. 636, 70 N. W. 1060, 62 A. S. R. 895, affirmed (1904) 194 U. S. 243, 24 S. Ct. 643, 48 U. S. (L. ed.) 960.

Notice to co-owner.—A published notice of forfeiture is invalid as to a co-owner whose name does not appear therein. Ballard v. Golob, (1908) 34 Colo. 417, 83 Pac. 376.

Notice to grantee of co-owner.—Where notice to contribute for annual assessment work was addressed personally to the individuals supposed to be the owners in default, and was personally served on them, and was delivered immediately to their grantee under a prior unrecorded deed, it was sufficient to forfeit the rights of their grantee, the co-owners serving the notice having neither actual nor constructive notice of the conveyance. Evalina Gold Min. Co. v. Yosemitc Gold Min., etc., Co., (1911) 15 Cal. App. 714, 115 Pac. 946.

Notice to minors, heirs, or lienholders.—The effect of a co-owner’s notice to all parties who might have any interest under the co-owner who is in default cuts off all such interests whether the parties claiming are minors, heirs, or lienholders.

One who does the assessment work on an association placer mining claim for which he is paid by one of the part owners has no right to enforce a forfeiture of the interest of another part owner for failure to contribute. Knickerbocker v. Halls, (C. C. A. 9th Cir. 1910) 177 Fed. 172, 100 C. C. A. 634.


Jury question.—Whether a prior location was forfeited as against an adverse location, and whether work was done for the purpose of developing the claim or was adapted to that purpose, are questions of fact. Gear v. Ford, (1906) 4 Cal. App. 556, 88 Pac. 600.

One who does a mining claim is such as to benefit or develop other claims and so satisfy the requirement as to development of such claims is a question of fact. Big Three Min., etc., Co. v. Hamilton, (1910) 157 Cal. 130, 107 Pac. 301, 137 A. S. R. 118.

Publication of notice—Computation of time. The phrase “for at least once a week for ninety days” should be rendered “at least once a week during ninety days”; that is to say, there shall be at least one publication in each week during that period. The ninety-day period begins with the first publication and is sufficient for the week beginning on that day; a publication on the following and each succeeding corresponding day of the week would constitute at least one publication each week while so continued. Elder v. Horseshoe Min., etc., Co., (1901) 16 S. D. 124, 87 N. W. 886, 104 A. S. R. 681, affirmed (1904) 194 U. S. 248, 24 S. Ct. 643, 48 U. S. (L. ed.) 960.

Waiver of prior personal notice. The publication of notice to a party owner of a mining claim to contribute to the cost of doing the assessment work thereon for the previous year under penalty of forfeiture of his interest under this section is a waiver of a prior personal notice, and the delinquent may make his contribution at any time within ninety days from such notice by publication. Knickerbocker v. Halla, (C. C. A. 9th Cir. 1910) 177 Fed. 172, 100 C. C. A. 634.

Proper parties to give notice. The beneficial owners of part interests in a mining claim are the proper parties to give the notice to a co-owner, to forfeit his interest for a failure to contribute to assessment work, although they have conveyed their interests in trust. Van Sice v. Rex Min. Co., (C. C. A. 8th Cir. 1908) 173 Fed. 905, 79 C. C. A. 557.

Notice by holder of inchoate title. The right to give notice of a claim for contribution is limited to a co-owner who has performed the labor. One who holds an inchoate title by virtue of a purchase at an execution sale and the receipt of the sheriff’s certificate is not a co-owner within the meaning of the statute, nor does the fact that he obtained the assignment of the other judgments which had been recovered against other owners of the mine make him a co-owner. Provision, providing as it does for the forfeiture of the rights of a co-owner, should be strictly construed. Turner v. Sawyer, (1893) 150 U. S. 578, 14 S. Ct. 192, 37 U. S. (L. ed.) 1189.

Notice of forfeiture as cloud upon title—Injunction pendente lite. The recording of the notice of forfeiture provided for in this section, with the affidavit of service, is hereafter, constitutes a cloud upon title, and such recording will be enjoined in an action to determine the right to claim or exist a forfeiture of interest in mining claims, pending final determina-


Insufficient personal notice.—In Pack v. Thompson, (C. C. A. 9th Cir. 1915) 223 Fed. 655, 139 C. C. A. 181, the personal notice required by this section was held insufficient, the court saying: “The notice served by Thomas W. Pack, for himself and his successors in interest, informed his co-owner, Thompson, that he (Pack) had expended during the years 1911 and 1912 the sum of $5,600 for labor and improvements upon 175 mining claims designated in the notice. The expenditure required by the statute for 175 mining claims for one year was $17,500, and for two years $35,000. The expenditure of $5,600 upon the mining claims designated in the notice was not the expenditure required by the statute, and was therefore clearly not sufficient to entitle Pack or his successor in interest to a forfeiture to himself or to the claims so designated. Thompson, in the claims mentioned in the notice, upon the failure of such delinquent to pay to Pack or his successor in interest his proportion of the sum of $5,600, namely, $706, for a one-eighth interest in the 175 claims. The only labor or improvement required by the statute which will entitle a co-owner doing the work or making the improvement to forfeiture from a delinquent co-owner of his interest is the expenditure of the full sum required by the statute, namely, not less than $100 for each claim. In order that the interest of a delinquent co-owner may be forfeited, it is essential that the entire work shall be performed by one or more of the co-owners claiming the forfeiture. Lindley on Mines, § 646, page 1622; The Golden and Cord Lode Mining Claims, 31 Land Dec. Dept. Int. 174, 181. The notice did not claim that the entire work required by the statute had been performed for the years 1911 and 1912. On the contrary, it conclusively appears from the notice that only a small proportion of the work required had been performed, and if the amount stated in the notice was all the work that had been performed on all of the claims, and it is so stated in the notice, they were then all subject to reclamation, and no interest was saved by a partial compliance with the statute.” See also Pack v. Carter, (C. C. A. 9th Cir. 1915) 223 Fed. 638, 139 C. C. A. 184; Pack v. Thompson, (C. C. A. 9th Cir. 1915) 223 Fed. 641, 642, 643, 646, 139 C. C. A. 157, 158, 159, 191.

Objection. An objection to the insufficiency of a notice to a co-owner can only be complained of by the delinquent and not by a party setting up a conflicting claim. Becker v. Pugh, (1895) 17 Col. 243, 29 Pac. 173.
VII. FORFEITURE OF INTEREST

Forfeiture of claim for failure to do work, and annotations under subdivision V, Annual Assessment Work, supra, this note, p. 543.

Constitutionality.—The provision for the extinguishment of the interest of a co-owner in a mining claim for his failure to contribute to the assessment work required thereby is constitutional and valid. Van Sice v. Ibeas Min. Co., (C. C. A. 8th Cir. 1909) 173 Fed. 905, 97 C. C. A. 887.

Scope of section.—Property situate in foreign country.—The provisions of this section respecting the rights of co-owners of mining claims where some of such owners have done all the assessment work thereon have no application to mining property situated in a foreign country. Gaines v. Chew, (E. D. Mo. 1909) 167 Fed. 636.

Personal responsibility after default.—Under this section where a co-owner of a mining claim fails to do his assessment work or fails to contribute his portion of the expenditure required in doing such work, his co-owners who have performed the labor may give such delinquent personal notice in writing or by publication, as provided in said statute, and if at the expiration of ninety days such delinquent should fail or refuse to contribute his proportion of such expenditure, his interest in the claim shall become the property of his co-owners who made such expenditures, and the defaulting co-owner is not personally responsible for any part of the assessment work, under the provisions of said section. Mclain v. Moore, (1910) 19 Idaho 43, 112 Pac. 317.

Effect of deed to corporation.—The fact that after the owners of a part interest in a mining claim had done the assessment work thereon for a particular year they conveyed the claim to a corporation, taking in payment substantially all of its capital stock, which they retained, did not preclude the forfeiture of the interest of their co-owner for failure to contribute to the work by a notice given in accordance with this section and signed both by them and by the corporation, and the vesting of such interest in the corporation by virtue of their deed, which purported to convey the entire claim. Badger Gold Min., etc. v. Stockton Gold, etc., Min. Co., (C. C. Ore. 1905) 139 Fed. 838.

Tender of contribution to assessment work.—A part owner of a mining claim who holds an option to purchase the interest of a co-owner has the right to tender the contribution of the latter to the cost of assessment work to avoid a forfeiture. A part owner of a mining claim has implied authority to make a tender of the amount due from a co-owner as a contribution to the cost of assessment work to avoid a forfeiture. Kowsler v. Halls, (C. C. A. 9th Cir. 1910) 177 Fed. 179, 100 C. C. A. 634.

Abandonment.—The abandonment of a mining claim, the legal title to which is in the United States, by a part owner, does not vest any right or title to his interest in his co-owner. Badger Gold Min., etc., Co. v. Stockton Gold, etc., Min. Co., (C. C. Ore. 1905) 139 Fed. 838.


Effect of Act of Nov. 3, 1893.—The Act of Nov. 3, 1893, noted under the text, suspending the operation of this section as to the forfeiture for nonperformance of the annual assessment for that year, deprived a co-owner of the right to have the interest of his co-owner, who failed to contribute, forfeited. Royse v. Miller, (C. C. Nev. 1896) 76 Fed. 50.


VIII. RECORDS OF MINING CLAIMS


Likewise it does not require the recording of location notices, but leaves that subject open to legislation by the states or to regulation by the miners. Sturtevant v. Vogel, (C. C. A. 9th Cir. 1909) 167 Fed. 448, 93 C. C. A. 84.

Nor does it require that a notice shall be posted on the claim. It leaves this matter to the regulations of the local laws. The local laws generally require that a notice shall be posted, and, even in the absence of such a requirement, it is a proper aid to the description. Madeira v. Sonoma Magnesite Co., (1912) 20 Cal. App. 719, 130 Pac. 175.

This rule is subject to the condition that when a notice is required to be recorded it shall contain among other things a description of the property. Allen v. Dunlap, (1893) 24 Ore. 229, 33 Pac. 675. See also Kendall v. San Juan Silver Min. Co., (1892) 144 U. S. 658, 12 S. Ct. 779, 36 U. S. (L. ed.) 583, as to filing record within three months from the date of discovery.

Record distinguished from location.—A location and its record are different
things. The federal and some state statutes distinguish between them, the former even in authorizing local rules "governing the notice of" and the correctness and accuracy of recording. The statutory object is to protect and reward discoverers of mines. Discovery with intent to claim is the principal thing and vests an estate. Clark-Montana Realty Co. v. Butte, etc., Copper Co., (D. C. Mont. 1916) 233 Fed. 547.

Absence of local requirement.—In the absence of a state or district requirement the failure to record a notice of location does not affect the validity of the location. Kern County v. Lee, (1900) 129 Cal. 361, 61 Pac. 1124.

When no local rules or customs are shown to exist, it is not necessary to introduce or prove the posted notice. It is proper, however, to prove the recorded notice and for that purpose a copy may be introduced. Wilford v. Bell, (Cal. 1897) 49 Pac. 6.

This section does not require an affidavit.—It merely prescribes that the record, subsequently made, where one is required by the regulations of the mining district, shall contain the names of the locators, the date of the location, and such a description, by reference to some natural feature or permanent monument, as will identify the claim. Hoyt v. Russell, (1886) 117 U. S. 401, 6 S. Ct. 381, 29 U. S. (L. ed.) 914.

Manner of recording.—Provisions of a state statute requiring county recorders to perform duties performed before by the district mining recorders, and requiring the latter to deposit the books and records of their offices with the county recorders of their respective counties, do not conflict with this section. In re Monk, (1897) 16 U. S. 390, 29 U. S. (L. ed.) 435.

Record—Effect.—The effect to be given to the record of mining claims under this section is not greater than that which is given to the registration laws of the states. They do not exclude parcel proof of actual possession and the extent of that possession is prima facie evidence of title. Campbell v. Rankin, (1878) 99 U. S. 261, 25 U. S. (L. ed.) 435.

Sufficiency.—A record which does not set out either a natural object or permanent monument or any designation or mark by which the placer claim can be identified is not such a record as complies with the law. Fuller v. Harris, (D. C. Alaska 1887) 29 Fed. 814.

Accuracy of description on recorded notice.—In Mitchell v. Hutchinson, (1904) 142 Cal. 404, 76 Pac. 55, it appeared that a description of a location omitted the last course and distance, describing the next to the last distance as running to the place of beginning, instead of to the last monument. In a subsequent action to quiet title to the claim, it appeared that a straight line from the next to the last monument to the place of beginning would include all the land in controversy, and that the correctness and accuracy last given in the recorded description were followed it would reach the monument described, from which a straight line to the place of beginning furnished an exact description. It was held that the inaccuracy in the description in the recorded notice did not render the location invalid, but that the description was sufficient under the statute.

Presumptions as to local customs.—In the absence of proof of a local custom of miners requiring a notice of location of a mining claim to be posted or recorded, it must be presumed that the United States law, which does not require such posting or recording, was in force in the mining district in question at the time in question. Anderson v. Caughey, (1906) 5 Cal. App. 22, 84 Pac. 223.

IX. Relocation of Claims

In general—A claim is open to location in the same manner as if never located at all, unless work is resumed before the second location is made. Russell v. Brosseau, (1884) 65 Cal. 605, 4 Pac. 643. See also South End Min. Co. v. Tinney, (1894) 22 Nev. 19, 35 Pac. 38.

A relocation of a mining claim is not a discoverer of the mineral contained therein, but an appropriator thereof, and cannot hold the ground except on proof that the original locator had abandoned or forfeited his right by failure to comply with the mining laws. Zerros v. Vannini, (C. C. Nev. 1905) 134 Fed. 610, affirmed (C. C. A. 9th Cir. 1907) 150 Fed. 564, 80 C. C. A. 366.

This section provides that, upon a failure to comply with certain named conditions, the claim or mine shall be open to relocation. Although a locator finds distinctly marked on the surface a location, it does not necessarily follow therefrom that the location is still valid and subsisting. "The statute does not provide, and it cannot be contemplated, that he is to wait until by judicial proceedings it has become established that the prior location is invalid or has failed before he may make a location. He ought to be at liberty to make his location at once, and thereafter, in the manner provided in the statute, litigate, if necessary, the validity of the other as well as that of his own location." Del Monte Min., etc., Co. v. Last Chance Min., etc., Co., (1898) 171 U. S. 55, 18 S. Ct. 895, 43 U. S. (L. ed.) 72.

A claim of mining lands under a relocation is an implied admission of the validity of the location, but one who has attempted a relocation and then expressly renounced any claim under it, but who yet claimed a right in some other right which would entitle him to show that he
never attempted such relocation, is not necessarily precluded from showing that the original locator never made a location, but is, in fact, perpetrating a fraud upon the government. Dowdy v. T. Dowdy, (1911) 13 Ariz. 331, 114 Pac. 565.

Where the plaintiff's alleged lode claims were mostly reclaims of abandoned claims and he failed to show actual possession prior to the commencement of the action, the dying of the requisite assessment work, or that there existed within the described boundaries of any of the claims a vein or deposit of ore sufficiently valuable to pay the cost of extraction or the cost of reduction, it was held that the claims were invalid. Muchmore v. McCarty, (1906) 149 Cal. 605, 87 Pac. 85.

A mere failure to comply with the statutory requirement does not terminate the right of the locator, but the sole effect of the failure is to throw the land open to location by others, and, in the absence of such other location, the original claimant's right to resume work and to hold his claim remains, and the estate of the original claimant is not divested until there has been a peaceable entry for the purpose of relocation. Madison v. Octave Oil Co., (1908) 154 Cal. 768, 99 Pac. 176.

Location notice on relocation.—A location notice on a relocation is not void because it fails to state if the location was located in the whole or in part as abandoned property. Copper Queen Consol. Min. Co. v. Stratton, (1915) 17 Ariz. 127, 149 Pac. 389, wherein the court said: "The only restraint the statute places upon a relocation of the land after an original location has been made is such as prevents the relocator by his relocation from depriving the former locator of any of his rights. But when, as here, all of the rights of the original locator have been abandoned or forfeited, and no claim of assessment work, the original locator, his heirs, assigns, or legal representatives, and the contesting parties to the action concede that all rights that ever existed by reason of such prior location ceased to exist before any relocation of the ground was attempted, then it is clear that, under the statute and its unquestioned meaning, the land was open to relocation in the same manner as if no location of the same had ever been made when appellant's grantees commenced their location on January 1, 1905.

The land on that date was in character open, unappropriated, public mineral land, subject to location in the same manner as if it had never been located, and, being of such character, a location that was made in such manner as an original location is required to be made, was effective as such, and the validity of such location cannot be questioned except upon the same grounds that a location upon ground that has been the subject of a location of a location can be questioned. In order to complete a valid location of the ground in question the locators were not required to state if the whole or any part of the location was located as abandoned property, because they were not in fact locating the ground as abandoned, but were locating the ground in the same manner as other public mineral ground is located, that is, as an original location; and, in order to complete a valid location as such, the law did not require them to state in their location notice if the whole or any part of the location was located as abandoned property, in such a state of circumstances.

Time of entry for relocation.—An entry upon a mining claim before the owner of it is in default cannot be made for the purpose of making a provisional location, to be valid or worthless according as the owner fails or not to do the annual work subsequently. Slavonian Min. Co. v. Perasich, (C. C. Nev. 1881) 7 Fed. 331; Rooney v. Barnette, (C. C. A. 9th Cir. 1912) 200 Fed. 700, 119 C. C. A. 116. See McCann v. McMillan, (1900) 129 Cal. 350, 62 Pac. 31.

An entry by relocators cannot be made before the former location has expired. A location to be effective must be good at the time it is made. Belk v. Meaghar, (1881) 104 U. S. 279, 26 U. S. (L. ed.) 735; Swanson v. Kettler, (1910) 17 Idaho 321, 105 Pac. 1059; Lockhart v. Farrell, (1906) 31 Utah 155, 86 Pac. 1077; Slothower v. Hunter, (1906) 16 Wyo. 199, 88 Pac. 36.

In Malone v. Jackson, (C. C. A. 9th Cir. 1905) 137 Fed. 878, 70 C. C. A. 216, it appeared that the plaintiff located the mining claim in controversy on Jan. 1, 1899, which had been previously located in December, 1898. The plaintiff remained in actual possession from 1900 to 1902, but made no relocation of the claim after Jan. 1, 1900, when the original locator's rights expired for failure to do required assessment work, and on Jan. 1, 1902, the defendant entered peaceably and relocated the claim. It was held that the defendant's relocation gave him the exclusive right of possession for one year from the date of his location.

During performance of labor by locator.—A claim is not subject to relocation as long as a locator or his successor in interest continues to perform the labor or make the improvements upon the same required by this statute. A failure to file with the county recorder an affidavit of annual labor and improvements as required by the state statute does not work a forfeiture. Murray Hill Min., etc., Co. v. Havenor, (1901) 24 Utah 73, 66 Pac. 762.

Relocation in night when original locators not working.—Where the locators of a claim were at work thereon on the 31st of December, and that night left their tools in the cut, intending to resume work the next morning at the usual time in which they did, their possession and work were in law continuous, and one who made
a relocation in the night, during their absence, was a trespasser, and acquired no rights by the relocation. Willitt v. Baker, (W. D. Ark. 1904) 133 Fed. 937.

White locator in actual possession. — A relocation upon the failure to perform the annual work may be made upon entry of the relocation properly and in good faith, though the original locator may be in actual possession of the premises. Du Pratt v. James, (1884) 65 Cal. 655, 4 Pac. 662.

But there can be no relocation where the claim is in the actual possession of persons who have done the requisite amount of assessment work under an insufficient location. Ware v. White, (1897) 81 Ark. 220, 108 S. W. 811.

Abandonment. — A senior locator, possession of a paramount right in mineral land for which a patent is sought, may abandon such right, and thereby render the ground covered by such location subject to relocation before the expiration of the period prescribed by statute, within which the annual labor must be performed. Swanson v. Kettler, (1909) 17 Idaho 321, 105 Pac. 1059.

Privity of earlier and later claimants. — Where a mineral claimant abandons his claim and another claimant makes a relocation in hostility to the prior locator there is no privity between the two. Burke v. Southern Pac. R. Co., (1914) 234 U. S. 669, 34 S. Ct. 907, 58 U. S. (L. ed.) 1827.

Relocation of patented claims. — Where the validity of mining claims is established by a patent therefor, until abandonment thereof by the patentees, so as to render the premises a part of the unappropriated public domain, no location can be made therein by other parties. Sharkey v. Cudiani, (1906) 48 Ore. 112, 85 Pac. 219, 7 L. R. A. (N. S.) 791.

Junior location. — Upon failure to do the requisite amount of annual developmental work, a junior locator of a cross vein cannot acquire a right to the forfeited claim except by taking the same action under existing laws that other persons would be required to take if they desired to appropriate it as abandoned property. O'camp v. Crystal River Min. Co., (C. C. A. 8th Cir. 1893) 58 Fed. 293, 19 U. S. App. 18, 7 C. C. A. 233.

A junior location made on ground covered by a valid existing senior location will not prevail over a relocation on the same ground, made after a failure to do the work on the senior location. Nash v. McNamara, (1905) 30 Nev. 114, 93 Pac. 405, 133 A. S. R. 694, 16 L. R. A. (N. S.) 168.

Resumption of work by original owner before relocation perfected. — A failure to do the requisite amount of annual developmental work simply renders the claim subject to a relocation by third parties after the lapse of the year and not before and such right of relocation is itself lost and the original owner is restored to all of his rights if he enters without forces and resumes work before the relocation is perfected by any third party. O'camp v. Crystal River Min. Co., (C. C. A. 8th Cir. 1893) 58 Fed. 293, 19 U. S. App. 18, 7 C. C. A. 233; Worthen v. Sidway, (1904) 79 Ark. 515, 90 S. W. 777; Thornton v. Kaufman, (1910) 40 Mont. 282, 106 Pac. 361, 135 A. S. R. 618. See also Belk v. Meagher, (1891) 104 U. S. 279, 26 U. S. (L. ed.) 736; Preston v. Hunter, (C. C. A. 9th Cir. 1896) 67 Fed. 986, 29 U. S. App. 321, 15 C. C. A. 145; Gorre v. Russell, (1879) 3 Mont. 358.

When a locator has failed to perform the assessment work for any given year, but has subsequently performed the work before any intervening rights by other parties have been acquired, his rights in the claim have been revived. Justice Min. Co. v. Barclay, (C. C. Nev. 1897) 92 Fed. 554.

Rights of relocation against trespassers. — A relocation, after entry for the purpose of beginning annual work, would have the same effect as an original locator — the same right to hold the ground against trespassers — without complying with the local rules and customs, or with the Acts of Congress; and after a forfeiture incurred, an original locator cannot put himself in a position to maintain ejectment, except by actually resuming work before an entry by a person seeking to relocate the forfeiture, and an outer by such person. St. Louis, Min. & C. R. Co. v. Persch, (C. C. Nev. 1881) 7 Fed. 331.

Cotenancy as affected by relocation. — A cotenant is incapable of performing any act of hostility to his cotenant in reference to the joint estate, and acts of relocation do not terminate the fiduciary relation between them. An adequate method is provided by this section for enforcing the rights of co-owners in respect to the development of mining property. McCarthy v. Speed, (1896) 11 S. D. 309, 77 N. W. 390, 50 L. R. A. 184, writ of error dismissed (1901) 181 U. S. 269, 21 S. Ct. 613, 45 U. S. (L. ed.) 855, the court saying that as the record stood, the United States Supreme Court would be justified in holding that the state court denied a right or title specially set up as secured by the statute, when it determined this particular question on the general principles of law recognized as prevailing in South Dakota.

Relocation by agent of original owner. — An agent who has agreed with his principal to perform work upon a claim as the assessment work for a certain year cannot, after failing to perform the work, relocate the ground and profit by a violation of the confidence which had been placed in him. R. v. Benedict, (1898) 18 Utah 153, 55 Pac. 559.

Amendment of relocation certificate. — Where the defendants, claiming a forfeiture of a location by the plaintiff of
a mining claim, relocated thereon, defects in their location certificate could not be cured, as against him, by filing amended certificates after he had re-entered the claim. Field v. Tanner, (1904) 32 Colo. 275, 75 Pac. 916.

Burden of proof.—Where one undertakes to make a relocation of the claim the burden devolves upon him to show that the rights of the prior locators or their assignees have expired by abandonment, forfeiture or for other causes. Richen v. Davis, (1915) 76 Ore. 311, 148 Pac. 1130.

One basing a relocation of a mining claim on the existence of a forfeiture of the original location by reason of neglect to make the required improvement has the burden of establishing the forfeiture, which is prima facie done by proof that no labor was performed within the limits of the original claim during a specified year, and the burden then shifts to the original locator to show that work performed on an adjacent claim inured to the benefit of the claim in controversy. Hirschler v. McKendricks, (1895) 16 Mont. 211, 40 Pac. 290.

Illustration.—At one o'clock A. M. on January the first a relocator posted his notice, but did not mark out his boundaries until January 5th. In the meantime, at the usual hour of commencing work on the 1st of January the original locator resumed labor on his claim and did ten dollars’ worth of work on it up to the 5th of January, and afterwards during that year performed labor to the amount of two hundred dollars more. It was held that posting the notice, without marking the boundaries of the claim before resumption of work by the original locator, conferred no rights. Pharis v. Muldoon, (1888) 75 Cal. 284, 17 Pac. 70.

Sec. 2325. [Patents for mineral lands, how obtained.] A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land-office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars’ worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct,
with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. Provided, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits:

And provided, That this section shall apply to all applications now pending for patents to mineral lands. [R. S.]

The provisions were added to the section by Act of Jan. 22, 1880, ch. 9, § 1, 21 Stat. L. 61.

Object and scope.—This section prescribes the manner and conditions under which a patent for a mining claim may be obtained. McKinley v. Wheeler, (1888) 130 U. S. 630, 9 S. Ct. 638, 32 U. S. (L. ed.) 1048; U. S. v. Fickett, (C. C. A. 9th Cir. 1913) 205 Fed. 134, 123 C. C. A. 366.

The sections relating to proceedings upon application for a patent are for the purpose of enabling claimants to obtain a final grant of the legal title from the government for ground previously acquired and to avoid any necessity of doing the annual work. Nash v. McNamara, (1908) 30 Nev. 114, 93 Pac. 405, 133 A. S. R. 694, 16 L. R. A. (N. S.) 168.

It was also the purpose of these provisions to have all conflicts, so far as practicable, settled by the issuance of the patent, through the adverse proceedings therein provided for. Lee v. Stahl, (1859) 13 Colo. 174, 22 Pac. 436. See also Marshall Silver Min. Co. v. Kirtley, (1889) 12 Colo. 410, 21 Pac. 492.

Placer patent.—This section relates to lode claims. But the proceedings therein set forth, notwithstanding the differences between the rights of the lode and placer claimant as to the quantity of land, the price per acre, conformity to public surveys, and other minor matters, apply to applications for a placer patent. Northern Pac. R. Co. v. Cannon, (C. C. A. 9th Cir. 1893) 54 Fed. 252, 7 U. S. App. 507, 4 C. C. A. 303.

Existing claims.—This section refers to a present, tangible claim, existing at some time during the 60-day period of publication. Poore v. Kaufman, (1911) 44 Mont. 248, 119 Pac. 786.

Construction.—Failure to comply with statute.—With respect to the clause of this section which provides that "thereafter no objection from third parties to issuance of a patent shall be held sufficient, except it be shown that the applicant has failed to comply with the terms of this chapter," it has been held that all that it covers is the right to anybody to come in and enter his protest or objection; in other words, to say to the officers of the government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination by such officers to see if the terms have in fact been complied with. Poore v. Kaufman, (1911) 44 Mont. 248, 119 Pac. 785.

But he does not appear as a party asserting his own right and such a protest does not revivify rights lost by a failure to adverse. Wright v. Dubois, (C. C. Colo. 1854) 21 Fed. 492.


The proceeding is in the nature of a proceeding in rem, and is binding upon all the world, so far as any unpresented adverse claim is concerned. Hamilton v. Southern Nevada Gold, etc., Min. Co., (C. C. Nev. 1897) 33 Fed. 502.

Mining claim how acquired.—Congress
has provided how a mining claim can be acquired. In general, it may be acquired by a discovery of mineral, particularly of gold, silver, or copper, and the like, upon the public lands, and by staking the same off or marking it upon the ground, so that the boundaries may be plainly designated and readily seen and defined. The right of continuous occupation may be maintained by keeping up the assessment work prescribed by law, and this without incurring the obligation towards the government of buying and paying for the land. When an individual entitled to the benefit of the statute has made location in accordance therewith, and gone into possession, he is said to be the owner and in possession of the mining claim thus located. Such a claim, when perfected, is declared to be "property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent." Trinity Gold Dredging, etc., Co. v. Beaundry, (C. C. A. 9th Cir. 1915) 223 Fed. 739, 139 C. C. A. 269.

Jurisdiction of land department.—The jurisdiction of the land office on the filing of an application for a patent to public mineral lands is exclusive, and can be stayed only by the filing of an adverse claim as provided by R. S. sec. 2320. Warner v. Cowan, (1910) 13 Ariz. 42, 108 Pac. 233.

The test of the jurisdiction of the land department is whether or not it has the power to enter upon the inquiry, and not whether its conclusions were right or wrong. Work Min., etc., Co. v. Doctor Jack Pot Min. Co., (C. C. A. 8th Cir. 1912) 194 Fed. 620, 114 C. C. A. 392.

Sufficiency of work.—The sufficiency of the work performed and improvements made upon each claim, both as to amount and character, is a matter to be determined by the surveyor-general from his own observation, or from the testimony of parties having knowledge of the subject; and where there are no fraudulent representations to him respecting them by the patentee, his determination, unless corrected by the land department before patent, must be taken as conclusive. U. S. v. Iron Silver Min. Co., (1888) 128 U. S. 873, 9 S. Ct. 196, 32 U. S. (L. ed.) 571. See also U. S. v. King, (C. C. A. 9th Cir. 1897) 83 Fed. 188, 49 U. S. App. 542, 27 C. C. A. 509.

Boundaries.—The question as to what are the true boundaries of a claim is a question of fact, coming properly within the jurisdiction of the land department. Golden Reward Min. Co. v. Buxton Min. Co., (C. C. S. D. 1897) 79 Fed. 868.

Quotation of jurisdiction.—It may be shown that the land officers were without jurisdiction to issue the patent. St. Louis Smelting, etc., Co. v. Kemp, (1881) 104 U. S. 638, 26 U. S. (L. ed.) 675; Chireno Quartz Min. Co. v. Oliver, (1888) 75 Cal. 194, 16 Pac. 780, 7 A. S. R. 143.

Patent—Purpose and effect.—A patent from the government would be of but little, if any, use or effect, if the duty devolved upon the patentee whenever the validity of his claim is called in question, to prove that each separate location was properly made in strict conformity with the law. One purpose, object and effect of procuring a patent is to at once and forever settle this question, and set at rest all further contests in relation to such matters. Carson City Gold, etc., Min. Co. v. North Star Min. Co., (C. C. A. 9th Cir. 1897) 83 Fed. 685, 46 U. S. App. 724, 28 C. C. A. 333.

If questions relating to the boundaries of the location, the marking of them, the discovery of a vein, lode or ledge within them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim, as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based." Doe v. Waterloo Min. Co., (S. D. Cal. 1893) 54 Fed. 935.

Purpose of location or claim.—The land must not only be located for valuable deposits, but claimed for such deposits, when patent is asked. If the sole purpose of location, or making claim to the land, when patent is sought, is to secure valuable water power or timber, a claimant is not entitled to it under the mineral land law. U. S. v. Lavenson, (W. D. Wash. 1913) 206 Fed. 755.


Prior to the Act of May 10, 1872, a locator was entitled to one ledge only, and a patent containing the provision "together with all other veins, lodes, ledges, or deposits, throughout their entire length, as aforesaid, the tops or apexes of which lie inside of the exterior lines of said survey, as against all persons claiming under location made upon such other veins, lodes, ledges, or deposits subsequent to May 10, 1872," excludes from the grant to the locators any other ledge, located by parties other than the grantees, prior to May 10, 1872. Eclipse Gold, etc., Min. Co. v. Spring, (1881) 50 Cal. 898.

Conflicting patents.—When two parties have patents from the government, and the question is as to the superiority of the title under those patents, if this depends upon extrinsic facts not shown by the patents themselves, it is competent, in any judicial proceeding, inquiring of the question of superiority of title arises, to establish it by proof of these facts. Iron

Record as to co-owner.—The record on an application for a patent need not show that a co-owner had lost his title to the ground by the publication of a notice, as required by R. S. sec. 2324, supra, p. 533, nor need it show that the co-owner had not contributed his part in labor or money to represent the claim. Riste v. Morton, (1897) 20 Mont. 139, 49 Pac. 856.

Validity of patent.—If a patent be obtained by fraud and trickery practiced in the land office without notice to others who are the beneficial owners of the property in accordance with the laws of the United States, and without their knowledge, a court of equity can afford relief. South End Min. Co. v. Tinney, (1894) 22 Nev. 19, 35 Pac. 59.

Right of government.—The government has the same right to demand a cancellation of a patent when obtained by fraud or fraudulent representation as a private individual when a conveyance of his land is obtained in like manner. The burden of proof in such cases is upon the government. The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the location of public lands, can only be overcome by clear and convincing proof. U. S. v. Iron Silver Min. Co., (1888) 128 U. S. 673, 9 S. Ct. 195, 32 U. S. (L. ed.) 571.

Burden of proof.—In a suit to cancel a patent to a mining claim on the ground that the patent had been obtained by means of false and fraudulent representations, the burden of proof is upon the government. The presumption that the patent was correctly issued can only be overcome by clear and convincing proof of the false and fraudulent representations whereby the patent was secured. U. S. v. King, (C. C. A. 9th Cir. 1897) 83 Fed. 188, 49 U. S. App. 542, 27 C. C. A. 509.

Statutory requirements.—If the statute has not been complied with, and a patent is issued without authority of law, no substantial title is acquired. Rose v. Richmond Min. Co., (1882) 17 Nev. 25, 27 Pac. 1105.

Conclusiveness of patent.—"A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within the scope of its authority, that is when it has jurisdiction under the law to convey the land. In that court the patent is unassailable for mere errors of judgment," St. Louis Smelting, etc., Co. v. Kemp, (1881) 104 U. S. 530, 26 U. S. (L. ed.) 878. See also Bunker Hill, etc., Min., etc., Co. v. Empire State-Idaho Min., etc., Co., (C. C. A. 9th Cir. 1901) 109 Fed. 538, 48 C. C. A. 695; (C. C. A. 9th Cir. 1902) 114 Fed. 420, 52 C. C. A. 222; Work Min., etc., Co. v. Doctor Jack Pot Min. Co., (C. C. A. 8th Cir. 1912) 194 Fed. 620, 114 C. C. A. 392; Fox v. Mackay, (1881) 1 Alaska 392; Newcastle Min. Co. v. Seatter, (1910) 4 Alaska 95; Poire v. Wells, (1892) 6 Colo. 408; Hunt v. Eureka Gulch Min. Co., (1890) 14 Colo. 431, 24 Pac. 550.


The issuance of a patent for a mining claim affords a conclusive presumption that there was a discovery vein therein, that the land was properly located and that all preliminary and preceding acts necessary to authorize and justify the issuance of the patent had been performed as the law required. Stewart Min. Co. v. Bourne, (C. C. A. 9th Cir. 1914) 213 Fed. 327, 124 C. C. A. 123.

It is a common and approved practice to obtain patents from the government to mining claims in the names of the original locators, without regard to intervening changes in right or ownership, and the fact that a corporation grantee of certain owners proceeded upon an application made by prior owners, and obtained a patent running to them or their heirs and assigns, did not estop it from asserting that the interest of one of such patentees had been forfeited under the statute, for veins in its grantors prior to the patent. Van Sice v. Ibeix Min. Co., (C. C. A. 8th Cir. 1909) 173 Fed. 895, 97 C. C. A. 557.

Where an application for a patent was made by the owner of one of two overlapping claims, the issuance of a patent...
to him including the area within the overlapping boundaries is necessarily a determination of the patentee at the time of the proceedings such area was a part of that claim; but it does not necessarily determine the priority of location, and, where it does not appear that such question was put in issue and actually decided in the course of the patent proceedings, the owner of the other claim is not estopped from asserting the priority of his claim in a subsequent controversy respecting extralateral rights, which were not involved in the proceedings for a patent. U. S. Mining Co. v. Lawson, (C. C. A. 8th Cir. 1904) 134 Fed. 769, 67 C. C. A. 587, affirmed (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

A patent to a mining claim raises the conclusive presumption that there is an apex of a vein within the patented ground, but there is no presumption that such vein embraces ore without the side lines of the claim, or that the vein presumed is the one in dispute. Grand Cent. Min. Co. v. Mammoth Min. Co., (1906) 29 Utah 409, 112 Pac. 646, 56 L. R. A. 158.


"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in that process while he had in the land department before its issuance, nor can be called upon to explain every irregularity or even impropriety in the process by which the patent is procured. Especially is it true that where the United States has not received any damage or injury, and can obtain no advantage from the suit instituted by it, the conduct of the parties themselves, for whose benefit such action may be brought, must itself be so free from fault or neglect as to authorize them to come, with clean hands, to ask the use of the government to redress any wrong which may have been done to them." U. S. v. Marshall Silver Min. Co., (1899) 129 U. S. 579, 9 S. Ct. 345, 32 U. S. (L. ed.) 734.

End lines not in fact parallel.—The rights of a patentee are to be determined by the terms of his patent, and when the description in a patent gives it parallel end lines, and grants the right to follow all lodes on their dip outside of the side lines whose apex is within the surface lines of the claim, the courts cannot go behind it in a collateral proceeding, though the end lines are not in fact parallel. Waterman v. Dore (C. C. A. 9th Cir. 1897) 82 Fed. 45, 48 U. S. App. 411, 27 C. C. A. 50.

Lack of jurisdiction.— But where there was no jurisdiction to dispose of the lands, a patent may be collaterally impeached in any action and its operation as a conveyance defeated; that is if the law did not provide for selling the lands, or that they had been reserved for sale or dedicated to special purposes, or had been previously transferred to others. St. Louis Smelting, etc., Co. v. Kemp, (1881) 104 U. S. 636, 26 U. S. (L. ed.) 875.

Void patent.— So also, a patent void on its face may be impeached collaterally in a court of law. Poire v. Wells, (1882) 6 Colo. 406.

Interest conveyed by patent.—This section and R. S. secs. 2310 and 2322, supra, pp. 509, 523, tend to indicate that the patent when issued is a grant of land with all the rights incident to common-law ownership. St. Louis Min., etc., Co. v. Montana Min. Co. (C. C. A. 9th Cir. 1902) 113 Fed. 900, 51 C. C. A. 530, 64 L. R. A. 207.

"Patents issued since the passage of the Act of 1872 convey, under that Act, to the grantees, all the surface included within the lines of their location, and all veins, lodes, and lodes throughout their entire depth, the top or apex of which lies inside such surface lines, where no adverse rights existed on the 10th of May, 1872." Blake v. Butte Silver Min. Co., 2 Utah 54. See also New Dunderberg Min. Co. v. Old, (C. C. A. 8th Cir. 1897) 79 Fed. 598, 49 U. S. App. 201, 25 C. C. A. 116.

A valid location is equivalent to a contract of purchase. The location, together with the necessary work, is the purchase, and the patent is the evidence of the title so acquired. The location, therefore, has the effect of a grant from the government to the locator, and this grant cannot be defeated or abridged by an unauthorized exception contained in the patent, for the patent must always be in accordance with the consummation of the grant evidenced by a valid location. Talbott v. King, (1886) 6 Mont. 76, 9 Pac. 434.

Adverse claim.— Failure to file.— A failure to file an adverse claim is a waiver of all rights. Nesbitt v. Delamar's Nevada Gold Min. Co., (1898) 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 A. S. R. 907. See also Lee v. Stahl, (1886) 9 Colo. 205, 11 Pac. 77.

Preemptions.— When no adverse claim within the time prescribed is filed, it must be assumed that the applicant is entitled to a patent, and that no adverse claim exists. Lily Min. Co. v. Kellogg, (1903) 27 Utah 111, 74 Pac. 518; Lockhart v. Farrell, (1906) 31 Utah 155, 96 Pac. 1077. See also Lavagnino v. Uhlig, (1908) 26 Utah 1, 71 Pac. 1046, 99 A. S. R. 808.
By one who had received a patent.—The provision creating an adverse claim was not intended to affect a party who, before the publication first required, had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States; had established title to the land claimed by him, and received his patent; and was reposing quietly upon its sufficiency and validity. Iron Silver Min. Co. v. Campbell, (1890) 135 U. S. 286, 10 S. Ct. 765, 34 U. S. (L. ed.) 155.

Patent pending.—Nor is one who has regularly applied for a patent compelled, in order to preserve his rights, to protest against any subsequent application for the same ground while his own application is still pending in the land department. Steel v. Gold Lead, etc., Min. Co., (1883) 18 Nev. 80, 1 Pac. 448.

A purchaser at an auction sale of the interest of a locator, pending an application for a patent, purchases only the present interest of the judgment debtor, and is an adverse claimant against such judgment debtor, with a right to file his claim under the statute; if the defendant goes on and procures the title from the United States, the patent vests in him an absolute title. Hamilton v. Southern Nevada Gold, etc., Co., (C. C. Nev. 1887) 33 Fed. 562.

May set up a trust.—The provision that if no adverse claim shall have been filed, it shall be assumed that the applicant is entitled to a patent, does not prevent a party from maintaining a bill in equity to have a patentee declared a trustee for the use of the plaintiff. Turner v. Sawyer, (1893) 150 U. S. 578, 14 S. Ct. 192, 37 U. S. (L. ed.) 1189. See also Ducie v. Ford, (1891) 138 U. S. 587, 11 S. Ct. 417, 34 U. S. (L. ed.) 1091; Figger v. Seymour, (1897) 23 Colo. 542, 49 Pac. 30.

Tunnel site claim.—The claimant of a tunnel site is not required to file an adverse claim and submit his rights in the tunnel claims to cross adjudication by the court. When it is made upon the filing of applications for patents to those claims when his rights are at that time uncertain, contingent, and intangible. Creede, etc., Min., etc., Co. v. Uinta Tunnel Min., etc., Co., (1908) 190 U. S. 337, 25 S. Ct. 268, 49 U. S. (L. ed.) 501, affirming (C. C. A. 8th Cir. 1902) 119 Fed. 164, 57 C. C. A. 200.


"When the claim to a tunnel site has been located before the entry of conflicting lode claims, which have subsequently passed to patents, the question whether discoveries of mineral in place were made in the lode claims before or after the location of the claim to the tunnel site was perfected is open to determination by means of the testimony of witnesses and other competent evidence dehors the patents in any litigation between the parties involving their conflicting claims." Uinta Tunnel Min., etc., Co. v. Creede, etc., Min., etc., Co., (C. C. A. 8th Cir. 1902) 119 Fed. 164, 57 C. C. A. 200, affirmed (1905) 190 U. S. 337, 25 S. Ct. 266, 49 U. S. (L. ed.) 501.


Controversies between co-owners.—The provision for the filing of adverse claims on the application for a patent to a mining claim has reference to adverse claims arising from independent and conflicting locations, and not to a controversy between co-owners or others claiming under the same location; and the fact that one owner did not adverse the application of his co-owner does not affect his right to establish and enforce a trust in the patented claim. Stevens v. Grand Cent. Min. Co., (C. C. A. 8th Cir. 1904) 153 Fed. 28, 67 C. C. A. 284.

Town lot owners.—The owner of a town lot, unpatented, can adverse the application of one applying for a patent to a lode claim; any person having a claim, other than a patented one, adverse to the applicant for patent, may adverse the same. Young v. Goldsencen, (D. C. Alaska 1890) 97 Fed. 303. See also Bonner v. Meikle, (C. C. Nev. 1897) 82 Fed. 697. But see Behrends v. Goldsteem, (1902) 1 Alaska 518.

The owners of town lots can adverse the application of one applying for a patent to a mining claim though neither the town authorities nor the owners have taken any steps to secure title from the government to the land occupied by them. Bonner v. Meikle, (C. C. Nev. 1897) 82 Fed. 697.

"In determining the extent of the lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect, but they must at that time be known to contain minerals of the extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent." Bonner v. Meikle, (C. C. Nev. 1897) 82 Fed. 697.

Placer claimant.—A placer claimant may adverse an application for a patent of a lode claim. Clipper Min. Co. v. Eli Min.

The proceedings set forth in this section apply to applications for placer patents, notwithstanding the existence between the rights of the lode and the placer claimant, as to the quantity of land, the price per acre, conformity to public surveys, and other minor matters. Northern Pac. R. Co. v. Cannon, (C. C. A. 9th Cir. 1893) 54 Fed. 292; 7 U. S. App. 507, 4 C. C. A. 303.

Notice.—The notices required to be given by an applicant for a patent for a mining claim are in effect a summons to all adverse claimants who are required to assert their right by filing an adverse within the sixty days' publication of notice as provided by this section. Healey v. Rupp, (1906) 37 Colo. 25, 86 Pac. 1015.


Publication.—The publication of the notice is process, and brings all adverse claimants into court, and, failing to assert their claims, they stand, at the expiration of the notice, in default. Wight v. Dubois, (C. C. Colo. 1884) 21 Fed. 693.

Sixty days' limitation.—The fact that the sixty days prescribed for the publication of notice had expired before the complainant, in default of the application, was held to have no application to a case where the adverse claim did not arise until after the expiration of the sixty days' limitation, and the applicant for the patent had let his application lie dormant for a number of years without either paying the purchase money or doing the required work of one hundred dollars each year pending the application for patent. Gillis v. Downey, (C. C. A. 8th Cir. 1898) 85 Fed. 483, 85 U. S. App. 687, 29 C. C. A. 286.

Notwithstanding a regulation of the department requiring ten weekly publications of the notice, making sixty-three days between the first and last publication, yet the adverse claim must be filed within sixty days as provided by the statute. Hunt v. Eureka Gulch Min. Co., (1890) 14 Colo. 451, 24 Pac. 550.

Affidavit of posting.—An entry is not necessarily void because of irregularities in proof including the execution of affidavits of posting before other than the designated officers. El Paso Brick Co. v. McKnight, (1914) 233 U. S. 250, 34 S. Ct. 498, 68 U. S. (L. ed.) 943, I. R. A. 1915A 1113, reversing (1911) 16 N. M. 721, 120 Pac. 694, Ann. Cas. 1912D 1309, wherein the court said: "The case involves a determination of the single question as to whether the patent was properly made by the Land Department because of the objection that the Brick Company had failed to comply with the terms of the law relating to mineral land. R. S. sec. 2325 [the text section]. That can be determined by an inspection of the record, in which the orders appears. It shows that the cancellation of the entry was not based on the Brick Company's failure to do the annual assessment work, or to give the proper notice, or to pay the statutory price, but solely for the reason that the affidavit of posting was executed before an officer who resided outside of the land district. That decision (37 Land Dec. 155), though supported by some Departmental rulings of comparatively recent date, was in conflict with the established practice of the Land Department, and was expressly and by name overruled, on July 29, 1911, in Exp. Stock Oil Co., 40 Land Dec. 198, which reaffirmed prior decisions to the effect that irregularities in proof, including the execution of affidavits before other than the designated officers, might be supplied, even on appeal. These and similar rulings and proceedings, following in the Department, are manifestly correct. They accord with the policy of the land laws, under which the United States does not act as an ordinary proprietor seeking to sell real estate at the highest possible price, but offers it on liberal terms to encourage the citizen and to develop the country. The Government does not deal at arm's length with the settler or locator and whenever it appears that there has been a compliance with the substantial requirements of the law, irregularities are waived or permission is given, even on appeal, to cure them by supplemental proofs. U. S. v. Marshall Silver Min. Co., (1889) 129 U. S. 579, 587, 9 S. Ct. 343, 32 U. S. (L. ed.) 734. In the present case such proof by supplemental affidavits, properly executed, showed that the land had been properly posted. But that fact was not allowed to have any effect because of the mistaken view that, as the original affidavit of posting had been signed before an officer residing outside of the land district, the patent proceedings were absolutely void. This confused service by proper posting — which was jurisdictional — with defective proof of such service which, like the defective return of an officer, could be corrected. Under the law, jurisdiction depended upon giving notice by publication in a newspaper, by posting in the land office, and by posting on the land itself — the statute directing how the giving of such notice should be proved. But irregularities in complying with such directory provision could be cured, and when cured, as it was here, the patent should have been issued."

Affidavit of continuous posting.—The entryman must furnish a proper "affidavit of continuous posting." Shanks v. Holmes, (1914) 15 Ariz. 229, 137 Pac. 871.

Cancellation of entry.—The provision of this section that if no adverse claim shall have been filed with the register and receiver of the land office at the expiration

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of sixty days from the date of publication of an application for a patent to a mining claim, it shall be assumed that the applicant is entitled to a patent, when construed in connection with other sections in pari materia, does not prevent the commissioner of the general land office from canceling an entry, of his own motion, for failure of the applicant to comply with some statute or rule of the department, even though no adverse claim is filed. Mineral Farm Min. Co. v. Barrick, (1905) 33 Colo. 410, 80 Pac. 1055.

Cited.—This section was cited in Pocina v. Eagle, (1912) 29 Idaho 60, 152 Pac. 209, where it was held that the instant case was not an adverse suit under R. S. sec. 2326, infra, p. 583.

Sec. 910. [Possessory actions for recovery of mining titles.] No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession. [R. S.]

Act of Feb. 27, 1865, ch. 64, 13 Stat. L. 441.

Purpose of statute.—Before the enactment of any statute recognizing and relating to his possessory rights, the mining locator, as between himself and the United States, was technically a mere trespasser upon the public domain; and even although he might have conformed in his location to the rules and customs adopted in the mining district in which his claim was situated, yet so far as any legal right existed to hold his claim against the newcomer, that right rested upon possession merely; hence the statute. Duggan v. Davey, (1898) 4 Dak. 110, 26 N. W. 287.

In furtherance of the policy to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States, Congress enacted this statute. Belg v. Meagher, (1881) 104 U. S. 279, 26 U. S. (L. ed.) 735.

Mining title.—By “mining title,” as employed in this statute, evidently is meant the title which the miner obtains by his discovery and location, followed up by a compliance with the statutory regulations to preserve his right of possession, and therefore, in a possessory action between persons, notwithstanding the paramount title to the land is in the United States, the case shall be adjudged by the law of possession as between the parties. Gillis v. Downey, (C. C. A. 8th Cir. 1898) 85 Fed. 453, 56 U. S. App. 567, 29 C. C. A. 254.

Where local statutes [Alaska] provide that the distinction between actions at law and suits in equity and the forms of all such actions and suits are abolished, and that “any person in possession, by himself or his tenant, of real property, may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him for the purpose of determining such claim, estate, or interest,” under such statutory provisions and this section, it is clear that one who first makes a valid location of a mining claim and enters into its possession, acquires a title thereto; not the legal title which remains in the United States until conveyed by it, but such title as the laws of the United States recognize and will protect as against an intruder. Fulkerson v. Chiana Min., etc., Co., (C. C. A. 9th Cir. 1903) 122 Fed. 782, 58 C. C. A. 582.


Right of possession.—Where, prior to the time the plaintiff’s grantor staked out a placer claim on public land, the defendants had taken steps to appropriate the same land as a lode claim, and there was some evidence of mineral bearing rock on the surface, but an entire absence of proof that there was not a vein of metallic ore, such as might be located only as a vein or lode claim, it was held that the defendants’ right to possession was superior to that acquired by the plaintiff. Bevis v. Markland, (E. D. Wash. 1904) 130 Fed. 226.

Jurisdiction.—In Duffy v. Mix, (1903) 24 Ore. 265, 33 Pac. 807, it was held that the right of possession of a mine is not a legal estate or title to land, so that an action might be maintained in a justice’s court for its recovery, under a state statute giving to a justice of the peace jurisdiction of an action to recover the possession of a mining claim.


Issues.—Where neither party to a suit
to recover possession of land held under conflicting mining claims had acquired a perfect right to a conveyance from the United States, and the requirements of the statutes providing for adverse proceedings and suits for the determination of questions respecting conflicting claims had not been complied with, the only issue determinable in such suit was the right of possession. Bevis v. Markland, (E. D. Wash. 1904) 130 Fed. 226.

Burden of proof.—Where the plaintiff and the defendants claimed land covered by conflicting mining claims, and the defendants had not molested the plaintiff or interfered with his possession or that of his grantor, otherwise than by continuing to hold possession in the same manner as before the attempted laying out of plaintiff’s claim, the burden was on the plaintiff to prove that defendants were mere intruders, having no color of title or right to possession. Bevis v. Markland, (E. D. Wash. 1904) 130 Fed. 226.

Quantum of proof in state court.—In an action brought under this section no greater proof of the right of recovery can be required in a state court than would be required in a court of the United States unless by virtue of some statute of the state. Harris v. Kellogg, (1897) 117 Cal. 484, 49 Pac. 708.


Sec. 2326. [Adverse claim, proceedings on.] Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improved, and the description made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land-Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land-Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining-claim to any person whatever. [R. S.]

This section was affected by the Act of March 3, 1881, ch. 140, infra, p. 599, and the Act of April 26, 1892, ch. 106, § 1, infra, p. 601.
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I. NATURE OF PROCEEDINGS

Purpose of statute.—The purpose of the statute seems to be that where there are two claimants to the same mine, neither of whom has yet acquired the title from the government, they shall bring their respective claims to the same proceedings, in the manner prescribed by the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these claimants shall have the patent, the final evidence of title, from the government. Iron Silver Min. Co. v. Campbell, (1896) 135 U. S. 256, 10 S. Ct. 705, 34 U. S. (L. ed.) 155.


Effect of forfeiture of senior location.—The area of conflict between two mining locations does not, upon the forfeiture of the senior location, become unoccupied mineral lands of the United States, so as to enable a relocator of the forfeited location to adverse successfully the application for a patent by the junior locator, since the latter's right, under this section, to a patent, which would exist in case of the failure of the owner of a subsisting senior location either to adverse the application or to prosecute such adverse if one was made, must also arise from the forfeiture of the claim of the senior locator to adverse successfully after the forfeiture is complete. Lavagnino v. Uhlig, (1905) 198 U. S. 443, 25 S. Ct. 716, 49 U. S. (L. ed.) 1119, qualified in Farrell v. Lockhart, (1907) 210 C. 142, 3 S. Ct. 651, 52 U. S. (L. ed.) 694, 16 L. R. A. (N. S.) 149, so as not to exclude the right of a subsequent locator on an adverse claim to test the lawfulness of a prior location of the same mining ground upon the contention that at the time such prior location was made the ground embraced therein was covered by a valid and subsisting mining claim. This qualification permits a third locator to offer proof tending to establish the existence of a valid and subsisting location anterior to that of the location which is being adversely.

"Shall show the nature, boundaries, and extent of such adverse claim."—A rule of the general land office, approved by the Secretary of the Interior, requiring that the plat showing the boundaries of the conflicting premises "must be made from an actual survey by a deputy United States surveyor," enlarges the requirements of the law and is invalid. Anchor v. Howe, (C. C. Idaho 1892) 50 Fed. 366. See Roper v. Richmond Min. Co., (1892) Il Nev. 25, 27 Pac. 1105.

Purpose of suit.—The purpose of a suit in support of an adverse claim to a mining location is to determine for the information of the officers of the land department, which, if either of the parties thereto, is entitled to a patent to the premises in dispute. Healey v. Rupp, (1906) 37 Colo. 25, 86 Pac. 1015.


Although a suit under this section may sometimes present questions arising under the Constitution or laws of the United States so that the federal courts will have jurisdiction, yet the mere fact that a suit is an adverse suit authorized by an Act of Congress is not in and of itself sufficient to vest jurisdiction in the federal courts. Shoshone Min. Co. v. Rutter, (1900) 177 U. S. 505, 20 S. Ct. 728, 44 U. S. (L. ed.) 864. See also Blackburn v. Portland Gold Min. Co., (1900) 175 U. S. 571, 20 S. Ct. 222, 44 U. S. (L. ed.) 276.

An action in support of an adverse claim does not of itself involve a federal

But if the amount in controversy is sufficient in a case tried in a court of the United States, or the proper case is made on a writ of error to a state court, the judgment may be taken to the Supreme Court of the United States for review as in similar cases. Chambers v. Harrington, (1884) 111 U. S. 350, 4 S. Ct. 428, 28 U. S. (L. ed.) 462.

II. TIME OF COMMENCING PROCEEDINGS

"Within thirty days after filing his claim."—This provision admits of no addition or modification by a statute that provides that, in case of the failure of a suit from insufficient service, unavoidable accident, and the like, plaintiffs may renew their suit "at any time within one year after the pendency of the determination of the original suit." Steves v. Carson, (C. C. Colo. 1890) 42 Fed. 821.

A complaint which states no cause of action, filed within thirty days, does not cause an amended complaint filed after the expiration of thirty days to relate back to the time of filing the original complaint, but the amended complaint is too late. Keppeler v. Becker, (1905) 9 Ariz. 234, 80 Pac. 334. Contra Woody v. Hinds, (1904) 30 Mont. 188, 76 Pac. 1.

How objections raised.—An objection that the action was not commenced within thirty days of filing the adverse claim cannot be first presented to the appellate court. Providence Gold Min. Co. v. Marks, (1900) 7 Ariz. 74, 60 Pac. 936.

An action for a declaratory action was not commenced within thirty days of filing the adverse claim must be raised by answer or demurrer. Providence Gold Min. Co. v. Marks, (1900) 7 Ariz. 74, 60 Pac. 936. But see Hopkins v. Butte Copper Co., (1904) 29 Mont. 390, 74 Pac. 1081, that the absence of an averment that the adverse claim was filed in time can only be taken advantage of by demurrer.

Action to quiet title.—An action to quiet title to property is not an action brought under this section, and it is not necessary that such action should be brought within thirty days from the time of filing the claim in the land office. Alcomo Quicksilver Min. Co. v. Integral Quick Silver Min. Co., (1898) 114 Cal. 100, 45 Pac. 1047.

Commencement of proceeding.—What constitutes the commencement of an action is a matter of state law, and the decision of a state court on the point is not a federal question and is not reviewable in the United States Supreme Court. Richmond Min. Co. v. Rose, (1885) 114 U. S. 576, 5 S. Ct. 1055, 29 U. S. (L. ed.) 273. See also Harris v. Holmes Gold Min. Co., (1907) 29 Nev. 506, 92 Pac. 1.


III. STAY OF PROCEEDINGS

"Until the controversy is settled or decided by the court."—A patent cannot be issued by the land office while a case is pending in the courts, upon an assumption that, as there have been delays in the court, the plaintiff has waived his claim. Richmond Min. Co. v. Rose, (1885) 114 U. S. 576, 5 S. Ct. 1055, 29 U. S. (L. ed.) 273, affirming (1882) 17 Nev. 25, 27 Pac. 1105.

While a controversy is pending it cannot be affected by any action of the land department. If upon some alleged settlement of the controversy and dismissal of the suit, the land department has issued a certificate of entry to defendant, it cannot have the effect to terminate the suit. The court alone will decide when the controversy is at an end, and until such decision all things done in the land office must be ignored. McEvoy v. Hyman, (C. C. Colo. 1885) 23 Fed. 539.

The filing of a claim and obtaining a patent to a portion of the claim outside the disputed ground, while a suit under this section is pending, is not a waiver of any right to the remainder of the ground. Fox v. Mackay, (1901) 1 Alaska 333. See also Last Chance Min. Co. v. Tyler Min. Co., (1895) 157 U. S. 683, 16 S. Ct. 73, 39 U. S. (L. ed.) 859.

A receipt for the purchase of the premises in controversy, procured from the receiver of the land department, is without the pendency of an action, is void. Deene v. Mineral Creek Milling Co., (1902) 11 N. M. 270, 67 Pac. 724.


Amendment of application pending proceedings.—An amendment of an application to the land office for a patent pending adverse proceedings, whether made by the original applicant or by the adverse claimant, is not a waiver of the matter in dispute or determinative of the contest, but if the patent be issued thereon it is a matter which rests purely between the government and the applicant, and affects no right of the adverse party. Mackay v.
IV. JURISDICTION

1. Court of Competent Jurisdiction

State or federal court.—The statute requires a judicial proceeding in a competent court. What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a state court or a federal court. Chambers v. Harrington, (1884) 111 U. S. 350, 4 S. Ct. 428, 28 U. S. (L. ed.) 452.

Congress did not intend to prescribe jurisdiction in any particular court, state or federal. The natural inference from the language of the statute is that the competency of the adjudicating court was not to be determined by the mere fact that the mining claims in controversy consisted of lands to which was in the United States. If that fact alone were to be decisive no other than a federal court would have been mentioned. The intention of Congress was to leave open to suitors all courts competent to determine the question of the right of possession. If the parties to the controversy were citizens of different states, and if the matter in dispute equaled the jurisdictional amount, then the claimant might elect to commence proceedings in a federal or a state court, because either would be competent to determine the question of the right of possession. But if the usual conditions of federal jurisdiction did not exist, that is if there were no adverse citizenship, and if the matter in dispute did not equal the jurisdictional amount then the party claimant could proceed in a state court. Blackburn v. Portland Gold Min. Co., (1899) 175 U. S. 571, 20 S. Ct. 222, 44 U. S. (L. ed.) 276; De Lamar's Nevada Gold Min. Co. v. Nesbitt, (1900) 177 U. S. 523, 20 S. Ct. 715, 44 U. S. (L. ed.) 872.

In Shoahone Min. Co. v. Rutter, (C. C. A. 9th Cir. 1898) 87 Fed. 801, 59 U. S. App. 538, 31 C. C. A. 223, the court said: "The proceedings required to be commenced, under the provisions of section 2326, in a court of competent jurisdiction, may be brought either in the state or national courts, at law or in equity, as the facts may warrant; but section 2326 does not confer any special jurisdiction on the state courts. When the suits are brought and tried in the state courts, they are subject to the provisions of the state statutes in relation to such cases and the courts proceed in the manner prescribed by such statutes." This case was reversed upon appeal to the Supreme Court upon the point that no federal question was involved in respect to the quotation above made, in Shoahone Min. Co. v. Rutter, (1900) 177 U. S. 505, 20 S. Ct. 726, 44 U. S. (L. ed.) 864.

After a careful review and consideration of the decisions of the Supreme Court of the United States, the court in Nome-Sinook Co. v. Simpson, (1902) 1 Alaska 578, enunciated the following conclusions: 1. That Congress did not intend by R. S. secs. 2325 and 2326, and the Amending Act of 1881 [supra, pp. 555, 563, and infra, p. 599], to prescribe the jurisdiction in any particular court, state or federal. 2. The local trial court may determine the action, without any controversy as to the acts of Congress in relation to patent proceedings, and therefore no federal question is necessarily involved. 3. The state or local court shall be guided and controlled as to jurisdiction, practice, and procedure only by the laws, regulations and customs of the mining district and the state or territorial statutes—the law of the forum. 4. No power or jurisdiction is conferred upon the local courts by the provisions in relation to patent proceedings, nor are their general powers or jurisdiction limited in any respect thereby.

In the case of Rose v. Richmond Min. Co., (1882) 17 Nev. 25, 27 Pac. 1105, the Supreme Court of Nevada, reaffirming an earlier decision, said: "In 420 Min. Co. v. Bullion Min. Co., [1874] 9 Nev. (240), 247, we said: 'Congress did not, by the passage of this Act... confer any additional jurisdiction upon the state courts. The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the state courts of competent jurisdiction, and institute such proceedings as they might, under the different forms of action therein approved, and there try 'the right of possession' to said claim, and have the question determined. The Acts of Congress do not attempt to confer any jurisdiction not already possessed by the state courts, nor to prescribe a different form of action... We are of the opinion that when the action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles and controlled by the same statutes that apply to such actions in our state courts irrespective of the Acts of Congress.'" This case was affirmed, including the language from 9 Nev. 248, by the Supreme Court in Richmond Min. Co. v. Rose, (1885) 114 U. S. 676, 5 S. Ct. 1055, 29 U. S. (L. ed.) 273.

Where a state statute authorizes a suit to quiet title regardless of possession, a federal court of equity in such state is a court of competent jurisdiction, in which a suit in support of an adverse claim to mining ground may be maintained under the provisions of the state law, although sustained in respect to the quotation above made, in Shoahone Min. Co. v. Baker, (W. D. Ark. 1904) 133 Fed. 937.
2. Questions Determinable

It is "the question of the right of possession" which is to be determined by the courts. The only jurisdiction which the courts have is of a controversy between individual claimants and it has not been provided that the rights of an applicant for public lands as against the government may be determined by the courts in a suit against the latter. Perego v. Dodge, (1896) 163 U. S. 160, 16 S. Ct. 971, 41 U. S. (L. ed.) 113.

By this section there was relegated to the court the jurisdiction to determine the right of possession between the adverse claimants. The determination of that question necessarily involves, not only the question of which of the adverse claimants was in title in making location, and whether the location was made in compliance with the law, but also the question whether the land occupied and covered by the location was subject to location in the manner in which it was attempted to be acquired. Duffield v. San Francisco Chemical Co., (C. C. A. 9th Cir. 1913) 205 Fed. 480, 123 C. C. A. 548, reversing (S. D. Idaho 1912) 198 Fed. 942.

Controversies as to character of land. —This section confers jurisdiction on the courts only of suits between adverse mining claimants to the same mineral land, but does not confer jurisdiction to determine the character of the land involved as mineral or nonmineral, that question being for the land department. Wright v. Hartville, (1906) 13 Wyo. 497, 81 Pac. 649, 82 Pac. 450.

A complaint affirmatively showing the filing by the defendant of an application for patent, there being no allegation that the plaintiff has filed an adverse claim, is subject to a hearing directly by the court to the jurisdiction of the trial court; the subject-matter of the action being within the exclusive jurisdiction of the land office. Warneker v. Cowan, (1910) 13 Ariz. 42, 108 Pac. 235.

In an action for damages for encroaching on the plaintiff's mining claim, the defendant answered that the plaintiff had made application for a patent on his mine, and that the defendant had filed its protest against the issuance of a patent, and the land department had ordered a hearing. It was held that under this section the court had jurisdiction of the action; for, if the protest was not an adverse claim within the statute, there was no controversy to be settled by the land department, and, if it was an adverse claim, the court had jurisdiction to decide the controversy. Lightner Min. Co. v. Superior Ct., (1911) 14 Cal. App. 642, 112 Pac. 909.

Matters determined. — In the absence of the record of an adverse suit, there is no presumption that substantial rights under idle mining locations were therein considered and determined. Lawson v. U. S. Mining Co., (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

V. PROSECUTION OF SUIT

Prosecute the same with reasonable diligence. — In Lee Doon v. Tesh, (1901) 131 Cal. 406, it was held that the motion for a new trial should have been dismissed when the parties, having given notice of intention to move for a new trial, took no further steps for over twelve years to have the motion heard. See also Mars v. Oro Fino Min. Co. (1896) 7 S. D. 605, 65 N. W. 19, as to failure of sheriff to serve summons.

In Iowa Min. Co. v. Bonanza Min. Co., (1851) 16 Nev. 64, it was held that by filing a demurrer and answer the defendants waived the right to object to the failure of the plaintiff to prosecute his suit with diligence by delay in serving summons.

VI. FORM OF ACTION

VI. FORM OF ACTION

The form of an action is not provided for by the statute, and apparently an action at law or a suit in equity would lie as either might be appropriate under the particular circumstances, an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession. Perego v. Dodge, (1896) 163 U. S. 160, 16 S. Ct. 971, 41 U. S. (L. ed.) 113. See also Young v. Goldsteen, (D. C. Alaska 1899) 97 Fed. 303; Allan v. Myers, (1901) 1 Alaska 114. But see Davidson v. Calkins, (S. D. Cal. 1899) 92 Fed. 230; Ware v. White, (1907) 81 Ark. 220, 108 S. W. 831; Iba v. Central Ass'n, (1895) 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20, as to the action being at law only; and Doe v. Waterloo Min. Co., (S. D. Cal. 1890) 43 Fed. 219; Hunter v. Russell, (C. C. Mont. 1894) 59 Fed. 964; Shoahine Min. Co. v. Rutter, (C. C. A. 9th Cir. 1898) 81 Fed. 501, 59 U. S. App. 588, 31 C. C. A. 223, as to the action being one in equity only.


An ordinary declaration in ejectment, as authorized by state statute, may be filed in support of an action brought under this section. Deeney v. Mineral Creek Min. Co., (1902) 11 N. M. 279, 67 Pac. 724; Upton v. Santa Rita Min. Co., (1907) 14 N. M. 96, 90 Pac. 275.
An action in the nature of ejectment is undoubtedly proper to support an adverse claim filed under this section, though the rules pertaining to ejectment are modified in the trial of such causes. Becker v. Pugh, (1886) 9 Colo. 589, 13 Pac. 906.

An action of ejectment based upon a patent issued prior to the initiation of a mining claim for which another has applied for a patent is not inconsistent with a claim adverse to that application, and such adverse claim does not estop the plaintiff from maintaining his action. Larned v. Jenkins, (C. C. A. 8th Cir. 1902) 113 Fed. 634, 51 C. C. A. 344.

An action brought to quiet title to mining ground may be turned into an action under this section when an application for a patent has been made after the suit was begun. Jones v. Pacific Dredging Co., (1903) 9 Idaho 186, 72 Pac. 956.

A complaint in the nature of a bill in equity, prepared for a state court and designed to state a cause of action under the state code of civil procedure, which provides for but one form of civil action, is sufficient as a bill in equity in a court of the United States on removal of the cause from the state court. Durgan v. Redding, (N. D. Cal. 1900) 103 Fed. 914.

When a suit has been begun under this section by an action at law, a suit in equity to quiet title cannot be maintained. Allen v. Myers, (1901) 1 Alaska 114.

"The action to quiet title is allowed where the application for patent Is not resisted, as in case of the location of a lode claim, within the limits of a placer claim, after an application for patent for the latter has been made, and the lode claim was not known to exist at the time of the application for the patent. Dahl v. Rauheim, (1899) 132 U. S. 260 [10 S. Ct. 74, 33 U. S. (L. ed.) 324]. But in such a proceeding as this where the plaintiff seeks to establish a claim paramount to that of the defendant who has applied for a patent, it is doubtful if the right of the defendant could be asserted to have the title quieted, as the relief to be obtained in a suit at law is adequate, and the determination of the controversy settles the rights of either party or the rights of neither." Iba v. Central Ass'n, (1895) 5 Wyo. 355, 40 Pac. 627, 42 Pac. 20.

A action in a state court to quiet title to mining property is not an action under this section to determine which of the parties is entitled to purchase the land under the mining laws of the United States. The proceedings in the land department, the citizenship of the parties, and other matters may be heard by the trial court for the purpose of determining who is entitled to the lode, but they are only matters of evidence of aid in arriving at the ultimate fact. Gruwell v. Rocca, (1903) 141 Cal. 417, 74 Pac. 1028.

VII. Parties

Proper parties.—An action brought under this section is one in which those only who have filed claims to the land in the land office can properly be made parties, as it is one brought for the sole purpose of determining the rights of possession between such adverse claimants. Mt. Blencosol Cond. Gravel Min. Co. v. Debour, (1892) 61 Cal. 364.

This case, however, has apparently been overruled in principle by the Supreme Court of California. In Altoona Quick-silver Min. Co. v. Integral Quick-silver Min. Co., (1896) 114 Cal. 100, 45 Pac. 1047, the court said: "The parties of the parties will be entirely determined by the laws of the United States granting the right to enter upon the mineral lands, to extract metal therefrom and to acquire title thereto, and the suit must be tried in every respect as though no contest was pending in the land office of the United States in regard to the right to purchase the same."

And in Quigley v. Gillett, (1894) 101 Cal. 462, 35 Pac. 1040, the same court said: "The action was brought "to determine the question of the right of possession in the claim mining land, and this was the only question involved. The court had nothing to do with the proceedings in the land office and had no power to determine their regularity or irregularity, sufficiency or insufficiency."

One who has contracted to convey the lands in dispute to a third party, who is in the actual control and possession of the property, is interested to defeat the claim of the contestants who are seeking to get the patent, and may assert the right to possession, and to have the verdict of the jury on that question in a suit in which he is a party. Wolverine v. Nichols, (1886) 119 U. S. 485, 8 S. Ct. 699, 9 U. S. (L. ed.) 474.

Intervening parties.—Right to intervene.—The state or local court shall be guided and controlled as to jurisdiction, practice, and procedure only by the laws, regulations, and customs of the mining district and the state and territorial statutes, and when the state law authorizes an intervention, a party may intervene though he has not filed an adverse claim within the time limited by R. S. sec. 2325. Nome-Sisook Co. v. Simpson, (1902) 1 Alaska 578. See also Rose v. Richmond Min. Co., (1882) 17 Nev. 25, 27 Pac. 1105.

A party who has not filed an adverse claim in the land office may intervene by virtue of the provision of R. S. sec. 2325, supra, p. 555, as to objections to third parties that they are only matters of evidence of aid in arriving at the ultimate fact. Nome-Sisook Co. v. Simpson, (1902) 1 Alaska 578.
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It has, however, been held that a party cannot be allowed to intervene when he has failed to file his adverse claim in the land office within the time prescribed. Missouri v. Foshee, 176 U. S. 1, 20 L. Ed. 150, 20 S. Ct. 240, 59 Pac. 439. And the case of Mt. Blanc Consol. Grand Min. Co. v. Debour, (1882) 61 Cal. 364, denied the intervention of one who had not filed an adverse claim. This case however was apparently overruled by later California cases. See the preceding note Proper parties.

That intervention by one who has not filed an adverse claim is allowable may be supported, inferentially, by the case of Noonan v. Caledonian Gold Min. Co., (1887) 121 U. S. 393, 7 S. Ct. 911, 30 U. S. (L. ed.) 1061. That was a suit to determine the rights of the applicant and adverse claimant to a mining claim in the territory of Dakota and which was carried to the Supreme Court. During the trial below it appeared that one Mahan, not a party of record, asserted an interest in the claim and was a necessary party to a complete determination of the matter in controversy. He had not filed an adverse claim in the land office. He was made a party defendant notwithstanding that fact, and the judgment was affirmed. The court determined that the Dakota provision in relation to the amendment of pleadings by adding to or striking out the name of any party, or by correcting a mistake in the name of any party, applied in the case and sustained the decision of the court in permitting Mahan to be a party to the case. It would seem to follow that if he could be made a party by a motion without his consent, he might have become a party by intervention.

Rights of the government.—There is no provision in the law for action against the government. The only jurisdiction which the court can have is of a controversy between individual claimants, and though its judgment is made conclusive upon the government of the rights of the party in whose favor the judgment goes, it is none the less true that the condition of jurisdiction is a controversy between individuals. Last Chance Min. Co. v. Tyler Min. Co., (1896) 157 U. S. 683, 15 S. Ct. 733, 39 U. S. (L. ed.) 859.

The evident intention of the adverse proceedings is not to deprive any of the rights of the United States, or the rights of the contestants to a patent, but, in aid of and for the information of the land department, to determine, as between the litigants, the right of the possession of the mining claim in dispute. Lavagnino r. Ulhig, (1903) 26 Utah 1, 71 Pac. 1046, 99 A. S. R. 808. See also Doe r. Waterloo Min. Co., (C. C. A. 9th Cir. 1895) 70 Fed. 455, 44 U. S. App. 204, 17 C. C. A. 190; Connolly r. Hughes, (1902) 18 Colo. App. 372, 71 Pac. 681.

The government is not a party to a suit to determine an adverse claim, except in so far as it has agreed to accept the judgment therein rendered as conclusive of the right of possession by the adverse claiming claimants; and such judgment is not conclusive on a subsequent patentee from the government of land embraced therein, who was not a party, or privy to a party, to the suit in which the judgment was rendered. Butte Land, etc., Co. v. Merriman, (1905) 32 Mont. 402, 80 Pac. 675, 108 A. S. R. 590.

Part owner.—A part owner of a mining claim, who joins with the other owners in filing an adverse claim under this section, but afterwards becomes vested by conveyances with title to the interests of the others, may maintain the suit required by said section in support of the adverse claim in his own name. Willitt v. Baker, (W. D. Ark. 1904) 133 Fed. 937.


Controversies between co-owners.—The provisions of this and the preceding section for the issuance of patents for mineral lands and the prosecution of adverse claims to mining locations, apply only to adverse claims arising out of independent conflicting locations of the same ground, and not to controversies between co-owners claiming under the same location. Davidson r. Fraser, (1906) 30 Colo. 1, 64 Pac. 695, 4 L. R. A. (N. S.) 1128; Allen r. Blanche Gold Min. Co., (1909) 46 Colo. 199, 102 Pac. 1072.

Action by co-owner.—When a complaint alleges that the plaintiff and his co-owners as tenants in common are in possession and entitled to the possession of a certain mine, the action is for the benefit of all the tenants in common. Nesbitt v. Delamar's Nevada Gold Min. Co., (1898) 24 Nev. 273, 52 Pac. 609, 53 Pac. 178, 77 A. S. R. 807.

Adverse claim by third locator.—In an application for a patent by a junior locator, upon failure of the senior locator to adverse, it will be presumed that there was no senior location, and that at the time the junior location was made the ground was open to entry under the mineral laws of the United States; but when it also appears that there is a third location made subsequent to the junior location, such third locator may adverse the application for patent by the junior locator, and show that the junior location is void because at the time it was made the ground was not open to location under the mineral laws of the United States. Swanston r. Kettler, (1910) 17 Idaho 321, 105 Pac. 1069.

Purchaser pendente lite.—A purchaser pendente lite takes the property subject
to the rights of the parties in litigation. People v. District Ct., (1894) 19 Colo. 343, 35 Pac. 731.

VIII. PLEADINGS

Allegations of complaint — Value of property.—In a suit brought in the federal court the complaint should show that the value of the property in controversy is sufficient to bring it within the requirement of the general statute prescribing the jurisdiction of that court. Yellow Aster Min., etc., Co. v. Winchell, (S. D. Cal. 1899) 95 Fed. 213. See also Strasburger v. Beecher, (C. C. Mont. 1890) 44 Fed. 209.

Adverse suit.—In an adverse suit the rules governing ordinary ejectment suits are modified by the Act of March 3, 1881, ch. 140, 21 Stat. L. 305, infra, p. 599, which requires that the defendant, no less than the plaintiff, shall recover on the strength of his own title. In order, therefore, that the court may be advised of the nature of the suit so as to apply these exceptional rules, there should, in addition to the ordinary allegations in ejectment, be appropriate allegations showing the fact that such suit is designed as an adverse suit. Upton v. Santa Rita Min. Co., (1907) 14 N. M. 96, 89 Pac. 275.

Time adverse claim filed and suit brought.—A complaint in an action to contest an adverse claim in patent proceedings, which fails to allege that the adverse claim was filed in the proper land office within the sixty days allowed by the statute, is defective. Thornton v. Kaufman, (1907) 33 Mont. 181, 88 Pac. 796.

A complaint should allege that the adverse claim was filed in the land office within sixty days of the publication of the notice of application for patent, and also that the suit was brought in support of such adverse claim within thirty days of the filing of the same. Cronin v. Bear Creek Gold Min. Co., (1893) 3 Idaho 614, 32 Pac. 204.

The complaint should allege that the adverse claim was filed within the time in the proper land office; its presence in the pleading is necessary to state a cause of action, but it is not a jurisdictional fact, and its absence is only open to objection by demurrer. Hopkins v. Butte Copper Co., (1904) 29 Mont. 390, 74 Pac. 1081.

Whether lode or placer claim.—The bill should show affirmatively, and not by inference only, whether the ground in controversy between the parties is a lode or placer claim. Yellow Aster Min., etc., Co. v. Winchell, (S. D. Cal. 1899) 95 Fed. 213.

Citizenship.—An allegation of citizenship, or its equivalent, is necessary to constitute a good complaint in a proceeding to determine adverse claims to mining lands preliminary to the issuance of a patent. Keeler v. Trueman, (1890) 15 Colo. 143, 25 Pac. 311. See also Lee Doon v. Tesh, (1888) 65 Cal. 43, 6 Pac. 97, 8 Pac. 621; Anthony v. Jillon, (1890) 63 Cal. 296, 23 Pac. 419.

In an ordinary action to quiet title to mining claims it is not necessary to allege or prove citizenship, but when the action is brought under this section to adverse the party applying for a patent it is necessary to both allege and prove that plaintiffs are citizens of the United States, or have declared their intention to become such. Allyn v. Schultz, (1897) 5 Ariz. 152, 48 Pac. 960. See also Thompson v. Spray, (1887) 72 Cal. 528, 14 Pac. 182; Buckley v. Fox, (1902) 8 Idaho 249, 67 Pac. 659.

Description of land.—The complaint should describe the land embraced in the claim, so that the officers in the land office may be informed by the judgment that the land described in the application for patent was owned by the parties, without going outside of the complaint, to the proofs or maps or charts, to identify the claim in such manner as to make it sufficiently certain. Cronin v. Bear Creek Gold Min. Co., (1893) 3 Idaho 614, 32 Pac. 204.

The complaint must contain a definite description of the area in conflict in order to support the judgment, which must designate the part, if any, of the area in conflict, that might belong to each of the adverse claimants. Smith v. Imperial Copper Co., (1907) 11 Ariz. 193, 89 Pac. 510.

If an application for patent should be made when it is impossible on account of the severity of the climate and deep snows to secure a survey of a claim adverse thereto, the adverse claim is sufficiently shown by an allegation giving the boundaries and extent, supported by affidavits and plats showing that the mining claim of the applicant for the patent is contained within the mining claim of the adverse claimant. Hoffman v. Beecher, (1892) 12 Mont. 489, 31 Pac. 92.


Pleading forfeiture.—Generally forfeiture as a defense must be specially pleaded, but this rule does not necessarily obtain in a proceeding to determine adverse claims under this section, where the title of each party is in issue, and neither can recover without proof of title. Merchants' Nat. Bank v. McKeown, (1911) 60 Ore. 325, 119 Pac. 334.

In an action of ejectment to recover the possession of mining ground, if the defendant relies upon a forfeiture by plaintiff for failure to comply with the local rules
and regulations of the mining district, the forfeiture must be specially pleaded. But this does not apply to an action brought under this section. In such actions, the question whether the plaintiff has forfeited any rights under the Acts of Congress is necessarily involved, and need not, when relied upon by the defendants, be specially pleaded. Steel v. Gold Lead, etc., Min. Co., (1882) 18 Nev. 80, 1 Pac. 448.

Assessment and claim complaint.— In Davidson v. Fraser, (1906) 36 Colo. 1, 84 Pac. 695, 4 L. R. A. (N. S.) 1126, it was held that though an amended complaint in ejectment, in support of an adverse to a mining location, was inartificial, in that it contained averments in support of an adverse between hostile locations, instead of limiting the allegations to a statement that plaintiff had been ousted from his interest in the premises in controversy by a co-owner, on which he relied to maintain his action, it was not for that reason objectionable, because the original complaint only embraced parts of the claim which did not conflict with another claim, while the amended complaint limited the ground in controversy to the conflict between the two.

A state statute permitting an amendment of pleadings by adding to or striking out the name of any party applies to an action under this section, and one may be made a party defendant notwithstanding he had not filed an adverse claim in the land office. Noonan v. Caledonia Gold Min. Co., (1887) 121 U. S. 393, 7 S. Ct. 911, 30 U. S. (L. ed.) 1081.

Supplemental complaint.— A party who commences an action under this section must stand or fall by the rights which he has asserted in his adverse claim, which must have been filed within the time prescribed, but he may be permitted by the court to bring in other adverse claims by a supplemental complaint, if the same have been duly filed, and as brought within the time limited for the commencement of an action in support thereof, although he may have acquired the right to the possession of such claims by purchase after the commencement of the action. Marshall Silver Min. Co. v. Kirtley, (1888) 13 Colo. 410, 21 Pac. 492.

IX. EVIDENCE AND PROOF

Proof of title.— Each party must rely upon the strength of his own title and not on the weakness of that of his adversary. Murray Hill Min., etc., Co. v. Haver- nor, (1901) 24 Utah 73, 66 Pac. 762.

In a suit brought under this section by an adverse claimant to determine the right to possess of a mining location, each party must show affirmatively his title, and the court, on finding that one party is entitled to the possession of a claim as located by him, which includes a part of a claim of the adverse party, must find on the strength of possession and the right to patent the other part of the claim of the adverse party. Slothower v. Hunter, (1906) 15 Wyo. 159, 88 Pac. 36.

If in the trial of an adverse suit there is any testimony submitted upon which to base a contention that the area in conflict should be divided between the parties, it is the duty of the court to permit the testimony to go to the jury with an instruction, if requested, as to their right and privilege in the consideration of such evidence, and as to what their verdict might be if they believed it. Currency Min. Co. v. Bentley, (1897) 10 Colo. App. 271, 50 Pac. 920.

Assessment work.—The title of each party is brought in question in a suit by an adverse claimant to determine the right to the possession of a mining claim, and, to entitle the defendant to a judgment or decree establishing his title, even where the plaintiff's case fails, he must prove that he did the assessment work for each year as required by the statute. Willitt v. Baker, (W. D. Ark. 1904) 133 Fed. 937.

The plaintiffs are not required to prove that they have performed sufficient work to entitle them to a patent; the object of the litigation being merely to defeat the defendant's application for a patent by showing that it was not, in possession of the property and was not entitled to possession thereof. Stolp v. Treasury Gold Min. Co., (1905) 38 Wash. 610, 80 Pac. 817.

When it is shown on the trial that neither of the parties had performed any labor or made improvements, the jury should be instructed to find against both. Jackson v. Ruby, (1883) 100 U. S. 440, 3 S. Ct. 301, 27 U. S. (L. ed.) 990; Bay State Silver Min. Co. v. Brown, (C. C. 1884) 21 Fed. 167. See Anthony v. Jillsen, (1880) 83 Cal. 296, 23 Pac. 419; Conway v. Hart, (1900) 129 Cal. 480, 62 Pac. 44; Phillips v. Brill, (1908) 17 Wyo. 26, 95 Pac. 858.

Location.—To entitle a party to recover in a suit brought under this statute, it is incumbent on him to show that he is the owner of a valid and subsisting location of the lands in dispute superior to that of the defendant. His location must be one which entitles him to possession against the United States, as well as against another claimant. If it is not valid as against the one it is not as against the other. The location is his title, and he must recover on the strength of his own title, not on the weakness of that of his adversary. Gwillim v. Donnellan, (1855) 115 U. S. 45, 5 S. Ct. 1110, 29 U. S. (L. ed.) 348.

In an action in support of an adverse to a mining location it was held that plaintiff was not entitled to recover, in the absence of evidence that the ground he sought to locate was unappropriated and inappropriate public mineral domain, subject to location prior to his attempted
location. McWilliams v. Winslow, (1905) 34 Colo. 341, 82 Pac. 528. Where a plaintiff in ejectment, brought in support of an adverse claim, relies upon a location, he must prove all of the acts of location, including the posting of the location notice, the discovery of mineral in place, and a marking of the boundaries of a claim upon the ground. Childers v. Lahann, (1914) 19 N. M. 301, 142 Pac. 924.

Where three locations were made covering the same ground and the first locator, after forfeiture, did not adverse, the burden of proof was on the third locator to establish the existence of a valid and subsisting location anterior to the second location. Farrell v. Lockhart, (1907) 210 U. S. 142, 28 S. Ct. 651, 52 U. S. (L. ed.) 964, 16 L. R. A. (N. S.) 185, granting Lavigne v. Uhlig, (1905) 198 U. S. 443, 25 S. Ct. 716, 49 U. S. (L. ed.) 1119, and reversing (1906) 31 Utah 165, 86 Pac. 1077.

Certified copy of location record.—The introduction of a certified copy of the record of the location notice of the mining claim is not proof of the acts of location. Childers v. Lahann, (1914) 19 N. M. 301, 142 Pac. 924.

Citizenship.—Proof of citizenship or a declaration to become such is required. Strickley v. Hill, (1900) 22 Utah 257, 62 Pac. 892, 83 A. S. R. 786.

Proof of citizenship in an adverse suit is required only to enable a party to recover a judgment in his own favor. The absence of such proof may prevent a recovery by the one party, but it does not operate to authorize a judgment, for that reason alone, in favor of his adversary. Sherlock v. Leighton, (1900) 9 Wyo. 297, 63 Pac. 580, 63 Pac. 934.

For other cases see Porter v. Tonopah No. 1, 2nd Tunnel, et al., Co., (C. C. A. 9th Cir. 1906) 146 Fed. 350, 76 C. C. A. 657; Slothower v. Hunter, (1906) 15 Wyo. 189, 88 Pac. 36.

Statutory compliance.—A recovery cannot be maintained by proof of occupancy merely of the premises in dispute, but either party, before he can secure judgment, must show a compliance with the statutes, state and federal, and also miners' rules and regulations in force relative to the location of mining claims. Becker v. Pugh, (1888) 9 Colo. 559, 13 Pac. 906.

Evidence.—Proceedings in Land Office.—In a suit to quiet title to a mining claim in support of an adverse claim filed in the United States Land Office, the proceedings in the Land Office are immaterial unless they show title or right of possession in any of the parties to the suit. Parmerlee v. Parmeelee, (1907) 6 Cal. App. 537, 92 Pac. 653.

Limiting issues by stipulation.—A stipulation in an adverse suit that the parties waive all other points raised by

the pleadings and submit the sole issue whether plaintiff under their location resumed work on the claim, after forfeitures, before defendant's location, is valid, and dispenses with proof of other matters. Gibson v. Wilson, (1906) 79 Ark. 581, 86 S. W. 157.

Necessity for trial de novo on appeal.—Where, in a suit brought under this section, by an adverse claimant to determine the right to the possession of a mining claim, there is no conflict in the evidence, and the possession and right to a patent are supported by evidence so that a contrary decree would be unsupported by the evidence, the case, on the failure of the court to find on the issues of possession and the right to patent, need not be tried de novo on such issues. Slothower v. Hunter, (1906) 15 Wyo. 189, 88 Pac. 36.

X. VERDICT

FORMS.—In a suit under this section a verdict in the form, "We, the jury, find the defendant guilty," was held to be sufficient to answer all the purposes of the proceedings. Upton v. Santa Rita Min. Co., (1907) 14 N. M. 96, 89 Pac. 275.

In Bennett v. Harkrader, (1895) 158 U. S. 441, 15 S. Ct. 863, 39 U. S. (L. ed.) 1046, which was an adverse suit, it was contended that the following verdict: "We the jury find for the plaintiff," was insufficient. The court said: "The verdict in this case does not state in terms that the plaintiff is entitled to the possession of the property described in the complaint or any part thereof; neither does it state the value or duration of his estate in the property. Hence it is insisted that the verdict was irregular and that no judgment should be rendered thereon, and in support thereof the cases of Jones v. Snider, (1879) 8 Ore. 127, and Kall如果玩家 v. Powell, (1878) 13 U. S. [318] 319, [7 S. Ct. 576, 36 U. S. (L. ed.) 643], are cited. We do not think the defect, if it be one, is sufficient to vitiate the judgment. Where the complaint alleges that the plaintiff is entitled to the possession of certain described property, which is unlawfully detained by the defendant and the possession of which the plaintiff fails to recover, a general verdict for the plaintiff is a finding that he is entitled to the possession of all the property described in the complaint." This decision was quoted with approval in the later case of Maloney v. Adair, (1899) 175 U. S. 281, 20 S. Ct. 115, 44 U. S. (L. ed.) 163.

Special findings.—In a suit under this section the parties are, upon proper request, entitled to special findings upon questions relevant to the cause; but, in the absence of such request, it is not error for the court to fail to require findings of the jury. Upton v. Santa Rita Min. Co., (1907) 14 N. M. 96, 89 Pac. 275.
XI. JUDGMENT

Effect.—Notwithstanding the judgment of a court on the question as to the right of possession between two litigants, it still remains for the land department to pass on the sufficiency of proofs, and to ascertain the character of the land and whether the conditions of the law had been complied with in good faith before the government parted with the title. Perego v. Dodge. (1895) 163 U. S. 160, 16 S. Ct. 971, 41 U. S. (L. ed.) 113.

The judgment goes no further than to end the contest between the adverse parties and determine the right of possession, leaving the applicant to make the proof required by law to entitle him to a patent. Mason v. Washington-Butte Min. Co., (C. C. A. 9th Cir. 1914) 50 Fed. 228, 81 A. 498.

The judgment of the court is to determine the question of the right of possession. It does not go beyond that. When it has determined which of the parties litigant is entitled to possession, its order is ended, but title to patent is not yet established. The judgment at the court ends the contest between the parties and determines the right of possession.


A decree of the court in adverse proceedings determines the right of possession as between the parties but does not deprive the land department of the requisite authority to ascertain whether there had been a due compliance with the law, and the land is of the character claimed by the mineral applicant. Upton v. Santa Rita Min. Co., (1907) 14 N. M. 96, 89 Pac. 275.

Where the complaint alleges, as the single ground upon which superiority of right is claimed, priority of location, a judgment for the plaintiffs upon such a complaint is necessarily an adjudication in favor of that priority of location. Last Chance Min. Co. v. Tyler Min. Co., (1895) 157 U. S. 883, 15 S. Ct. 733, 39 U. S. (L. ed.) 899.

Defeat judgment.—A judgment by default is just as conclusive an adjudication in the parties of whatever is essential to support the judgment as one rendered after answer and contest. A failure to answer is taken as an admission of the truth of the facts stated in the complaint and the court may properly base its determination on such admission. Last Chance Min. Co. v. Tyler Min. Co., (1895) 157 U. S. 883, 15 S. Ct. 733, 39 U. S. (L. ed.) 899.

XII. PATENT

Issuance of patent.—After judgment shall have been rendered, the party entitled to the possession of the claim may, without further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended, or improvements made thereon, and the description required as in other cases. When this has been done and the proper fees paid, the whole proceedings and the judgment roll must be certified to the land office and a patent shall issue for the claim or such portion thereof as the applicant shall appear from the decision of the court to rightly possess.


Separate patents.—If it appears from the decision that several parties are entitled to separate and distinct portions of the claim, each party may pay for his portion of the claim, together with the proper fees, and file the certificate and description by the surveyor general; then the register must certify the proceedings and judgment roll to the land office and patents shall issue to the several parties according to their respective rights.


Cancellation.—If the officers of the land department have acted within the general scope of their power, and without fraud, the patent which has issued after such proceedings must remain a valid instrument, and the court will not interfere, unless there is such a gross mistake or violation of the law which confers their authority as to demand a cancellation of the instrument. U. S. v. Marshall Silver Min. Co., (1889) 129 U. S. 579, 9 S. Ct. 343, 33 L. ed. 734.

Cited.—This section was cited in Golden Marguerite Silver, etc., Min. Co. v. National Copper Min. Co., (1915) 28 Idaho 206, 154 Pac. 207, wherein the question involved was the taxation of costs under a state statute, in an action brought under this section.

Sec. 2327. [Description of vein claims on surveyed and unsurveyed lands.] The description of vein or lode claims upon surveyed lands shall
designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto. [R.S.]

This section was amended to read as given in the text by an Act of April 28, 1904, ch. 1796, 33 Stat. L. 545, entitled “An Act To amend section twenty-three hundred and twenty-seven of the Revised Statutes of the United States, relating to lands.” As originally enacted it was as follows:

Sec. 2327. The description of vein or lode [sic] claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.”


Stakes and monuments.—The rule is well settled that stakes and monuments upon the ground will prevail over the calls of a location notice in case of a discrepancy. Cardoner v. Stanley Min., etc., Co., (C. C. Idaho 1911) 193 Fed. 517.

Lode claims.—Under the provisions of this section lode claims need not conform to public surveys. State v. Ross. (1909) 55 Wash. 242, 104 Pac. 216.

Sec. 2328. [Pending applications; existing rights.] Applications for patents for mining-claims under former laws now pending may be prosecuted to a final decision in the General Land-Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining-claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two. [R.S.]


Scope of patent.—A patent issued under and in accordance with the provisions of this section and R. S. sec. 2322. supra, p. 523, to a mining claim located before the Act of May 10, 1872, conveys the legal title to every vein or lode of mineral whose apex is within its surface lines extended downward vertically, and is not subject to collateral attack in an action at law, either on the ground that there was a claim adverse to that patent when the Act of 1872 was passed, or on the ground that adverse rights were affected by its issue under the provisions of that Act. New Dunderberg Min. Co. v. Old, (C. C. A. 3d Cir. 1897) 79 Fed. 598, 49 U. S. App. 201, 25 C. C. A. 116.

“Patents issued since the passage of the Act of 1872 convey under that Act to the grantees all the surface included within the lines of their location, and all veins, lodes, and ledges throughout their entire depth. The top or apex of which lies inside of such surface lines, where no ad-
verse rights existed on the 10th of May, 1872." Blake v. Butte Silver Min., 2 Utah 64.

Although section 9 of the Act of 1872, in repealing certain parts of the old law, provided that "such repeal shall not affect existing rights," when any claim is patented those rights are controlled by the patented lines. Carson City Gold, etc., Min. Co. v. North Star Min. Co., (N. D. Cal. 1886) 73 Fed. 387.


**Adverse claims.**—The questions whether or not any adverse claim to the location existed at the time of the passage of the Act of May 10, 1872, and whether or not any adverse rights would be affected by issuing the patent according to the provisions of the Act, are necessarily determined by the officers of the land department before issuing a patent. It is a judicial determination of these questions and cannot be collaterally attacked. If the action of the land department resulted from fraud, mistake, or erroneous views of the law, a court of equity might set aside the patent or declare it to be held in trust for him who had a better right to it. New Dunderberg Min. Co. v. Old, (C. C. A. 8th Cir. 1897) 78 Fed. 595, 49 U. S. App. 201, 25 C. C. A. 116.

**Sec. 2329. [Conformity of placer-claims to surveys, limit of.]** Claims usually called "placer," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. [R. S.]


**Effect of section.**—The effect of this section is to declare that the circumstances and conditions under which vein or lode claims may be entered and patented shall be likewise applicable to placer claims, and as the location of a vein or lode claim may be kept alive for the purpose of entry and patent only by the performance of a requisite amount of annual work, so a placer claim must be kept alive for the same purpose in the same manner. Carney v. Arizona Gold Min. Co., (1884) 85 Cal. 440, 2 Pac. 734.

This section extends and enlarges the significance commonly given to placer claims, and makes such locations include all forms of deposit, excepting quartz veins or other rock in place. The officers of the land department have construed it as embracing quarries of rock valuable for building purposes, and this construction is undoubtedly correct. Freezer v. Sweetney, (1880) 8 Mont. 508, 21 Pac. 20.

This section simply provides where the claimant shall run the lines of his claim, and does not at all dispense with the requirements as to how the lines shall be marked or evidenced. See R. S. sec. 2324, supra, p. 533. White v. Lee, (1889) 78 Cal. 593, 21 Pac. 363, 12 A. S. R. 115.

**Discovery.**—In the location of a mineral claim, placer as well as lode, the first requirement of the law is a discovery. Creede, etc., Min., etc., Co. v. Cinta Tunnel Min., etc., Co., (1905) 196 U. S. 337, 25 S. Ct. 266, 49 U. S. (L. ed.) 501.

Although in some instances courts have questioned the necessity of an actual discovery of mineral upon gold placer ground, it is established by the decided weight of authority that appropriate discovery is as necessary to the location of a placer claim as to the location of a lode claim. Steele v. Tanana Mines R. Co., (C. C. A. 9th Cir. 1906) 148 Fed. 678, 78 C. C. A. 412; Hall v. McKinnon, (C. C. A. 9th Cir. 1911) 195 Fed. 572, 113 C. C. A. 440; Zeiger v. Dowdy, (1911) 13 Ariz. 331, 114 Pac. 565.

There must be such a discovery of mineral as gives reasonable evidence of the fact that it be claimed as placer ground that it is valuable for placer mining. chrome of Miller, (1905) 197 U. S. 318, 25 S. Ct. 468, 49 U. S. (L. ed.) 770.

It is unimportant, in the absence of any intervening right, whether the discovery of mineral in the ground claimed is made before or after the marking of its boundaries. In such a case the performance of those two acts (where the recording of the notice of location is not required) perfects the location; and both of them are essential to the validity of a mining claim under the United States statutes. Waskey v. Hammer, (C. C. A. 9th Cir. 1909) 170 Fed. 31, 95 C. C. A. 306, affirmed (1912) 223 U. S. 85, 32 S. Ct. 187, 56 U. S. (L. ed.) 359.
Question of fact.—The question of discovery is in every case one of fact for the court or jury. Iron Silver Min. Co. v. Mike, etc., Gold, etc., Min. Co., (1892) 143 U. S. 394, 430, 12 S. Ct. 543, 36 U. S. (L. ed.) 201.

There must be some gold found within the limits of the land located as a placer gold claim but it cannot be said in advance as a matter of law how much must be found in order to warrant the court or jury in finding that there was in fact a discovery such as the law requires. The question must be decided not only with reference to the gold actually found within the limits of the claim located but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rock and soil formation are such as is usually found where these deposits exist in paying quantities; and further in considering the evidence bearing upon the general question, it must not be forgotten that the object of the law in requiring the discovery to precede location is to insure good faith upon the part of the mineral locator and to prevent frauds upon the government by persons attempting to acquire patents to land not mineral in character. Lange v. Robinson, (C. C. A. 9th Cir. 1906) 149 Fed. 799, 79 C. C. A. 1.

Placer claim.—'By the term 'placer claim,' as here used, is meant ground within defined boundaries which contains mineral in its earth, sand or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamating without mining.' U. S. v. Iron Silver Min. Co., (1885) 128 U. S. 675, 9 S. Ct. 195, 32 U. S. (L. ed.) 571; San Francisco Chemical Co. v. Duffield, (C. C. A. 8th Cir. 1912) 201 Fed. 830, 129 C. C. A. 160; Duffield v. San Francisco Chemical Co., (C. C. A. 9th Cir. 1913) 203 Fed. 450, 123 C. C. A. 548.

Placer claims are merely superficial deposits, occupying the beds of ancient rivers or valleys, washed down from some vein or lode. Northern Pac. R. Co. v. Soderberg, (1902) 188 U. S. 526, 23 S. Ct. 365, 47 U. S. (L. ed.) 575.

By the Act of July 9, 1870, placer claims were declared to include all forms of deposit, except quartz or other rock in place. Deffebach v. Hawke, (1885) 115 U. S. 392, 6 S. Ct. 95, 29 U. S. (L. ed.) 423; Reynolds v. Iron Silver Min. Co., (1886) 116 U. S. 687, 6 S. Ct. 601, 29 U. S. (L. ed.) 774.

A placer is said to be a "place near the bank of a river where gold dust is found" and has been defined as a "gravelly place where gold is found, especially by the side of a river or in the bed of a mountain torrent." The terms employed in the Acts of Congress are used in the sense in which they are received by miners. Gregory v. Pereshbaker, (1887) 73 Cal. 109, 14 Pac. 401.

Nature of deposit subject to placer claim.—Stone.—Stone is a mineral. It has been recognized as such by the duly authorized department of the government, and nothing of land containing valuable mineral deposits or building stone or limestone are permitted as placer claims under this section and R. S. sec. 2319, supra, p. 509. Johnston v. Harrington, (1892) 5 Wash. 73, 51 Pac. 316. But see Wheeler v. Smith, (1895) 5 Wash. 704, 32 Pac. 784, wherein it was held that land containing limestone deposits, in the absence of ore, could not be entered as a placer claim.

Sand.—Land more valuable for the building sand it contains than for agriculture or placer location. Loney v. Scott, (1910) 57 Ore. 378, 112 Pac. 172, 32 L. R. A. (N. S.) 466.

Gravel bed.—A gravel bed with gold therein is a placer. Gregory v. Pereshbaker, (1887) 73 Cal. 109, 14 Pac. 401.

Calcium phosphate.—The word "mineral" includes what is known as calcium phosphate or rock phosphate, and ground containing horizontal veins, commonly called "blanket veins" of calcium or rock phosphate occurring between strata of limestone, chalk and shale, cannot be entered as a placer claim. San Francisco Chemical Co. v. Duffield, (C. C. A. 8th Cir. 1912) 201 Fed. 830, 120 C. C. A. 160.


The government title to oil bearing lands can only be acquired, under existing laws, pursuant to the provisions of the mining laws relating to placer claims. Gird v. Quinter Fortiz Oil Co., (S. D. Cal. 1894) 60 Fed. 531.

Distinction between lode and placer claims.—A placer location gives a qualified possession of the ground located; that is to say, it confers upon the owner the exclusive right of possession of the surface area for all purposes incidental to the use and operation of the same as a placer mining claim, and all unknown lodes or veins, but does not give right of possession to known lodes or veins within its limits. The right to the possession of such lodes or veins can be acquired only by locating

None of the provisions fixing the size and extent of lode claims apply to placer claims. Price v. McIntosh, (1901) 1 Alaska 296.

See further note Distinction between lode and placer claims under R. S. sec. 2320, supra, p. 513.

Marking boundaries.—Under R. S. sec. 2324, supra, p. 533, requiring that the location of mining claims must be distinctly marked on the ground, so that their boundaries can be readily traced, and this section directing that placer claims shall be subject to entry and patent under like conditions, but where the lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivision of the public lands, an attempted location of a placer mining claim by posting a notice on a tree, claiming the exclusive right to prospect on a certain quarter section, without any effort to distinctly mark the location on the ground, is insufficient, and no rights are acquired thereby. Worthen v. Sidway, (1904) 72 Ark. 215, 70 S. W. 777.

Sufficient conformity to public survey.—Under this section and R. S. sec. 2331, infra, p. 579, requiring placer claims to conform to the lines of the public survey, they are required to so conform only where it is reasonably practicable, and otherwise it is sufficient if they conform as near as is reasonably practicable. Mitchell v. Hutchinson, (1904) 142 Cal. 404, 76 Pac. 55.

Patent.—Patents for placer claims are issuable under like circumstances and conditions as for vein or lode claims, and persons having contiguous claims of any size may make joint entry thereof. There is no limitation upon the number of locations which may be included in a patent. St. Louis Smelting, etc., Co v. Kemp, (1881) 104 U. S. 638, 26 U. S. (L. ed.) 675.

Lode passing under placer patent.—The lode claimant gets a complete title to the lands within his patent, subject only to the express reservation which the law directs should be contained in the patent. No reason appears why a placer patent shall not be construed in the same way, and the law has not expressed any limitation upon the estate or authorized the officers of the land department to express in the patent any reservation. In the absence of a located lode within the limits of the placer claim, and of a contest, it would seem that the officers of the land department need only ascertain that there is a placer which may be entered as such. Cranes Gulch Min. Co v. Scherrer, (1901) 134 Cal. 350, 66 Pac. 487, 86 A. S. R. 278.

Riparian rights.—By the settled rule of decision in the Supreme Court, conveyances by the United States of public lands on nonnavigable streams and lakes, where it is not provided otherwise, are to be construed and have effect according to the law of the state in which the lands are situate, in so far as the rights and incidents of riparian proprietorship are concerned. Snyder v. Colorado Gold Dredging Co., (C. C. A. 8th Cir. 1910) 181 Fed. 62, 104 C. C. A. 136, and cases cited.

In Colorado, a placer patent does not carry by implication the right to the unappropriated waters of any stream bordering upon or traversing the claim. Snyder v. Colorado Gold Dredging Co., (C. C. A. 8th Cir. 1910) 181 Fed. 62, 104 C. C. A. 136.

Sec. 2330. [Subdivisions of ten-acre tracts; maximum of placer locations.] Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona-fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona-fide settler to any purchaser. [R. S.]


Extent of claim—Void as to excess.—The general principle may be considered as settled that a mining location, whether lode or placer, containing more than allowed by the statute, must be held void as to the excess; to the extent allowed by law it will be sustained. Price v. McIntosh, (1901) 1 Alaska 286.

A placer mining claim located in good faith is not wholly void because it exceeds twenty acres, but is void only as to the excess, which may be rejected from any
portion the owner may select; and until he has been advised of the excess, and has had a reasonable time to make his selection, his possession extends to the entire claim, and another who goes upon it and makes a location of any part is a trespasser, and his location a nullity and void for any purpose. Jones v. Wild Goose Min., etc., Co., (C. C. A. 9th Cir. 1910) 177 Fed. 95, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392.

Association claim.—An association of persons may make a location of a tract which shall embrace as many individual claims of twenty acres each as there are individuals in the association, not to exceed eight locators making a location aggregating 160 acres. Hall v. McKinnon, (C. C. A. 9th Cir. 1911) 103 Fed. 572, 113 C. C. A. 440.

A patent for a claim in no case exceed 160 acres; that is, for a single claim, and it cannot be so much except in the case of an association of persons. An association may take 160 acres; an individual claimant can have only twenty acres. St. Louis Smelting, etc., Co. v. Kemp, (1879) 21 Fed. Cas. No. 12,239a.

Discovery to validate 160-acre claim.—The 160 acres which may be entered by an association are treated as an entirety under one location for the purpose of discovery. Miller v. Chrisman, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 A. S. R. 63.

Manner of location.—An association placer mining claim cannot be located over other prior claims, so as to include within its boundaries and appropriate a number of unlocated and noncontiguous fractions lying between such prior claims. Stenfeld v. Espe, (C. C. A. 9th Cir. 1909) 171 Fed. 825, 96 C. C. A. 497.

Fraudulent conduct of one of the locators.—Where a location is made by an association of locators, the fraudulent and concealed conduct of one of the locators will not invalidate the entire location. Rooney v. Barnette, (C. C. A. 9th Cir. 1912) 200 Fed. 700, 119 C. C. A. 116.

Agreement as to individual interest.—An agreement between one of the locators with other absent locators as to his share in their individual interest in the claim, if made after the location of the claim and the discovery of the mineral, in no way affects the validity of the location of the associated claim. Rooney v. Barnette, (C. C. A. 9th Cir. 1912) 200 Fed. 700, 119 C. C. A. 116, distinguishing Cook v. Klonus, (C. C. A. 9th Cir. 1908) 164 Fed. 529, 90 C. C. A. 403, (C. C. A. 9th Cir. 1909) 167 Fed. 700, 94 C. C. A. 144, cited in the next succeeding note.

But where the location is made after, that is, in pursuance of an agreement, whereby one individual is to acquire more than twenty acres, it constitutes a fraud on the law, and consequently a fraud on the government, rendering the entire location invalid, so that where a partnership, consisting of five persons, attempted to locate a single claim covering one hundred acres, and formed a joint-stock association, by which two of the members acquired only a nominal interest, one less than a fifth, one more than a fifth, and one more than half, the location was void. Nome, etc., Co. v. Snyder, (C. C. A. 9th Cir. 1911) 187 Fed. 385, 109 C. C. A. 217. Of similar effect see Cook v. Klonus, (C. C. A. 9th Cir. 1908) 164 Fed. 529, 90 C. C. A. 403, modified (C. C. A. 9th Cir. 1908) 168 Fed. 700, 94 C. C. A. 144.


The statute confers the right upon an association of not less than eight persons to locate not to exceed one hundred and sixty acres, and the courts, in determining the protection of persons, and in lieu of and in addition to the protection of the government, have held that they may associate, and by a majority of vote and a majority of the shares, make an application for the purpose of either securing a patent or to protect pending applications for a patent, for the whole of such ground or claims, and by parity of reasoning it would seem that $100 in work or improvements expended or made upon such 160-acre claim in any one year would save it from forfeiture. McDonald v. Montana Wood Co., (1894) 34 Mont. 88, 35 Pac. 688, 43 A. S. R. 616.

Conveyance by association to individual.—An association of locators may convey the right to prosecute the work and perfect the location to one of them before discovery. Miller v. Chrisman, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 A. S. R. 63.

Contiguous claims.—The provision for the joint entry and patent of contiguous placer claims owned by two or more persons, as contiguity implies that they may be located and occupied jointly before such purchase. Chapman v. Toy Long, (1876) 4 Savy. 28, 5 Fed. Cas. No. 2,610.

If one individual should acquire contiguous claims by purchase he is entitled to enter them all by one entry. St. Louis Smelting, etc., Co. v. Kemp, (1881) 104 U. S. 638, 26 U. S. (L. ed.) 875.

An owner of valid and regular contiguous locations, if he desires to obtain a patent for them, is required to make the application for each one of them, to post the notice as required by statute, and give the notice by publication, and file his plat and survey, and do all such things as are required in the several claims upon each one of them. St. Louis Smelting, etc., Co. v. Kemp, (1879) 21 Fed. Cas. No. 12,259a. See also St. Louis Smelting, etc., Co. v. Ray, (1879) 21 Fed. Cas. No. 12,339a.

Relocation.—Where locators of a placer
mine are at most in constructive possession only, their location must be valid, to enable one person to re-locate the ground. Saxton v. Perry, (1910) 47 Colo. 263, 107 Pac. 281.

Patent.—This section and R. S. sec. 2331, following, do not place a limitation upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in the patent. St. Louis Smelting, etc., Co. v. Kemp, (1881) 104 U. S. 636, 26 U. S. (L. ed.) 875.

Sec. 2331. [Conformity of placer-claims to surveys, limitation of claims.] Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes. [H. S.]


Policy and purpose of statute.—"The policy and object of this law are to limit the quantity of placer mineral land which may be located by one person to twenty acres; and although one person may obtain a patent for more than twenty acres, he can do so only by representing to the government that he is a purchaser of the excess from one or more bona fide locators whose locations were made in conformity with the above statutory limitation as to quantity. For this purpose he is required to present with his application for a patent an authenticated abstract of his title showing its derivation from lawful locations. A contract by which sham locaters agreed or permitted their names to be used as locators to enable their friends to obtain possession of patents for more mineral lands than they were entitled to by law was held to be void. Mitchell v. Cline, (1890) 84 Cal. 409, 24 Pac. 184.

"The policy of the government in disposing of the mineral lands, as well as other portions of the public domain, is to make a general distribution among as large a number as possible of those who wish to acquire such land for their own use, rather than to favor a few individuals who might wish to acquire princely fortunes by securing large tracts of such land; and it is contrary to this policy, and to the provisions of sections 2330 and 2331 (this and the preceding sections), for one person to cover more than twenty acres of placer ground by one location by the device of using the names of his employees and friends as locators." Durant v. Corbin, (C. C. Wash. 1899) 94 Fed. 392. See (3rd v. California Oil Co., (S. D. Cal. 1894) 60 Fed. 331.

Unit of placer claim.—The unit of an individual placer mining claim is twenty acres. Hall v. McKinnon, (C. C. A. 9th Cir. 1911) 193 Fed. 572, 113 C. C. A. 440.

Form of twenty-acre claim.—No limit is fixed by statute to the length, breadth, or form of a twenty-acre placer claim. R. S. sec. 2320, supra, p. 512, fixing the maximum length and width of lode claims, does not apply; and unless some rule, regulation, or custom of mining within the district limit the locator, he may locate his placer claim to follow the pay streak in any form he chooses, but not to exceed twenty acres in extent. Price v. McIntosh, (1901) 1 Alaska 286.

A miner may locate twenty acres, or less if he desires, of placer mining ground in any form he chooses, excluding known mineral lands; no miners’ rule, regulation, or custom can limit him in the area or form of his claim, nor in its width or length; any such rule, regulation, or custom is void for conflict with both the spirit and letter of the mining law. Price v. McIntosh, (1901) 1 Alaska 286.

Survey or plat.—This provision does not refer to the marking by the claimant of the boundaries of his claim upon the ground, but to the plat and survey which are to be filed upon the application for the patent. It does not dispense with the general requirement that the boundary shall be marked as required by R. S. sec. 2324. White v. Lee, (1889) 78 Cal. 293, 21 Pac. 363, 12 A. S. R. 115.

Marking boundaries.—This section does not dispense with the requirement of R. S. sec. 2324, supra, p. 533, directing that the location of mining claims must be distinctly marked on the ground, so
that its boundaries can be readily traced. Worthen v. Sidway, (1904) 72 Ark. 215, 79 S. W. 777.

In Kern Oil Co. v. Crawford, (1903) 143 Cal. 293, 76 Pac. 1111, 3 L. R. A. (N. S.) 993, it appeared that plaintiff's grantors entered on a quarter section of land, with intent to locate a placer mining claim. They posted notice on the land, claiming such quarter section, and, after due preliminary steps, caused survey to be made, and set up stakes at the supposed corners, marked "N. E. corner section 32" and "S. E. corner section 32," and set laths between them to mark the line. These stakes were in reality some distance west of the true line. On the strip between the true line and that marked by the grantors, defendant after-

wards entered. It was held that the notice and stakes posted by plaintiff's grantors were sufficient to notify the defendant that the plaintiff's claim extended to the whole quarter section, so that she acquired no title to the strip erroneously omitted from the boundaries.

State laws.—A state law requiring boundary stakes at the angle of a placer mine does not conflict with this section. Providing that where placer claims are on surveyed lands, and conform to the legal subdivisions, no further survey or plat shall be required, since the latter refers only to the plat and survey required to be filed on applications for patent, and has no reference to location. Saxton v. Perry, (1910) 47 Colo. 263, 107 Pac. 281.

Sec. 2332. [What evidence of possession, &c., to establish a right to a patent.] Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining-claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining-claim or property thereto attached prior to the issuance of a patent. [R. S.]


Purpose of statute.—"The object of this section was to permit a party applying for patent to make a prima facie case before the land office by proving that the claim upon which the application for patent was made had been in possession of himself and grantors for a period equal to the statute of limitations of the jurisdiction in which the claim was situated, provided no adverse claim was interposed. In other words, proof of possession for the statutory period in the absence of any adverse claim was to be taken by the land department as equivalent to an establishment in detail of all the facts necessary to constitute a valid location. The statute, therefore, is not available in an action brought in support of an adverse against an application for patent, for its language necessarily implies that possession in the applicant for the statutory period is of no avail as against an adverse claim based upon a conflicting location, except it might be in such action that proof of such possession would be sufficient upon which to presume that all steps necessary to effect a location of the claim adversely had been taken." Cleary v. Skiffich, (1901) 28 Colo. 302, 65 Pac. 59, 89 A. S. R. 207.

This section was enacted to meet cases where applicants for the patent have been in possession of their claims for a period of the statute of limitation, but are unable to make full proof of their rights to the patent as required by the previous provisions of the law; and to excuse their defects in title Congress determined that the land office should pass over such defects and give them their patents, provided no one appeared to contest their application. The land office, under such circumstances, is authorized to omit some of the proof required from an applicant in consideration of there being no opposition to the application. But if an adverse claimant appears the contest should be referred to a court of competent jurisdiction for determination as in other cases. McCowan v. Macay, (1895) 16 Mont. 234, 40 Pac. 602.

Construction of statute.—This section is to be construed in connection with the other federal mining statutes. When so construed, its effect is simply to declare that possession for the statutory period is the equivalent of a valid location. Upton v. Santa Rita Min. Co., (1907) 14 N. M. 98, 89 Pac. 276.

Scope of section.—This section is applicable to lode mining claims. Lavagnino v. Uhlig, (1903) 26 Utah 1, 71 Pac. 1046, 89 A. S. R. 808.

Citizenship.—This section provides an additional mode of acquisition, but does not enlarge the class who can acquire. Even if the possession be otherwise suffi-
cient it must be shown that the persons whose possession is relied on were citizens of the United States or had declared their intention to become such. Under R. S. sec. 2319, supra, p. 509, that class is the only one that can acquire mineral land from the government. Anthony v. Jilbun, (1890) 83 Cal. 206, 23 Pac. 419.

Adverse possession.—Where possession has continued for the period covered by the state statute of limitations before the adverse right exists, it is equivalent to a location under the laws of Congress. Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co., (1896) 114 Cal. 106, 45 Pac. 1047.

Under this section the claimant to mineral lands of the United States who has been in the open, exclusive adverse possession of a claim for a continuous period equal to that required by the local statute of limitations governing adverse possession of real estate, is relieved of the necessity of making proof of posting and recording a notice of location and such other proofs as are usually furnished by the county recorder; or, in other words, he is relieved from furnishing the evidence of record title. Humphreys v. Idaho Gold Mines Development Co., (1912) 21 Idaho 126, 120 Pac. 823, 40 L. R. A. (N. S.) 817. See also Beek v. Meagher, (1881) 30 U. S. (L. ed.) 735; 420 Min. Co. v. Bullion Min. Co., (1876) 3 S. W. 634, 9 Fed. Cas. No. 4,989; Harris v. Equator Min., etc., Co., (C. C. Colo. 1881) 8 Fed. 843.

When the possessor right in a mining claim is real estate under the provisions of a state statute, such a claim is sustained by the state statute of limitation governing the recovery of real property. Lavagnino v. Ubilgi, (1903) 26 Utah 1, 71 Pac. 1046, 59 A. S. R. 508.

Liens.—A judgment creditor need not adversely the application of the judgment debtor or his grantee for a patent after execution levied and officer’s deed made and delivered; the purchaser should adverse because the lien is gone as a lien. Butte Hardware Co. v. Frank, (1901) 22 Mont. 344, 55 Pac. 1.

Local customs or rules of miners.—By R. S. secs. 2319, 2324, supra, pp. 509, 533, and the text section, it is expressly provided that the right of possession may be determined by “local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States;” or “by the statute of limitations for mining claims of the state or territory where the same may be situated.” So that in a given case the right of possession may not involve any question under the Constitution or laws of the United States but simply a determination of local rules and customs, or state statutes, or only a mere matter of fact. Shoshone Min. Co. v. Rutter, (1900) 177 U. S. 505, 20 S. Ct. 726, 44 U. S. (L. ed.) 864.

Sec. 2333, [Proceedings for patent for placer-claim, etc.] Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of the placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof. [R. S.]


Application of section.—This statute made provision for three distinct classes of cases: 1. When the applicant for a placer patent is at the time in possession of a vein or lode included within the boundaries of his placer claim, he shall
state that fact, and on payment of the sum required for a vein claim and twenty-five feet on each side of it at $5 per acre, and $2.50 for the remainder of the placer claim, his patent shall cover both. 2. It enacted that where no such vein or lode is known to exist at the time the patent is applied for, the patent for a placer claim shall carry all valuable mineral and other deposits which may be found within the boundaries thereof. 3. But in case where the applicant for the placer patent is not in possession of such lode or vein within the boundaries of his claim, but such vein is known to exist, and it is not referred to or mentioned in the claim or patent, then the application shall be construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode claim. Reynolds v. Iron Silver Min. Co., (1886) 116 U. S. 687, 6 S. Ct. 601, 29 U. S. (L. ed.) 774.

Located veins.—This section can apply only to lodes or veins not taken up and located so as to become the property of others. If they are not thus owned and are known to exist, the applicant for the patent must include them in his application or he will be deemed to have declared that he had no right to them. Noyes v. Mantle, (1888) 127 U. S. 348, 8 S. Ct. 1132, 32 U. S. (L. ed.) 165.

Limitation of width of lode claim.—The limitation of the width of a lode claim in this section is not only applicable to the placer claimant, but applies as well to others who locate a lode within the boundaries of a previously located placer. Mt. Ross Min., etc., Co. v. Palmer, (1889) 28 Colo. 56, 56 Pac. 176, 77 A. S. R. 245, 50 L. R. A. 259.

Vein or lode.—A "vein or lode" within this section is a body of mineral or mineral bearing rock within defined boundaries in the general mass of the mountain, and a "known vein or lode" is one that is clearly ascertained and of such extent as to render the land more valuable on that account and justify its exploitation and development. Noyes v. Clifford, (1908) 37 Mont. 138, 94 Pac. 842.

Veins or lodes are lines or aggregations of metal imbedded in quartz or other rock in place, consisting of a strip of mineral bearing rock within defined boundaries in the general mass of the mountain, which must be continuous and without interruption, bounded by country rock mineralized to no greater extent than the general condition of the vicinity. Grand Cent. Min. Co. v. Mammoth Min. Co., (1905) 29 Utah 400, 83 Pac. 648.

The terms "vein" and "lode" are synonymous, and the same definition of such terms as used in R. S. sec. 2320, supra, p. 312, must be applied to them in this section. Noyes v. Clifford, (1908) 37 Mont. 138, 94 Pac. 842.

Knowledge of lode or vein.—Lodes or veins to be known must be clearly ascertained to be of such extent as to render the land more valuable on that account and justify their exploitation. It is not enough that there may have been some indication, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal to justify their designation as "known" veins or lodes. U. S. v. Iron Silver Min. Co., (1888) 128 U. S. 673, 9 S. Ct. 195, 32 U. S. (L. ed.) 571.

"The earlier decisions on the subject of what constitutes 'known veins' within the limits of a placer are not altogether clear or harmonious, but without attempting to enter into any extended discussion of the question at this time, it is sufficient to say that it is now settled that as between placer and subsequent conflicting lode locations a known vein within the limits of a placer, when that question is raised collaterally, is one known to exist at the time of application for patent for such placer, and to contain minerals in such quantity and quality as to justify expenditure for the purpose of extracting them." McConaghy v. Doyle, (1903) 92 Colo. 575 Pac. 419. See also Largey v. Black, 10 Land Dec. Dep. Int. 156; Butte, etc., Min. Co. v. Sloan, (1895) 16 Mont. 97, 49 Pac. 217.

Where a location of a vein or lode has been made under the law, and its boundary has been specifically marked on the surface so as to be readily traced, and notice of the location is recorded within the usual books of record within the district, the vein or lode is known to exist although personal knowledge of the fact may not be possessed by the applicant for the patent for the placer claim. The information which the law requires the locator to give to the public must be sufficient to acquaint the applicant with the existence of the vein or lode. Noyes v. Mulligan, (1888) 127 U. S. 348, 9 S. Ct. 1132, 32 U. S. (L. ed.) 165.

"Located vein" as "known vein."— "Known vein" is not synonymous with a "located vein." It is enough that it be known, and to come within the intention of the statute it must either have been known to the applicant for the placer patent, or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises for the purpose of obtaining titles from the government. The applicant for a placer patent is chargeable with notice of the existence of a tunnel running underneath its surface, and also with notice of whatever a casual inspection of that tunnel would disclose. Iron Silver Min. Co. v. Mike, etc., Gold, etc., Min. Co., (1892)
Vein known to exist at time of application.—The time at which the vein or lode is discovered is that in order to be excepted from the grant of the patent is the time at which the application is made and not at or before entry and payment. Iron Silver Min. Co. v. Mike, etc., Gold, etc., Min. Co., (1892) 143 U. S. 394, 152, 12 S. Ct. 543, 36 U. S. (L. ed.) 201. See also U. S. v. Iron Silver Min. Co., (1888) 125 U. S. 673, 9 S. Ct. 195, 32 U. S. (L. ed.) 571.

Abandoned lode claim.—The fact that a lode claim had been abandoned prior to the issuance of patent for a placer claim, when no mineral was disclosed in any vein upon this claim which would justify expenditure for the purpose of extraction, is of no moment in determining the existence of a known lode or vein. McConaghy v. Doyle, (1903) 32 Colo. 92, 75 Pac. 419; Brownfield v. Bier, (1895) 15 Mont. 403, 39 Pac. 461; Casey v. Thievierge, (1887) 19 Mont. 341, 48 Pac. 394, 61 A. S. R. 611.

Lode outside placer boundaries.—The discovery of a lode 200 or 300 feet outside of the boundaries of a placer claim does not create any presumption of the possession of a vein or lode within those boundaries, nor that a vein or lode exists within them. Dahl v. Raheim, (1889) 122 U. S. 260, 10 S. Ct. 74, 33 U. S. (L. ed.) 324.

Conflicting placer and lode patents or locations.—In any conflict between the title conferred by two patents, whether it be in law or in equity, the holder of the title under the elder patent has a right to require that the existence of the lode and the knowledge of its existence on the part of the grantee of the elder patent should be established. If the junior lode patent has been issued by the land department it cannot be presumed that at the time of the application for the placer patent the lode or vein was known. Iron Silver Min. Co. v. Campbell, (1890) 135 U. S. 286, 10 S. Ct. 765, 34 U. S. (L. ed.) 155.

Where each party has a patent from the government and the question is as to the superiority of the titles under these patents, if this depends upon extrinsic facts not shown by the patents themselves, it is competent in any judicial proceeding where the question of superiority of titles arises, to establish it by proof of these facts. Iron Silver Min. Co. v. Campbell, (1890) 135 U. S. 286, 10 S. Ct. 765, 34 U. S. (L. ed.) 155. See Cleary v. Skiffich, (1901) 28 Colo. 362, 65 Pac. 59, 89 A. S. R. 207.

Lode location on placer claim.—Where the defendant claimed the right to a lode location within the limits of the placer, the secretary of the Interior having previously located the placer, as excepted from plaintiff's patent, affidavits of representation work done on defendant's alleged lode.
claim from year to year. After the location was made were admissible to show defendant's good faith and belief that the same warranted expenditure to develop it. Noyes v. Clifford, (1808) 37 Mont. 158, 94 Pac. 542.

A stranger has no right to go upon a placer claim and by sinking shafts or otherwise explore for any lode or vein, and on finding one obtain a patent thereto. An entry upon a placer claim, against the will of the placer locator, for the purpose of prospecting, is undoubtedly a trespass, and such a trespass cannot be relied upon to sustain a claim of a right to veins or lodes. Clipper Min. Co. v. Eli Min., etc., Co., (1904) 194 U. S. 220, 24 S. Ct. 632, 48 U. S. (L. ed.) 944.

The burden of proof as between placer and subsequent lode locations is upon the lode claimant to establish by clear and convincing testimony that the vein or veins which he claims are exempt from the placer application by operation of law and are of a character which will render them known veins. McConaghy v. Doyle, (1903) 32 Colo. 92, 75 Pac. 419.

As between a placer patent and subsequent located lodes, the presumption is in favor of the placer. Casey v. Thievierge, (1897) 19 Mont. 341, 49 Pac. 394, 61 A. S. R. 511.

Duty of land department.—"In the absence of a located lode within the limits of the placer claim, and of a contest, it would seem that the officers of the land department need only ascertain that there is a placer which may be entered." Cranes Gulch Min. Co. v. Scherrer, (1901) 134 Cal. 350, 66 Pac. 487, 86 A. S. R. 279.

Patent.—Lodes or veins known to exist when the patent is asked for are excluded from the grant as much as if described in clear terms. Reynolds v. Iron Silver Min. Co., (1868) 116 U. S. 687, 6 S. Ct. 601, 29 U. S. (L. ed.) 774.

A placer patent conveys to the locator no other or different rights than those acquired under the location; he has no possession and acquires no right to any lodes known to exist within his claim by virtue of his placer appropriation; such a patent does not operate to preclude a subsequent lawful discovery and location of veins or lodes within its boundaries. Mt. Rose Min., etc., Co. v. Palmer, (1899) 26 Colo. 56, 50 Pac. 176, 77 A. S. R. 245, 50 L. R. A. 289.

Right to possession.—In Loney v. Scott, (1910) 57 Ore. 378, 112 Pac. 172, 32 L. R. A. (N. S.) 406, it appeared that the plaintiffs made placer locations upon public lands while the contents of the claim were obtained from entry and gave the notices as required by law. After the reopening of the land to entry, the defendant's grantor, a railroad company, obtained a patent to the land as lieu land under its land grant, defendant making the nonmineral affi-
davit, which showed the land to be in fact mineral in character and that it was claimed under placer filings, and after conveyance to him the defendant sued the plaintiffs claimants for possession. It appeared also that the defendant and his grantor knew of its mineral character at the time the patent was applied for. It was held that the possession of the plaintiffs as placer claimants at the time of the application of the defendant for a patent was sufficient to defeat defendant's action for possession, and that plaintiffs might enjoin defendant's action.

Reservation in patent.—When there was a regularly defined lode of gold-bearing quartz rock in place, known to exist at the time of the application for patent, a reservation in the patent that any vein or lode claim already known to exist within the described premises was expressly excepted and excluded, was authorized. Clary v. Hazlitt, (1853) 67 Cal. 236, 7 Pac. 701.

Enlarging exception by terms of patent.—The exception of the statute as to lodes or veins known to exist cannot be enlarged by the terms of the patent, and an exception from grant in a patent of any vein or lode "claimed or known to exist" is unauthorized. Where the existence of a vein or lode in a placer claim is not known at the time of the application for a patent, that instrument will convey all valuable mineral or other deposits subsequently found within the boundary of the claim. U. S. v. Iron Silver Min. Co., (1888) 128 U. S. 673, 9 S. Ct. 195, 32 U. S. (L. ed.) 571.

Exception from patent of lode or vein.—If the lode or vein within the limits of a placer location is excepted from the patent to the placer claim, such lode or vein and twenty-five feet on either side thereof are open to exploitation and location by any citizen of the United States, for which purpose he is entitled to enter into possession thereof. Noyes v. Clifford, (1908) 37 Mont. 138, 94 Pac. 842.

Evidence.—Where the defendant claimed that a lode or vein within the limits of a placer location was excepted from the patent to the placer, evidence of the character, extent, and value of the contents of the vein at any time before or after the beginning of the patent proceedings for the placer was competent on the issue whether it was such a vein as would justify a location and the expenditure of labor and money to develop and utilize it; evidence of what it contained at the date of the location being relevant to the contents of the patent as of the date of the application for the patent. Noyes v. Clifford, (1908) 37 Mont. 138, 94 Pac. 842.

Expert opinion.—On an issue whether a lode or vein within the limits of plaintiff's placer location was of sufficient value
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to justify exploitation and development so as to exempt it from the terms of the plaintiff's placer patent, the opinion of an expert based on his experience and observation of the conditions in the district that the prospects of the vein were good and that it carried some mineral value was admissible as bearing on the contents of the vein at the time the application of plaintiff's patent was made. Noyes v. Clifford, (1908) 37 Mont. 138, 94 Pac. 842.

Question of fact.—It is a question for the jury whether a vein or lode within the limits of a placer location was excepted from the patent to the holder, and therefore subject to defendant's location, whether such vein was "known" at the date of plaintiff's application for patent as a clearly ascertained vein, and whether it contained such mineral as made the ground more valuable on that account and justified expenditure. Noyes v. Clifford, (1908) 37 Mont. 138, 94 Pac. 842.

Whether there was a known lode or vein at the time of the application for a placer patent is a question of fact for the jury, and it was held in this case that the finding of the jury that there was a known vein within the scope of this section was based upon sufficient testimony. Iron Silver Mine Co. v. Mike, etc., Gold, etc., Min. Co., (1892) 143 U. S. 394, 430, 12 S. Ct. 543, 36 U. S. (L. ed.) 201. See also Cleary v. Skiffich, (1901) 28 Colo. 362, 66 Pac. 59, 89 A. S. R. 207.

Conclusiveness of patent.—One who has complied with all the proceedings essential for the issue of a patent and is therefore entitled to a patent is the equitable owner of the mining ground, and may maintain an action to quiet title. Dahl v. Rainheim, (1890) 132 U. S. 260, 10 S. Ct. 74, 33 U. S. (L. ed.) 324.

And when no adverse claim was asserted to the application for the patent, the question whether the mining ground is placer ground is not open to litigation by private parties seeking to avoid the effect of the proceedings. Dahl v. Rainheim, (1890) 132 U. S. 260, 10 S. Ct. 74, 33 U. S. (L. ed.) 324.

All presumptions favor the validity of a placer patent; that the patentee had fully complied with the law in all respects; that the vein was not a known vein; and these presumptions can be overcome only by clear and convincing proof. Montana Cent. R. Co. v. Migeon, (C. C. Mont. 1896) 68 Fed. 811, affirmed (C. C. A. 9th Cir. 1896) 77 Fed. 249, 44 U. S. App. 724, 23 C. C. A. 166.

Sec. 2334. [Surveyor-general to appoint surveyors of mining claims, etc.] The surveyor-general of the United States may appoint in each land-distriict containing mining lands as many competent surveyors as shall apply for appointment to survey mining-claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land-Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land-distriict where mines are situated for the publication of mining-notices in such distriict, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land-office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land-Office. [E. S.]


Duties of mineral surveyors.—"Mineral surveyors are appointed by the surveyor general under [the text section], and their field of action is confined to the surveying of mining claims and to matters incident thereto. They act only at the solicitation of owners of such claims, and are paid by the owners, not by the Government; but their charges must be within the maximum fixed by the Commissioner of the General Land Office, and their work must be done in conformity to regulations
prescribed by that officer. They are required to take an oath, and to execute a bond to the United States, as are many public officers. Within the limits of their authority they act in the stead of the surveyor general and under his direction, and the surveyors are his deputies. The work which they do is the work of the Government, and the surveys which they make are its surveys. The right performance of their duties is of real concern, not merely to those at whose solicitations they act, but also to the owners of adjacent and conflicting claims and to the Government. Of the representatives of the Government who have to do with the proceedings incident to applications for patents to mining claims, they alone come in contact with the land itself, and have an opportunity to observe its situation and character, and the extent and nature of the work done and improvements made thereon; and it is upon their reports that the surveyor general makes the certificate required by Rev. Stat. sec. 2325 [supra, p. 555], which is a prerequisite to the issuance of a patent.” Waskey v. Hammer, (1912) 223 U. S. 85, 32 S. Ct. 187, 56 U. S. (L. ed.) 359, affirming (C. C. A. 9th Cir. 1909) 170 Fed. 31, 95 C. C. A. 305.

Payment for survey.—The United States government cannot be required or obligated to pay for the survey, even though made by one of its own officers, namely, a United States deputy mineral surveyor. There is nothing in the statute which requires any deputy surveyor to make a survey or enter into a contract with an applicant for a survey, except upon terms and conditions which are satisfactory to himself and the claimants. The department is authorized to fix the maximum fees for the survey, but nothing in the statute requires any deputy surveyor to accept even the maximum fees and to make a survey as a public or official duty upon the request of an applicant therefor. The matter of employment, and the manner and amount of payment of the surveyor, are left wholly to the choice and free will of the applicant and the deputy. Any deputy surveyor within the district may be selected by the applicant, and any arrangement or agreement whatever, which is satisfactory to them, may be made as to payment for such services. Fish, etc., Co. v. New England Homestead Min. Co., (1912) 28 S. D. 588, 134 N. W. 795.

Mineral surveyors act only at the solicitation of owners of mining claims and are paid by the owners, not by the government, but their charges must be within the maximum fixed by the commissioner of the general land office, and their work must be done in conformity to regulations prescribed by that officer. Waskey v. Hammer, (1912) 223 U. S. 85, 32 S. Ct. 187, 56 U. S. (L. ed.) 359, affirming (C. C. A. 9th Cir. 1909) 170 Fed. 31, 95 C. C. A. 305.

Location of mining claim by mineral surveyor.—A government mineral surveyor appointed under this section is within the prohibition of R. S. sec. 452 (title PUBLIC LANDS), and hence is disqualified from locating a mining claim. That prohibition is addressed not merely to the officers of the general land office, or to its officers and clerks, but to its “officers, clerks and employees.” These words, taken collectively, are very comprehensive and easily embrace all persons holding positions under that office and participating in the work assigned to it, as is the case with mineral surveyors. Waskey v. Hammer, (1912) 223 U. S. 85, 32 S. Ct. 187, 56 U. S. (L. ed.) 359, affirming (C. C. A. 9th Cir. 1909) 170 Fed. 31, 95 C. C. A. 305.

The purpose of the prohibition is to guard against the temptations and partiality likely to attend efforts to acquire public lands, or interests therein, by persons so situated, and thereby to prevent abuse and inspire confidence in the administration of the public land laws. Waskey v. Hammer, (1912) 223 U. S. 85, 32 S. Ct. 187, 56 U. S. (L. ed.) 359, affirming (C. C. A. 9th Cir. 1909) 170 Fed. 31, 95 C. C. A. 305.

In the case of Hand v. Cook, (1907) 29 Nev. 518, 92 Pac. 3, it was held to the contrary, that a government mineral surveyor appointed under this section was not an officer, clerk or employee in the general land office, within R. S. sec. 452 (title PUBLIC LANDS), and hence was not disqualified thereby from locating a mining claim under R. S. sec. 2207 (title PUBLIC LANDS) providing for such location.

Sec. 2335. [Verification of affidavits, etc.] All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated, and all testimony and proofs may be taken before any such officer. And, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found.
then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land; and the register shall require proof that such notice has been given. [R. S.]


Notice.—The right to personal notice of all proceedings is dependent upon having initiated a contest. Northern Pac. R. Co. v. Cannon, (C. C. A. 9th Cir. 1893) 54 Fed. 252, 7 U. S. App. 507, 4 C. C. A. 303, affirming (C. C. Mont. 1891) 46 Fed. 237.

Affidavit—Irregularities.—Whenever it appears that there has been a compliance with the substantial requirements of the law, irregularities are waived or permission given, even on appeal, to cure them by supplemental proofs. So the fact that an original affidavit of posting had been signed before an officer residing outside of the land district, was an irregularity which could be cured. El Paso Brick Co. v. Mc-Knight, (1913) 233 U. S. 260, 34 S. Ct. 498, 58 U. S. (L. ed.) 943, L. R. A. 1915A 1113, reversing (1911) 16 N. M. 721, 120 Pac. 694, Ann. Cas. 1912D 1309.

Verification.—By its terms this section expressly limits the general authority to verify affidavits before any officer authorized to administer oaths to the particular affidavits required or authorized by the chapter, and it can have no bearing upon a case in which the affidavit is not one that is so required or authorized. U. S. v. Manion, (D. C. Wash. 1890) 44 Fed. 800.

Sec. 2336. [Where veins intersect, etc.] Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection. [R. S.]


Construction.—This section does not conflict with R. S. sec. 2322, supra, p. 523, but supplements it. It imposes a servitude upon the senior location, but does not otherwise affect the exclusive rights given the senior location. It gives a right of way to the junior location. "To what extent, however, there may be some ambiguity; whether only through the space of the intersection of the veins, as held by the Supreme Court of California, Arizona, and Montana, or through the space of intersection of the claims, as held by the Supreme Court of Colorado in the case at bar. It is not necessary to determine between these views." Calhoun Gold Min. Co. v. Ajax Gold Min. Co., (1901) 192 U. S. 499, 21 S. Ct. 885. See also Book v. Justice Min. Co., (C. C. Nev. 1893) 58 Fed. 108; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co., (N. D. Cal. 1894).

This section and R. S. sec. 2322, supra, p. 523, are in complete harmony. This section is designed to give a new right where lodes in fact cross, and not to define and settle prior existing rights at the space of intersection. In other words, if a lode on the junior location intersects, on its strike, within the boundaries of the senior location the lode of such location, then the junior locator may take all the ore in the first mentioned lode within the boundaries of both the senior and junior location, except at the space of intersection, notwithstanding that R. S. sec. 2322 limits the locator to his own boundaries except when pursuing a lode on its dip, and to this extent this section repeals said R. S. sec. 2322. The intersection has reference to the intersection of veins and not locations of claim. Watervale Min. Co. v. Leach, (1893) 4 Ariz. 34, 33 Pac. 418.

This section has a controlling effect over R. S. sec. 2322, supra, p. 523, and limits the right of the first locator of a mine in and to cross and intersecting veins to the ore which may be found in the space of intersection. If there are in fact two lodes crossing each other in these locations, the party having the elder title by patent has the better right and it is limited as last stated. If there are two veins uniting in their downward course, this section is applicable. Hall v. Equator Min., etc., Co., (1879) 11 Fed. Cas. No. 5,931. See also Branagan v. Dulaney, (1885) 8 Colo. 408, 8 Pac. 669; Lee v. Stahl, (1886) 9 Colo. 208, 11
of intersections of land where both the prior and the latter locators may have some rights. "There are two kinds of intersections of quartz ledges. They sometimes intersect, and sometimes unite, in their horizontal extension, or, as the miners call it, their strike; but they may also intersect or the one on the dip; that is, they may intersect laterally in their downward course. Now, when they intersect laterally, as last above stated, the owner of each ledge has rights at the point of intersection entirely consistent with all of the provisions of section 2322. In such a case the owner of a claim on land adjoining that of a prior locator would have a right to follow his ledge as it dipped laterally underneath the surface ground of his neighbor, and if his ledge intersected the ledge of the prior locator he would have the right of way through it under the statute, the older locator merely having the quartz at the exact point of intersection; but his right to thus follow his vein underground would be an entirely different thing from the right afforded in the case at bar by appellant to enter upon the surface of defendants' prior location and locate a claim the top or apex of which was within the surface location of defendants' ground. And to such an intersection the provision of section 2336 can be readily applied in perfect consistency with the provisions of section 2322." Wilhelm v. Silvester, (1894) 101 Cal. 358, 35 Pac. 997.

Title to ore at intersection.—The title to ore found at the intersection of two or more veins goes to the senior locator by virtue of this section. Esselstyn v. U. S. Gold Corp., (1915) 59 Colo. 294. 149 Pac. 93.

Integral character of vein.—Where two or more mining claims longitudinally intersect, the senior claim takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downwards outside of the side lines. U. S. Mining Co. v. Lawson, (C. C. A. 8th Cir. 1904) 134 Fed. 795. 77 C. C. A. 587, affirmed (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 63.

Determination of seniority.—In respect of conflicting mining claims, seniority is determined by the order in which they were located, whether they have been patented or remain unpatented. U. S. Mining Co. v. Lawson, (C. C. A. 8th Cir. 1904) 134 Fed. 795. 77 C. C. A. 587, affirmed (1907) 207 U. S. 1, 28 S. Ct. 15, 52 U. S. (L. ed.) 65.

The size of the vein in the prior location is immaterial when considered with reference to the legal rights attached to the ownership. Stinchfield v. Gillis, (1892) 96 Cal. 33, 30 Pac. 539.

Rights of junior claimant in space of intersection.—The provisions of this section refer to the intersection or crossing


This section and R. S. sec. 2322, supra, p. 233, to some extent are in conflict with each other. If this section contained the only provision bearing on the subject it would undoubtedly mean that where two veins cross each other, the junior location would only be entitled to the ore at the space of intersection of the veins; and that the owners of the cross lode would be entitled to all ore found in their vein within the side lines of the senior location save at the actual space of vein intersection. This construction, however, seems to be in conflict with the literal interpretation of R. S. sec. 2322. In such a case the foregoing construction should be adopted under the arbitrary rule or construction that, as between conflicting statutes, the latest in date will prevail, and as between conflicting sections of the same statute the last in order of arrangement will control. Branagan v. Dulaney, (1885) 8 Colo. 408, 8 Pac. 689. See also Pardee v. Murray, (1882) 4 Mont. 249, 2 Pac. 16.

Single vein.—This section has no reference to the case of a single vein. Omar v. Soper, (1888) 11 Colo. 390, 18 Pac. 443, 7 A. S. R. 246.

"Intersect" and "cross"—The words 'intersect' and 'cross,' as used in this section, are not strictly synonymous, and in using both it must be presumed intended to provide for different conditions. Veins might intersect, either on their strike or dip, and not cross; in that event, it was necessary to provide which location should have the ore at the space of intersection, and it was declared that the prior location should have the ore within that space. In case they crossed, then a further provision was necessary, and it was provided that the junior location should have the right of way through the space of intersection for the convenient working of the mine. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 27 Colo. 1, 59 Pac. 607, 83 A. S. R. 17, 50 L. R. A. 209.

Below the point of union.—The word "below" cannot be construed to mean "beyond." The words "below the point of union" do not apply to veins uniting on the "strike," or on a horizontal extension, but to veins which unite on the "dip," or in their downward course. Lee v. Stahl, (1899) 13 Colo. 174, 22 Pac. 436.

Kinds of intersections.—This section does not undertake to give to any person the right to make a valid location of a quartz ledge across either the surface ground or a lode of a prior locator. It merely assumes that there may be instances where there may be certain kinds
of veins either upon their strike or dip; the space of intersection, in determination of ownership of ore within such space, means either the intersection of veins conflicting claims according to the facts of each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins which he owns or controls outside of that space. Calhoun Gold Min. Co. v. Ajax Gold Min. Co., (1899) 27 Colo. 1, 59 Pac. 607, 83 A. S. R. 17, 50 L. R. A. 209. See also Lee v. Stahl, (1889) 13 Colo. 174, 22 Pac. 436.

"When a junior mining location crosses a senior location, and the veins therein are cross veins, the junior locator is entitled to all the ore found on his vein within the side lines of the senior location except at the space of intersection of the two veins. In such a case a junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross vein," Morgenson v. Middlesex Min., etc., Co., (1887) 11 Colo. 176, 17 Pac. 513.

The patentee of a location, if it be proved that the vein thereof actually intersects or crosses another vein, is entitled to follow his vein and extract ore therefrom within the patented limits of the other location, except within the space of actual intersection of the two veins, notwithstanding he did not adverse the application for a patent to that other vein. Lee v. Stahl, (1889) 13 Colo. 174, 22 Pac. 436. See also Lee v. Stahl, (1880) 9 Colo. 208, 11 Pac. 77.

Priority in case of three veins.—When two veins for two mining claims belonging to one person unite, and the vein thus formed continues down until it strikes a third vein belonging to another, the priority will be determined as between the date of the earliest of the two former claims and that of the third claim. Little Josephine Min. Co. v. Pulfort, (C. C. A. 8th Cir. 1893) 58 Fed. 621, 19 U. S. App. 190, 7 C. C. A. 340.

On conveyance of part of claim.—This section cannot be applied to a case where a party conveys part of his mining claim to another, for in such case there is no "prior location." In such case the ordinary rules which govern grants of land must of necessity apply, and if the intersection takes place on part of the land conveyed, the grantee takes all the mineral within the space of intersection. Stinchfield v. Gillis, (1889) 107 Cal. 84, 40 Pac. 98.

Presumption of valid location below point of union.—It will be presumed that there was a valid location prior to the issue of the patent, and evidence of the proceedings had in the United States land office, upon which the patent is based, was immaterial in the contest between the patentee and the locator of an adjoining claim whose location was subsequent to the date of the patent. Champion Min. Co. v. Consolidated Wyoming Gold Min. Co., (1888) 75 Cal. 78, 16 Pac. 513.

Federal question.—In an action brought by the grantee of part of the mining claim against the grantor, the decision of the State Supreme Court was clearly based upon the estoppel deemed by that court to operate against the grantor upon general principles of law and the state statute in respect of such conveyances, and this was an independent ground broad enough to maintain the judgment irrespective of any federal question. Gillis v. Stinchfield, (1895) 159 U. S. 658, 16 S. Ct. 131, 40 U. S. (L. ed.) 296.

Sec. 2337. [Patents for non-mineral lands, etc.] Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section. [R. S.]

but not contiguous to known veins or lodes may be nonmineral and enterable as such. If it contains no known valuable mineral deposits, it falls into the nonmineral or agricultural class, however rich in minerals are the adjacent lands. To attach mineral character to lands, it is not sufficient to demonstrate that adjacent lands are mineral in character. U. S. v. Kostelak, (D. C. Mont. 1913) 207 Fed. 447.

Application of section.—This section specifies two cases in which a patent to a mill site may be obtained, viz.: 1. Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes. 2. The owner of a quartz mill or reduction works not owning a mine in connection therewith may also receive a patent for his mill site. Hartman v. Smith, (1887) 7 Mont. 19, 14 Pac. 648.

Application for mill site.—The application for a mill site which does not embrace an application for any mine noncontiguous thereto, nor claim that the applicant is the owner of a quartz mill or reduction works, not owning a mine in connection therewith, is without merit. Hamburg Min. Co. v. Stephenson, (1883) 17 Nev. 449, 30 Pac. 1068.

Extent of location.—Under this section a location for the purpose of establishing a mill site cannot exceed five acres. Silver Peak Mines v. Valcala, (C. C. Nev. 1897) 79 Fed. 886.


"For mining or milling purposes."—The statute does not mention any particular kind of mining purposes for which it shall be used; and therefore if used in good faith for any mining purpose at all in connection with the quartz-lode mining claim such use would be within the meaning of the statute. It is certainly not intended that it shall be used for such work as is done upon the mine itself; for the land must be non-mineral and not adjacent to the mining claim.

We cannot say under this statute what shall be the extent of the use,—whether much or little,—or the particular character of the use. The phrase 'mining purposes' is very comprehensive, and may include any reasonable use for mining purposes, which the quartz-lode mining claim may require for its proper working and development. This may be very little or it may be a great deal. The locator of a quartz-lode mining claim is required to do only a hundred dollars' worth of work each year until he obtains a patent therefor. But if he does only this amount, and uses the mill site in connection therewith, is not this the use of the mill site for a mining purpose in connection with the mine? Who shall prescribe what shall be the kind and extent of the use under this statute, so long as it is used in good faith, in connection with the mining claim, for a mining purpose?" Hartman v. Smith, (1887) 7 Mont. 19, 14 Pac. 648. See also Cleary v. Skiffich. (1901) 28 Colo. 362. 65 Pac. 59, 90 A. S. R. 207.

Question of law and fact.—What constitutes the use of land as a mill site for "mining and milling purposes" so as to entitle a party to a patent is a mixed question of law and fact. Silver Peak Mines v. Valcala, (C. C. Nev. 1897) 79 Fed. 886.

All that the law requires is a reasonable use and occupation of the nonadjacent tract for mining purposes in connection with the mining claim. Hartman v. Smith, (1887) 7 Mont. 19, 14 Pac. 648.

Reservation of mill site from sale.—By requiring the mill site to be included in the application for the patent for the vein or lode, and that the same preliminary steps as to the survey and notice shall be had as are applicable to veins or lodes, and that it shall be paid for at the same rate per acre as the mining claim, and may be patented with the vein or lode to which it is appurtenant, the statute recognizes the mill site as a mining possession and it is therefore comprehended within R. S. sec. 2392 (Title Public Lands), and is reserved from sale. Hartman v. Smith, (1887) 7 Mont. 19, 14 Pac. 648.

Sec. 2338. [What conditions of sale may be made by local legislature.] As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent. [R. S.]

Act of July 26, 1866, ch. 262, 14 Stat. L. 262. For R. S. secs. 2339 and 2340 see Watters. Unconstitutional state statute.—Unless a state statute imposing an easement upon mining claims is in accord with the state constitution it cannot be enforced in the state court. Congress cannot ignore state constitutions and authorize
local legislatures, regardless of state constitutions, to pass laws providing rules for the working of mines and involving easements upon mineral lands. People v. District Ct., (1887) 11 Col. 147, 17 Pac. 298.

Easements — Intent of section. — It is an easement for the accidental requirement of drainage of quartz and drift mines that is contemplated by this section, and not a use of water for purposes of legitimate mining, such as the use of water for the purpose of carrying off the tailings, and the construction of the ditch to aid therein. Jacob v. Day, (1896) 111 Cal. 571, 44 Pac. 243.

Use of navigable waters. — This section is limited to the surrender of the right to provide rules for working mines, etc., to the state so far, and so far only, as the public lands are concerned; it has no relation to regulating commerce on the navigable waters of the state, and cannot authorize the use of navigable waters for the flow and deposit of mining debris. Woodruff v. North Bloomfield Gravel Min. Co., (C. C. Cal. 1884) 18 Fed. 753.

In North Bloomfield Gravel Min. Co. v. U. S., (C. C. A. 9th Cir. 1908) 58 Fed. 604, 59 U. S. App. 377, 32 C. C. A. 84, it is suggested that the above case was the cause of the enactment of the Act of March 1, 1893, creating the California Debris Commission, infra, p. 220.


Tunnel rights. — Under this section a state is authorized to pass an act granting to an owner of ground, with a mining tunnel located thereon, the right to run the same through the claims of other parties, and providing for the payment of all "actual damages or injury done to the owner of the claims crossed" by such tunnel. Bailie v. Larson, (C. C. Idaho 1905) 138 Fed. 177.

Reservation of right of way. — By this section there is not reserved by the United States a right of way through a patented mining claim which may be taken and used by any other miner, whenever it becomes necessary to use it in working his mine, upon such terms and conditions as the state legislature may have prescribed. Amador Queen Min. Co. v. Dewitt, (1887) 73 Cal. 482, 15 Pac. 74.

Sec. 2341. [Mineral lands in which no valuable mines are discovered open to homesteads.] Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "Homesteads." [R. S.]

For provisions relating to homesteads see PUBLIC LANDS.

Sec. 2342. [Mineral lands how set apart as agricultural lands.] Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same. [R. S.]

For R. S. sec. 2343 see PUBLIC LANDS.

Sec. 2344. [Provisions of this chapter not to affect certain rights.] Nothing contained in this chapter shall be construed to impair, in any way,
rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six. [B. S.]


"This chapter," above referred to, is ch. 6 ("Mineral Lands and Mining Resources") of title XXXII ("Public Lands") of the Revised Statutes.

Rights of aliens.—Parties who were not citizens and had not declared their intention to become such could not acquire any vested right to possession under the Act of 1866, and as a consequence had no rights to be preserved by the Act of 1872. Lee Doon v. Tesh, (1886) 68 Cal. 43, 6 Pac. 621.

Rights lost by failure to adverse.—This section does not operate as proprio vigore to reserve out of the grant of a patent other rights acquired prior to the passage of the Act of 1872, but secures the protection of such rights at the time of the issuance of the patent to those who avail themselves of the adverse procedure prescribed by the Act itself. See R. S. secs. 2325, 2326, supra, pp. 555, 563. Lee v. Stahl, (1889) 13 Colo. 174, 22 Pac. 436. See also Lee v. Stahl, (1886) 9 Colo. 208, 11 Pac. 77.

Rights under prior statute.—A certificate of purchase of a placer claim, issued before the Act of 1872 was passed, gave to the purchaser all the rights under the prior statute, including known veins or lodes, and a reservation in the patent issued after the Act of 1872 was passed, as to known lodes or claims, was unauthorized. Cranes Guleh Min. Co. v. Scherrer, (1901) 134 Cal. 530, 66 Pac. 487, 86 A. S. R. 279.

Sec. 2345. [Mineral lands in certain States excepted.] The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona-fide entries of such lands within the States named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands. [B. S.]


Mineral lands in Missouri and Kansas were excepted from the laws relating to mineral lands by the Act of May 5, 1876, ch. 91, infra, p. 599, and a like exception was made with respect to lands in Alabama by the Act of March 3, 1883, ch. 118, infra, p. 602.

Reservation of mineral lands.—While it has been the general practice of the United States to reserve mineral lands from homesteads, pre-emptions, sales and grants to railroad companies, an examination of the grants of lands to states for school purposes demonstrates the fact that it has been the practice of Congress to determine and declare by legislative act, in each case, and not by any settled public policy, whether or not mineral lands shall be reserved from the grant. Sweet v. U. S., (C. C. A. 8th Cir. 1915) 228 Fed. 421, 143 C. C. A. 3.

Sec. 2346. [Grants of lands to States or corporations not to include mineral lands.] No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved
exclusively to the United States, unless otherwise specially provided in the act or acts making the grant. [R. S.]

See Public Lands; States.

Reservation of minerals to the government.—In Barden v. Northern Pac. R. Co., (1894) 154 U. S. 288, 14 S. Ct. 1030, 38 U. S. (L. ed.) 992, an action for the possession of certain parcels of land containing veins or lodes of precious metals, claimed by the Northern Pac. R. Co. as parts of the land granted to it by an Act of Congress, the court said that the provisions of this section should be borne in mind when the statement is made, that there has been no reservation of mines or minerals to the government. See also Chicago Quartz Min. Co. v. Oliver, (1888) 75 Cal. 194, 16 Pac. 780, 7 A. S. R. 143, as to a patent issued to the Central Pacific Railroad Company.

Sec. 2347. [Entry of coal-lands.] Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road. [R. S.]

The provisions of R. S. secs. 2347-2362 were extended to Alaska by the Act of June 6, 1906, ch. 796, infra, p. 906.

Construction.—In Colorado Coal, etc., Co. v. U. S., (1897) 123 U. S. 307, 8 S. Ct. 131, 31 U. S. (L. ed.) 182, it was held that the provisions of this section and R. S. sec. 2258 (expressly repealed by Act of March 3, 1891, ch. 561, § 4, title Public Lands), relate to the classification and terms and mode of entry and sale of the coal lands excluded from pre-emption by the laws on the subject.

Purpose of statute.—"The purpose of Congress is manifest to withdraw from disposition except under particular restrictions those limited areas of the public domain which in general opinion based upon substantial evidence have a special value for mineral contents beyond that arising from their adaptation to agricultural or other like uses. True, the mineral character of the land must be known at the time of the grant, and the mineral must be in such quantities as to justify exploitation . . . but that does not mean a positive, absolute certainty which can only be shown by actual exposure or uncovering, nor that temporary distance from market makes unprofitable the mining of any but a very thick vein or deposit." U. S. v. Diamond Coal, etc., Co., (C. C. A. 8th Cir. 1911) 191 Fed. 786, 112 C. C. A. 272.

Persons qualified to enter coal lands.—The right to enter coal lands is given only to persons above the age of twenty-one years who are citizens of the United States, or have declared their intention to become such, and to associations of persons, severally so qualified. U. S. v. Trinidad Coal, etc., Co., (1899) 137 U. S. 160, 11 S. Ct. 57, 34 U. S. (L. ed.) 640.


Acreage subject to entry.—Persons above the age of twenty-one years who are citizens of the United States, or who have declared their intention to become such, are permitted to enter not exceeding one hundred and sixty acres, while "association of persons" may enter not exceeding three hundred and twenty acres. U. S. v. Trinidad Coal, etc., Co., (1890) 137 U. S. 160, 11 S. Ct. 57, 34 U. S. (L. ed.) 640.

Acreage permitted to incorporated association.—It is unreasonable to suppose that Congress intended to limit the right of entering coal lands to one hundred and sixty acres in the case of an individual, and to three hundred and twenty acres
in the case of an unincorporated association, and leave the way open for an incorporated association by means of entries made for its benefit in the names of its agents, officers, stockholders, employees, and agents, to acquire real estate in some members of which without any restriction whatsoever as to quantity. The language of the statute, to say nothing of the policy which underlies it, does not require or permit any such interpretation of its provisions.


Object of restrictions.—The object of the restrictions as to the acreage which may be entered was manifestly to prevent monopolies in the coal lands. U. S. v. Trinidad Coal, etc., Co., (1890) 137 U. S. 160, 11 S. Ct. 57, 34 U. S. (L. ed.) 640.

Entry — Independent and for use of others.—The difference between entries which are independent and entries for the use of others is pointed out by the Circuit Court of Appeals in two civil actions under the Desert Land Act. U. S. v. Mackintosh, (C. C. A. 8th Cir. 1898) 85 Fed. 533, 86 U. S. App. 483, 23 C. C. A. 176 (claimants acting in their own right); Salina Stock Co. v. U. S., (C. C. A. 8th Cir. 1898) 86 Fed. 339, 86 U. S. App. 494, 29 C. C. A. 181 (claimants acting for benefit of corporation).

The distinction is also pointed out in two cases under the Coal Land Act. Pericles v. Weil, (E. D. Wis. 1907) 157 Fed. 418 (entrants acting on their own behalf); Arnold v. Weil, (E. D. Wis. 1907) 157 Fed. 429 (entrants acting on behalf of others).

Entry by one in interest of another.—While the Coal Land Law does not expressly prohibit an entry by one person for the benefit of another, one person cannot make an entry in the interest of another who has had the benefit of the law, or in the interest of an association where it or any of its members has had the benefit thereof, or in the interest of a person or an association where he or it has not had such benefit but is seeking through entries made or to be made by others in his interest to acquire a greater quantity of land than is permitted by law.


Entry for benefit of corporation.—As a corporation is an association of persons within the meaning of the law, an entry may be made in the name of an individual for the benefit of the corporation, where such corporation lawfully could have made the entry in question in its own name, though it was not a stock corporation. It had had the benefit of the Coal Land Law or was seeking through such and other like entries to acquire coal land in excess of the quantity prescribed. U. S. v. Colorado Anthracite Co., (1911) 223 U. S. 219, 32 S. Ct. 617, 56 U. S. (L. ed.) 1065.

Combination to procure title in behalf of a single association in excess of amount allowed.—Where two persons were engaged in an unlawful combination to procure title in behalf of a single association to an area of coal lands in excess of the limits prescribed by law, that only two claims aggregating 320 acres allowed by this section were actually patented to them, would not make the patents valid; the unlawful combination making the proceeding illegal from the beginning.


An attempt to acquire land pursuant to a scheme whereby the several tracts would be entered for the benefit of a corporation in the name of certain persons, its officers, stockholders, and employees, the title, when thus obtained, to be conveyed to the company, which should bear all the expenses attending the entries and purchases from the government, is within the prohibition of this and the following section. U. S. v. Trinidad Coal, etc., Co., (1900) 137 U. S. 160, 11 S. Ct. 57, 34 U. S. (L. ed.) 640; U. S. v. Portland Coal, etc., Co., (W. D. Wash. 1908) 173 Fed. 506.

In U. S. v. Allen, (W. D. Wash. 1910) 180 Fed. 855, it appeared that a corporation was named to take over two absorbed coal land claims, the patents being in fact voidable, having been illegally obtained, one of the incorporators being father of the patent holder, and he and another incorporator having been parties to the transaction whereby the patents were obtained. The holder of the patents subscribed for all but four shares of the capital stock and sold to the corporation the two claims in payment of her subscription. Upon issuance to her of the shares she immediately transferred part of them to the treasurer of the company to be sold for the company's use. She was made secretary of the corporation, and her father, manager, and they continued to hold those offices until the time of the suit, covering a period of five years. It was held that the corporation was not a bona fide purchaser for value without notice, precluding the government from proceeding to cancel the patents, as one holding a voidable patent to public lands cannot protect himself against the process of the government by forming a corporation.
in which he is the dominant factor and conveying to it the premises which he has acquired in violation of law.

Evidence.—In U. S. v. Allen, (W. D. Wash. 1910) 190 Fed. 855, the evidence was held to show that two patents of public coal lands running to two persons were acquired as part of a general plan for procuring title in behalf of a single association to an area of coal lands in excess of the limits prescribed by law.

Fraud.—An agreement to acquire title to coal lands of the United States indirectly when it cannot be acquired directly constitutes an attempted fraud, and if the apparent title is so procured it constitutes fraud. Kennedy v. Lonabaugh, (1911) 19 Wyo. 352, 117 Pac. 1078, Ann. Cas. 1918E 133.


Cancellation of entry.—If an entry should be canceled because the proofs were shown to be false, repayment of the purchase money would not be authorized. U. S. v. Colorado Anthracite Co., (1911) 225 U. S. 519, 32 S. Ct. 617, 56 U. S. (L. ed.) 1063, affirming (1909) 45 Ct. Cl. 614.

Sale after entry.—The statute imposes no limitation on the right of a purchaser who has acquired coal land from the United States to sell the same after he has become the owner of the land. U. S. v. Keitel, (1908) 211 U. S. 370, 29 S. Ct. 123, 53 U. S. (L. ed.) 230.

Under this and the following sections authorizing individuals to enter 160 acres of vacant public coal lands, and associations to enter 320 acres, and prohibiting more than one entry by each person or association, one who has perfected an entry can sell or dispose of it as he pleases, and an individual or corporation can purchase as many entries made by others as he or it pleases, regardless of the entrant’s intent to sell at the time of entry. Ireland v. Henkle, (S. D. N. Y. 1910) 179 Fed. 993. See also Wilson Coal Co. v. U. S., (C. C. A. 9th Cir. 1911) 188 Fed. 545, 110 C. C. A. 343.

Pre-emption laws.—As to entries made under this section, the transaction is a pure purchase with no elements of pre-emption. U. S. v. Yankee Fuel Co., (D. C. N. M. 1912) 186 Fed. 860.

Powers of land department.—A ruling or decision by the officers of a local land office of the United States made in the usual course of proceedings for the acquisition of the title to public lands is not subject to review or correction in the courts while the title to the lands remains in the United States and, while the proceedings for acquiring that title are still in fieri, the courts are without power, by injunction or otherwise, to control the judgment and discretion of the officers of the land department in respect of the disposal of such lands under the public land laws. Pletsch v. Allen, (1912) 228 U. S. 42, 33 S. Ct. 503, 57 U. S. (L. ed.) 724.


"Congress has enacted a system of laws by which rights to these lands may be acquired and the title of the government conveyed to the citizen. This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States and the proceedings for acquiring it were as yet in fieri, the courts would not interfere to control the exercise of the power vested in that tribunal. To that doctrine we still adhere." U. S. v. Schurz, (1880) 102 U. S. 379, 26 U. S. (L. ed.) 167.

Cited.—This section was cited in Leonard v. Lennox, (C. C. A. 8th Cir. 1910) 181 Fed. 760, 104 C. C. A. 296; U. S. v. Doughten, (F. D. Wash. 1911) 186 Fed. 256.

Sec. 2348. [Pre-emption of coal-lands.] Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: Provided, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements. [R. S.]


See the note to the preceding R. S. sec. 2347.

Intent of statute.—This statute contemplates a right to possession of coal lands as effectively against any intruder, as does the other federal legislation in
regard to homestead and pre-emption claims. Atchison, etc., R. Co. v. Richter, 110 N. M. 278, 148 Pac. 478, L. R. A. 1916F 969.

Right to coal incidentally removed in course of lawful development work.—Under R. S. secs. 2347-2352 (pp. 593-598), a qualified individual or association who, in response to the government's invitation, enters upon public lands in search of coal deposits, and spends time, labor, and means in an honest effort to open and develop such deposits when found, intending to purchase the lands according to the statute if the coal proves to be such as to give character and value to them, is not a trespasser, but is in the exercise of a privilege conferred by law, and is entitled to such coal as is extracted and removed as an incident only to the reasonable prosecution of that work. Ghost v. U. S., (C. C. A. 8th Cir. 1909) 186 Fed. 641, 94 C. C. A. 253.


Sec. 2349. [Pre-emption claims of coal-land to be presented within sixty days, etc.] All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no case under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three. [R. S.]

See the note to R. S. sec. 2347. supra, p. 593.

Declaratory statement—Filing.—A declaratory statement or notice of every preference right must be filed in the proper land office within sixty days after the date of "actual possession and the commencement of improvements." Ghost v. U. S., (C. C. A. 8th Cir. 1909) 186 Fed. 641, 94 C. C. A. 253.

Effect of filing.—An entryman of coal lands of the United States who has filed a declaratory statement in the United States Land Office under the provisions of the preceding R. S. secs. 2347-2349, has a possessory right to the land of such a character as to render unlawful an entry thereon by a railroad corporation for railroad purposes previous to condemnation proceedings. Atchison, etc., R. Co. v. Richter, (1915) 20 N. M. 278, 148 Pac. 478, L. R. A. 1916F 969. See also Johnston v. Harrington, (1892) 5 Wash. 73, 31 Pac. 316.

False averments set out in an affidavit in support of pre-emption claims, and in the certificates issued thereon, as to settlements and improvements, when in fact there were no actual settlements and improvements, undoubtedly constitute a fraud upon the United States sufficient in equity as against the parties perpetrating it, or those who claim under them with notice of it, to justify the cancellation of the patents issued to them; but it is not such a fraud as prevents the passing of the legal title to the patents. It follows that to a bill in equity to cancel the patent upon these grounds alone the defense of a bona fide purchaser for value is perfect. Colorado Coal, etc., Co. v. U. S., (1887) 123 U. S. 307, 8 S. Ct. 131, 31 U. S. (L. ed.) 152.

The presumption that all the preceding steps required by the law to the obtaining of a patent had been observed before its issue can be overthrown only by full proof to the contrary, clear, convincing, and unambiguous. The burden of producing these proofs and establishing a conclusion to which they are directed rests upon the government. Colorado Coal, etc., Co. v. U. S., (1887) 123 U. S. 307, 8 S. Ct. 131, 31 U. S. (L. ed.) 152.

Cited.—This section was cited in U. S. v. Doughten, (E. D. Wash. 1911) 186 Fed. 226.

Sec. 2350. [Only one entry allowed.] The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member
of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period the same shall be subject to entry by any other qualified applicant. [R. S.]

See the note to R. S. sec. 2347, supra, p. 593.

Entry of coal lands.—See the notes under R. S. sec. 2347, supra, p. 593.

Entry of one person for another.—While the coal land law does not expressly prohibit an entry by one person for the benefit of another, it does limit the quantity of land that may be acquired thereunder by one person to 160 acres, and the quantity that may be acquired by an association of persons to 925 acres and, in exceptional instances, 640 acres; and it declares that its sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions.

These restrictions, as this court has held, forbid individuals and associations from acquiring public coal land in excess of the quantities prescribed, whether directly by entries in their own names or indirectly by entries made for their benefit in the names of others. And so, one person cannot lawfully make an entry in the interest of another who has had the benefit of the law, or in the interest of an association where it or any of its members had held the benefit thereof, or in the interest of a person or an association where he or it has not had such benefit but is seeking, through entries made or to be made by others in his or its interest, to acquire a greater quantity of land than is permitted by the law. But there is no prohibition, express or implied, against an entry by a qualified person for the benefit of another person or association where he or it is fully qualified to make the entry in his or its own name, and is not seeking to evade the restrictions in respect to quantity.


Entry for disqualified principal.—The prohibition against more than one entry of coal lands by the same person, which is made by this section, prohibits a qualified person from entering such lands apparently for himself, but in fact as the agent for a person who is himself disqualified because he has already purchased the full quantity permitted by law. U. S. v. Keitel, (1908) 211 U. S. 370, 29 S. Ct. 132, 53 U. S. (L. ed.) 230; U. S. v. Forrester, (1908) 211 U. S. 399, 29 S. Ct. 132, 53 U. S. (L. ed.) 245.

Purchase by corporation.—A corporation which acquires by purchase coal lands patented to entrymen, does not "take the benefit" of the coal land laws within the meaning of this section. The phrase "took the benefit" requires that the corporation shall either file an association claim itself or that it shall directly cause such a claim to be filed by others for its benefit. Northern Colorado Coal Co. v. U. S., (C. C. A. 8th Cir. 1916) 234 Fed. 34. 148 C. C. A. 50.

Alaska coal lands.—The restrictive features of this section are applicable to the sale of coal lands in Alaska. U. S. v. Doughten, (1911) 222 U. S. 175, 32 S. Ct. 53, 56 U. S. (L. ed.) 149.

Time for making proof.—The preference right must be perfected by making due proof thereof and paying the requisite purchase price within one year from the time prescribed for filing the declaratory statement or notice. Ghost r. U. S., (C. C. A. 8th Cir. 1909) 168 Fed. 841, 94 C. C. A. 253.

Cited.—This section was cited in U. S. v. Doughten, (E. D. Wash. 1911) 186 Fed. 226.

Sec. 2351. [Conflicting claim.] In case of conflicting claims upon coal-lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements
have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land-Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections. [R. S.]

See the note to R. S. sec. 2347, supra, p. 593.

Conclusiveness of land office decision.—The decisions of the land office "upon questions properly pending before it can only be annulled when such fraud or imposition is shown to have been practiced as prevented the unsuccessful party in a contest from fully presenting his case, or the officers composing the tribunal from fully considering it, or when such officers have themselves been guilty of fraudulent conduct, or when it is made to appear that, upon the case as established before the land department, the law applicable thereto was misconstrued or misapplied. If fraud is charged as a ground for annulling a decision of the land department, it is not enough that false testimony or forged documents have been employed; but it must be made to appear that such false testimony has affected the decision and led to a result which otherwise would not have been reached. Durango Land, etc., Co. v. Evans, (C. C. A. 8th Cir. 1897) 80 Fed. 425, 49 U. S. App. 305, 25 C. C. A. 523.

Priority of possession and improvement.—If there be conflicting claims to the same land, priority of "possession and improvement," followed by proper filing and "continued good faith," shall determine the right to purchase. Ghost v. U. S., (C. C. A. 8th Cir. 1909) 168 Fed. 841, 94 C. C. A. 253.

Notice of controversy.—Parties who have parted with all of their title to the land in dispute are not entitled to notice of a pending controversy. Durango Land, etc., Co. v. Evans, (C. C. A. 8th Cir. 1897) 80 Fed. 425, 49 U. S. App. 305, 25 C. C. A. 523.

Rules and regulations.—Rules and regulations issued by the commissioner of the general land office, pursuant to this section, do not have force as laws of the United States within the meaning of R. S. sec. 5392 (incorporated in Penal Laws, sec. 125, and repealed by sec. 341 thereof; see Penal Laws), relating to perjury. U. S. v. Manion, (D. C. Wash. 1890) 44 Fed. 800.

Affidavit before notary public.—An indictment for perjury under R. S. sec. 5392 (incorporated in Penal Laws, sec. 125, and repealed by sec. 341 thereof; see Penal Laws), cannot be maintained upon an affidavit made in support of a claim under R. S. secs. 2348 and 2349, supra, pp. 595, 596, before a notary public, when the regulations and instructions promulgated by the commissioner of the general land office do not confer any authority upon the notary public. U. S. v. Manion, (D. C. Wash. 1890) 44 Fed. 800.

Sec. 2352. [Rights reserved.] Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper. [R. S.]

See the note to R. S. sec. 2347, supra, p. 593.

Application generally.—See the annotations under R. S. secs. 2347-2351, supra.

An act to amend section two thousand three hundred and twenty-four of the revised statutes, relating to the development of the mining resources of the United States.

[Act of Feb. 11, 1875, ch. 41, 18 Stat. L. 315.]

[Moneys expended on tunnels for mining purposes to be deemed expended on lode.] That section two thousand three hundred and twenty-
four of the revised statutes, be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. [18 Stat. L. 315.]

This Act is incorporated in the second edition of the Revised Statutes at the end of R. S. sec. 2324, given supra, p. 533. See the notes to said section.

Effect of section on tunnel construction.—In Chambers v. Harrington, (1894) 111 U. S. 350, 4 S. Ct. 426, 28 U. S. (L. ed.) 452, the court said that this statute does not affect the character of either work to be done or improvements to be made according to the law as it stood before the enactment of the statute, except as it gives a special value to making a tunnel. See also Book v. Justice Min. Co., (C. C. Nev. 1893) 58 Fed. 106.

Assessment work.—Under this Act and R. S. sec. 2324, supra, p. 533, of which it is an amendment, work done in a tunnel may be applied as assessment work on a mining location, though the person doing the work does not own a continuous strip of territory from the portal of the tunnel to the boundary of such location. Hain v. Matte, (1865) 34 Colo. 345, 83 Pac. 127.

An act to exclude the States of Missouri and Kansas from the provisions of the act of Congress entitled "An act to promote the development of the mining resources of the United States" approved May tenth, eighteen hundred and seventy-two.

[Act of May 5, 1876, ch. 91, 19 Stat. L. 52.]

[Mineral lands in Missouri and Kansas, disposed of as agricultural lands.] That within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of mining resources of the United States" approved May tenth, eighteen hundred and seventy-two and all lands in said States shall be subject to disposal as agricultural lands. [19 Stat. L. 52.]

The Act of May 10, 1872, ch. 152, referred to in the text, is incorporated into the Revised Statutes as sections 2319–2337, supra, pp. 509–589.

Effect of act.—By virtue of this act coal, iron, lead or other minerals within the states of Missouri and Kansas were excluded from the operation of the Act of May 10, 1872, ch. 152, incorporated in R. S. secs. 2319–2337, supra, pp. 509–589. Deffebach v. Hawke, (1886) 115 U. S. 392, 6 S. Ct. 95, 29 U. S. (L. ed.) 428.

An act to amend section twenty-three hundred and twenty-six of the Revised Statutes relating to suits at law affecting the title to mining claims.


[Findings by jury — costs.] That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes,
title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land-office or be entitled to a patent for the ground in controversy until he shall have perfected his title. [21 Stat. L. 505.]

R. S. sec. 2326 mentioned in the text is given supra, p. 563. See the notes to said section.

Purpose of statute.—It was not the intention of this act to change the methods of trial. Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the court to enter such judgment or decree as would evidence that the applicant had not established the right of possession and was for that reason not entitled to a patent. Perego v. Dodge, (1896) 143 U. S. 160, 18 S. Ct. 971, 41 U. S. (L. ed.) 113; Brown v. Gurney, (1906) 201 U. S. 184, 26 S. Ct. 500, 50 U. S. (L. ed.) 1717.

"Prior to the year 1881, in adverse suits, even where the applicant had not complied with these precedent requirements, he frequently secured title; for the adversary party, being plaintiff in the resulting suit, had the burden of the issue, and under the familiar rule in ejectment was required to recover on the strength of his own title, regardless of the weakness of that of his adversary. If he failed to establish a valid prior location, verdict and judgment went for defendant (the applicant), though the latter had not shown compliance with the law. To avoid this anomalous and illogical result the statute in question was adopted. By authorizing a verdict and judgment in the adverse suit that neither party has shown 'title to the ground,' it protects the United States from the evasion of these just conditions precedent to the grant. But upon issue of patent this statute has spent its force." Seymour v. Fisher, (1891) 16 Colo. 188, 27 Pac. 240.

Nature of proceedings.—The whole proceeding is merely in aid of the land department and the object of the amendment was to secure that aid in as much in cases where both parties failed to establish title as where judgment was rendered in favor of either. Perego v. Dodge, (1896) 143 U. S. 160, 18 S. Ct. 971, 41 U. S. (L. ed.) 113.

Determining right to a patent as against United States.—This statute does not make the United States a party to the suit. If one of the contending parties should establish title, that is, the right of possession of the premises in dispute on account of a compliance with the mining laws of the United States and the laws of the state, and the rules and customs of miners, then there is no authority in the statute to find against the United States and that the party so establishing a title is entitled to a patent from the United States. The application for the patent is made to the land department and that department must ultimately determine the right to the patent. Doe v. Waterloo Min. Co., (C. C. A. 9th Cir. 1895) 70 Fed. 455, 44 U. S. App. 204, 17 C. C. A. 190. In Burke v. Bunker Hill, etc., Min., etc., Co., (C. C. Idaho 1891) 46 Fed. 647, upon the question whether a suit under R. S. sec. 2326, supra, p. 563 is one arising under the laws of the United States, the court said that the idea that such a suit is not only intended to determine the rights of the two parties as between themselves but also as between each of the parties and the United States, so as to determine finally whether either party has so far performed the conditions prescribed by the statute as to entitle him to pay for the mine and receive a patent from the United States, thereby making the United States substantially, though not formally, a party to the suit and entitled to have their rights determined in the national courts, is supported by this amendment. But see Connolly v. Hughes, (1892) 18 Colo. App. 372, 71 Pac. 651.

Proof of title.—To entitle a party to judgment in his favor, it must appear that he has not only the right of possession but that he has made a valid location of the premises in the controversy, and by virtue of a compliance with all the requirements of the mining law, is entitled to a patent from the government. Manning v. Strehlow, (1889) 11 Colo. 451, 18 Pac. 425. See also McGinnis v. Egbert, (1884) 8 Colo. 41, 5 Pac. 652.

Since the Act of 1881 both parties in adverse proceedings are to be regarded as actors, and a defendant cannot rely upon the weakness of the plaintiff's title as in ordinary ejectment cases. Consequently, defendants cannot recover a valid verdict and judgment in their favor without showing compliance with the require-
ments of the statute, state and federal, such as would entitle them to a patent from the United States. Thomas v. Chisholm, (1889) 13 Colo. 105, 21 Pac. 1019. See also Becker v. Pugh, (1886) 9 Colo. 593, 15 Pac. 906; Bryan v. McCraig, (1887) 10 Colo. 309, 15 Pac. 413; Burke v. McDonald, (1887) 2 Idaho 339, 13 Pac. 351; Rosenthal v. Ives, (1887) 2 Idaho 265, 12 Pac. 904; Back v. Sierra Nevada Consol. Min. Co., (1888) 2 Idaho 420, 17 Pac. 83. And see further the notes under R. S. sec. 2330, supra, p. 563.

No change in methods of trial.—There is nothing in this Act to indicate an intention to change the methods of trial and to circumscribe resort to the accustomed modes of procedure or to prevent the parties from submitting the determination of their controversies to the court. While a finding by a jury is referred to where the adverse claimant chooses to proceed by bill to quiet title, and as between him and the applicant for the patent neither is found entitled to relief, the court can render a decree to that effect just as it would render a verdict if the action were at law. Pergo v. Dodge, (1896) 163 U. S. 160, 16 S. Ct. 971, 41 U. S. (L. ed.) 113. See also Tonopah Fraction Min. Co. v. Douglass, (C. C. Nev. 1903) 123 Fed. 936; Mares v. Dillon, (1904) 75 Pac. 969, 30 Mont. 144.

An action brought under this statute is not a common-law action. Parties are not entitled as a matter of constitutional right to a verdict by common-law jury, and it was not error for the court to receive a verdict of the jury signed by but nine of its members when such procedure was authorized by state statute. Providence Gold-Min. Co. v. Burke, (1899) 6 Ariz. 323, 57 Pac. 641.

Nonsuit.—This provision only prescribes what shall be found by the jury if a verdict is returned. The law does not prohibit a nonsuit for failure to make a prima facie case. Kirk v. Mel drum, (1901) 28 Colo. 453, 65 Pac. 633; McWilliam v. Winslow, (1905) 34 Colo. 341, 82 Pac. 538. See also Lalande v. McDonald, (1887) 2 Idaho 307, 13 Pac. 347.

Dismissal.—This provision does not prevent the dismissal of a case without a verdict. Carnahan v. Connolly, (1901) 17 Colo. App. 98, 68 Pac. 636.

Equity actions.—This Act does not require that the findings should be by a jury, where the suit to determine the adverse claim is in equity. Mares v. Dillon, (1904) 30 Mont. 117, 76 Pac. 963.

An act to amend section twenty-three hundred and twenty-six of the Revised Statutes, in regard to mineral lands, and for other purposes.


[Sec. 1.] [Oath of claimant, before whom made.] That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly-authorized agent or attorney-in-fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or of the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory. [22 Stat. L. 49.]

R. S. sec. 2326 mentioned in the text is given supra, p. 563. See the note to said section.

Sec. 2. [Before whom affidavit made.] That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record or before any notary public of any State or Territory. [22 Stat. L. 49.]

Proof of citizenship was required by R. S. sec. 2321, supra, p. 522.
An act to exclude the public lands in Alabama from the operation of the laws relating to mineral lands.


[Mineral lands in Alabama disposed of as agricultural lands.] That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: Provided however, That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale. • • •

[22 Stat. L. 487.]

The part of this Act omitted related to pending homestead entries.

Cancellation of patent.—This statute provides for the future disposition of public lands in Alabama; it ratifies no previous titles, however obtained. The United States may recover lands fraudulently obtained and cancel patent. U. S. v. Pratt Coal, etc., Co., (N. D. Ala. 1883) 18 Fed. 708.

An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.


[Sec. 1.] [Entry of building stone lands under placer claims laws.] That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims, Provided, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act. [27 Stat. L. 348.]

For sections 2 and 3 of this Act see Timber Lands and Forest Reserves.
The placer mining laws were embodied in R. S. secs. 2329–2333, supra, pp. 575–581.

Effect of statute.—This statute can only be regarded as explaining to some extent the previous reservation of all lands valuable for mineral deposits. Northern Pac. R. Co. v. Soderberg, (1903) 188 U. S. 526, 23 S. Ct. 365, 47 U. S. (L. ed.) 575.
The right given by this statute and R. S. sec. 2318, supra, p. 508, to explore the public land necessarily carries with it the license to take what may be found in the course of the exploration and apply it to the discoverer’s own use, and one who finds granite on the public lands is not a trespasser, but by taking it and bestowing his labor upon it he becomes the owner of it in fact as against every person. Sullivan v. Schultz, (1899) 22 Mont. 541, 57 Pac. 278.

An Act To authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer-mining laws of the United States.

[Act of Feb. 11, 1897, ch. 216, 29 Stat. L. 526.]

[Entry of petroleum or other mineral oil lands under placer claims laws.] That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing
petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: Provided, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this Act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof. [29 Stat. L. 536.]

See the note to the preceding paragraph of the text.

It is explained in House Report No. 2,655, 54th Cong., 2d sess., that under decisions of the interior department, there cited, public lands containing petroleum, with other mineral oils, were held subject to entry and patent under the placer-mining laws, R. S. sec. 2329 [supra, p. 575]. By a later decision the previous executive rule was reversed, rendering new legislation necessary to authorize the entry and patent of petroleum lands, as formerly.” Compilers' note, 2 Supp. R. S. 549.

Purpose of Act.—By this Act Congress intentionally limited the right of entry upon, and location of, oil lands to such lands as were “chiefly valuable therefor,” i. e. lands chiefly valuable for oil. Obviously, the government, as sovereign proprietor, could say what lands, if any, might be entered and located as for petroleum. It could if it saw fit deny the right to enter upon any such lands, and for the same reason could limit the lands upon which entry might lawfully be made. In this view of the situation, as to any lands not within the category specified in the statute, there is no invitation or authorization given to enter them, and in consequence no right can be obtained, as against the government, by so doing. U. S. v. McCutchen, (S. D. Cal. 1918) 238 Fed. 575.

Contrasted with R. S. sec. 2319.—The Act of 1897 gives the right to enter on “lands” which are “chiefly valuable” for oil. R. S. sec. 2319, supra, p. 300, which has to do with the general right of the citizen to exploit the public mineral lands, recites that “all valuable mineral deposits” are declared open to exploration and purchase, and the lands in which they are found to occupation and purchase, etc. In other words, as to lodes and placer the right is given to explore and purchase “valuable mineral deposit” and “the lands in which they are found;” but with respect to petroleum the right is given only to enter and obtain patent to lands which not only contain petroleum but which are “chiefly valuable therefor.” In one case the value of the “deposits” is the criterion, and in the other, it is the value of the land. U. S. v. McCutchen, (S. D. Cal. 1918) 238 Fed. 575.

Federal jurisdiction.—When it is shown that the respective parties to the suit are making adverse claims to the same land under the laws of the United States, and that the proper determination of those conflicting claims necessarily requires the application and construction of these laws, it is the duty of the federal court to entertain jurisdiction for the purpose of settling the conflicting claims, and such court will, under well-settled principles of equity, entertain and determine all incidental questions between the respective parties growing out of these conflicting claims, including the granting of an injunction and the appointment of a receiver where such a course is shown to be proper. Nevada Sierra Oil Co. v. Miller, (S. D. Cal. 1899) 97 Fed. 651.

But when the bill fails short of showing that the proper determination of the suit will unnecessarily involve the construction or affect any law of the United States, or that there is any fact in dispute between the respective parties in respect to the construction or effect of such law, it fails to show jurisdiction in the federal court over the cause of action. Dewey Min. Co. v. Miller, (S. D. Cal. 1899) 96 Fed. 1. See also California Oil, etc., Co. v. Miller, (S. D. Cal. 1899) 96 Fed. 12.

Whether the patent alleged to have been issued by the officers of the United States is valid or invalid, and, if valid, whether the title thereby conveyed should be decreed to be held in trust for others and decreed to be conveyed to them, depends upon the proper application of the laws of the United States to the facts, and therefore presents a federal question of which the federal court has jurisdiction. Cates v. Producers', etc., Oil Co. (S. D. Cal. 1899) 96 Fed. 7.

Discovery.—To constitute a valid location of an oil claim, the locator must have actually discovered oil within the limits of the claim. Where no discovery of oil is made under an oil claim, the locator is not in the actual bona fide possession of the claim, and therefore the same is open to peaceable entry by others. Miller v. Chrisman, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 A. S. R. 63; McLemore v. Express Oil Co., (1910) 158 Cal. 569, 112 Pac. 59, 139 A. S. R. 147.

"What discovery will suffice to meet the requirements under the Act of 1897? Though under that Act entry and patent were to be obtained pursuant to the
place may not be secured under this Act regarding the entry of lands containing petroleum or other mineral oils. Weeb v. American Asphaltum Min. Co., (C. C. A. 8th Cir. 1907) 157 Fed. 203, 84 C. C. A. 651, wherein the court said: "The Act of 1897 was not enacted for scientists of for those specially learned in the composition and analysis of geological formations, but for citizens of common intelligence and learning who might desire to buy valuable deposits upon the lands of the United States; and to them the significance of these words, 'other mineral oils,' in this law, following, as they do, the word 'petroleum,' which describes a liquid, is liquid or semi-liquid mineral oils, and it does not include gilsonite or the hard forms of asphaltum. The sense in which the reader of ordinary knowledge and intelligence would take these words, the obvious common meaning of them, should be preferred to the recondite signification which would include the solid forms of asphaltum, and for this reason the Act of 1897 did not authorize the entry of lands which contain these deposits, by means of placer claims."

Fraudulent entry.—A fraudulent and clandestine entry on the oil claim of another with knowledge of the latter's occupancy of the territory cannot be made the basis of any right. Miller v. Chrisman, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 A. S. R. 63, affirmed (1905) 197 U. S. 313, 25 S. Ct. 483, 49 U. S. (L. ed.) 770.

Abandonment of location.—Where a location of an oil claim was invalid, the abandonment and relinquishment thereof by the grantee of the locator did not invalidate a location subsequently made by the grantee. Miller v. Chrisman, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 A. S. R. 63, affirmed (1905) 197 U. S. 313, 25 S. Ct. 483, 49 U. S. (L. ed.) 770.

Covenevance of location.—Where a location of an oil claim was made by an association of persons, the associates acquired a right to the claim before the location was perfected, which they could convey. Miller v. Chrisman, (1903) 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 A. S. R. 63, affirmed (1905) 197 U. S. 313, 25 S. Ct. 483, 49 U. S. (L. ed.) 770.

sect. 13. [Mining rights in Alaska—native-born citizens of Canada.] That native-born citizens of the Dominion of Canada shall be accorded in said District of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become
such may enjoy in said District of Alaska; and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect. [30 Stat. L. 415.]

This is from an Act of May 14, 1898, ch. 299, extending the homestead laws to Alaska and providing for right of way for railroads in the District of Alaska. See Alaska, vol. 1, p. 330.
The "District of Alaska" was reorganized as the Territory of Alaska by the Act of August 24, 1912, ch. 387. See Alaska, vol. 1, p. 250.

An Act To relieve owners of mining claims who enlist in the military or naval service of the United States for duty in the war with Spain from performing assessment work during such term of service.

[Act of July 2, 1898, ch. 563, 30 Stat. L. 651.]

[Sec. 1.] [Volunteers in war with Spain relieved from assessment work.] That the provisions of section twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars’ worth of labor shall be performed or improvements made during each year, shall not apply to claims or parts of claims owned by persons who may enlist in the volunteer army or navy of the United States for service in a war between this country and Spain, so that no mining claim or any part thereof owned by such person which has been regularly located and recorded shall be subject to forfeiture for nonperformance of the annual assessments until six months after such owner is mustered out of the service, or, if he should not survive the war, then six months after his death in the service. [30 Stat. L. 651.]

For all practical purposes this Act must be regarded as obsolete now.

Filing of notice.—The filing of the notice required by this Act was equivalent to the actual performance of the assessment work so as to revive the claimant’s rights, forfeited by failure to do the assessment work for the preceding year, where no one else has located there in the meantime. Field v. Tanner, (1904) 32 Colo. 278, 75 Pac. 916.

Sec. 2. [Notice of enlistment, etc., to be given.] That those desiring to take advantage of this Act shall file, or cause to be filed, a notice in the clerk’s office where the location certificate of said mine is recorded before the expiration of the assessment year, giving notice of his enlistment and of his desire to hold said claim under this Act. [30 Stat. L. 651.]

Effect of filing.—The filing of a notice of enlistment was equivalent to resumption and full performance of the annual assessment work for that year and saved to the locator in the absence of a relocation all the rights in the location and avoided the forfeiture which might have resulted from failure to perform the work of the preceding year. Field v. Tanner, (1904) 32 Colo. 278, 75 Pac. 916.

Sec. 3. [Co-owners not exempt from labor—transfer of forfeited interest.] That if any such enlisted soldier or sailor has a coowner or coowners in any mining claim, and who are not in the Army or Navy, and such coowner or coowners fail to do such a proportion of one hundred dollars’ worth of work per annum as the interest of such nonenlisted person
or persons bears to the whole claim, then such interest shall be open to
relocation by any other qualified person or persons by their doing the neces-
sary work thereon and filing an affidavit of labor showing the forfeiture
and that the relocators had done the annual work required of such non-
enlisted persons and succeeded them in right under this Act, which work
may be done at any time after the expiration of the assessment year and
before the former owners resume work thereon. The work and affidavit
aforesaid shall operate as a transfer of said forfeited interest from the
former owners to said relocators. [30 Stat. L. 651.]

An Act To extend the coal land laws to the district of Alaska.

[Act of June 6, 1900, ch. 796, 31 Stat. L. 658.]

[Coal land laws extended to Alaska.] That so much of the public land
laws of the United States are hereby extended to the district of Alaska as
relate to coal lands, namely, sections twenty-three hundred and forty-seven
to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes.
[31 Stat. L. 658.]

For provisions relating to mineral lands in Alaska, see Alaska, vol. 1, p. 299.

Construction.—That the various coal mining acts are not to be construed as
each complete in itself but in pari materia, see U. S. v. Doughten, (E. D. Wash. 1911) 186 Fed. 375.

Cited.—This section was cited in U. S. v. Munday, (W. D. Wash. 1911) 186 Fed. 293.

An Act Extending the mining laws to saline lands.


[Entry of saline lands under placer claims laws.] That all unoccupied
public lands of the United States containing salt springs, or deposits of salt
in any form, and chiefly valuable therefor, are hereby declared to be sub-
ject to location and purchase under the provisions of the law relating to
placer-mining claims: Provided, That the same person shall not locate
or enter more than one claim hereunder. [31 Stat. L. 745.]

This was the Act known as the "Saline Act."
The placer mining laws were embodied in R. S. secs. 2329-2333, supra, pp. 575-581.

Effect of Act.—This Act prohibited the acquisition of public lands chiefly valu-
able for salines under any law other than the mineral land law. As neither it nor
any other law designated any particular means by which the prohibition was to
be enforced, the selection of some appropriate means devolved upon the commis-

Regulation of land department.—A regulation of the land department
requiring applicants under the non-min-
eral laws to support their applications by
showing that the land applied for is
non-saline, is a valid regulation. Leonard
v. Lennox, (C. C. A. 8th Cir. 1910) 181
Fed. 760, 104 C. C. A. 296.
An Act Defining what shall constitute and providing for assessments on oil mining claims.


[Assessments required for oil mining claims.] That where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: Provided, That said labor will tend to the development or to determine the oil-bearing character of such contiguous claims.

[32 Stat. L. 825.]

Title 32, chapter 6, Revised Statutes, constitutes sections 2318-2352, set out supra, pp. 598-599.

Annual assessment labor.—The phrase "annual assessment labor," found in this act cannot be construed to include or refer to work done upon a claim to accomplish a discovery thereon in order to perfect the location. The use of that phrase limits the application of the act to claims upon which discovery has been made—claims upon which there has been a valid and completed location. Smith v. Union Oil Co., (1913) 166 Cal. 217, 135 Pac. 966.

An Act To authorize the Secretary of the Interior to reclassify the public lands of Alabama.

[Act of March 27, 1906, ch. 1347, 34 Stat. L. 88.]

[SEC. 1.] [Alabama — public lands reclassified — survey.] That the Secretary of the Interior be, and he is hereby, authorized to reclassify the public lands of Alabama, so as to determine which of said lands are in fact agricultural lands and which mineral lands, and to decide which of said lands should be subject to homestead entry, and to that end he is hereby authorized and empowered to employ such expert mineralogist, assayists, and civil engineers as may be necessary to designate and survey said mineral and agricultural lands. [34 Stat. L. 88.]

Sec. 2. [Agricultural lands subject to homestead entry.] That upon receipt of the report of the parties designated to make such classification, all lands designated thereby as agricultural shall be subject to homestead entry as such. [34 Stat. L. 88.]

Section 3 of this Act made an appropriation for the purpose of carrying out its provisions, and is omitted as executed.

An Act For relief of applicants for mineral surveys.


[Mineral land surveys — refund of unused deposit.] That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of the moneys heretofore or hereafter covered into the Treasury from deposits made by individuals to cover cost of work performed and to be
performed in the offices of the United States surveyors-general in connection with the survey of mineral lands, any excess in the amount deposited over and above the actual cost of the work performed, including all expenses incident thereto for which the deposits were severally made or the whole of any unused deposit; and such sums, as the several cases may be, shall be deemed to be annually and permanently appropriated for that purpose. Such repayments shall be made to the person or persons who made the several deposits, or to his or their legal representatives, after the completion or abandonment of the work for which the deposits were made, and upon an account certified by the surveyor-general of the district in which the mineral land surveyed, or sought to be surveyed is situated and approved by the Commissioner of the General Land Office. [35 Stat. L. 645.]

An Act For the protection of the surface rights of entrymen.  

[Confirmation of entries on lands erroneously deemed nonmineral.] That any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: Provided, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: Provided further, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal. [35 Stat. L. 844.]

An Act To provide for agricultural entries on coal lands.  

[Sec. 1.] [Classified, etc., coal lands — agricultural entries for surface allowed — right to prospect, etc., for coal reserved — limit and conditions.] That from and after the passage of this Act unreserved public
lands of the United States exclusive of Alaska which have been withdrawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the Act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the Act approved June seventeenth, nineteen hundred and two, known as the Reclamation Act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the Act approved February nineteenth, nineteen hundred and nine, entitled “An Act to provide for an enlarged homestead:” Provided, That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this Act. [36 Stat. L. 583.]

The desert land law mentioned in the text is the Act of March 3, 1877, ch. 107, and is given in Public Lands.
The Carey Act of Aug. 18, 1894, ch. 301, § 4, mentioned in the text, is given in Public Lands.
The Reclamation Act of June 17, 1902, ch. 1093, mentioned in the text, is given in Waters.

SEC. 2. [Applications to state nature of entry.] That any person desiring to make entry under the homestead laws or the desert-land law, any State desiring to make selection under section four of the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and the Secretary of the Interior in withdrawing under the Reclamation Act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said Acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this Act. [36 Stat. L. 584.]

SEC. 3. [Patents to reserve coal rights — disposal of coal deposits — entry for prospecting, etc.— damages to surface owners — mining for domestic use — right of entryman to disprove coal classifications.] That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this Act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal. Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or
patented, as provided by this Act, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: Provided, That the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: Provided further, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation. [36 Stat. L. 584.]

Entry of surface.—Under non-mineral laws the surface may be entered, the coal, if any, being reserved; or the land department can withdraw such lands from non-mineral or agricultural entry, and can maintain the withdrawal until time and development determine whether valuable deposits may exist therein. U. S. v. Kostelak, (D. C. Mont. 1913) 207 Fed. 477.

An Act To protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest. [Act of March 2, 1911, ch. 201, 36 Stat. L. 1015.]

[Sec. 1.] [Patents of oil or gas lands claimed under mining laws—effect of transfer before discovery.] That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases: Provided, however, That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry. [36 Stat. L. 1015.]

This Act was amended by an Act of August 25, 1914, ch. 287, entitled "An Act To amend an Act entitled 'An Act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest,' approved March second, nineteen hundred and eleven" by "adding thereto the following section" 2.

Sec. 2. [Agreement with government as to oil or gas.] That where applications for patents have been or may hereafter be offered for any oil or gas land included in an order of withdrawal upon which oil or gas has
heretofore been discovered, or is being produced, or upon which drilling operations were in actual progress on October third, nineteen hundred and ten, and oil or gas is thereafter discovered thereon, and where there has been no final determination by the Secretary of the Interior upon such applications for patent, said Secretary, in his discretion, may enter into agreements, under such conditions as he may prescribe with such applicants for patents in possession of such land or any portions thereof, relative to the disposition of the oil or gas produced therefrom or the proceeds thereof, pending final determination of the title thereto by the Secretary of the Interior, or such other disposition of the same as may be authorized by law. Any money which may accrue to the United States under the provisions of this Act from lands within the Naval Petroleum Reserves shall be set aside for the needs of the Navy and deposited in the Treasury to the credit of a fund to be known as the Navy Petroleum Fund, which fund shall be applied to the needs of the Navy as Congress may from time to time direct, by appropriation or otherwise. [38 Stat. L. 708.]

See the note to the preceding section 1 of this Act.


[Act of April 23, 1912, ch. 87, 37 Stat. L. 90.]

[Coal lands in Alabama opened to agricultural surface entry.] That unreserved public lands containing coal deposits in the State of Alabama which are now being withheld from homestead entry under the provisions of the Act entitled "An Act to exclude the public lands in Alabama from the operations of the laws relating to mineral lands," approved March third, eighteen hundred and eighty-three, may be entered under the homestead laws of the United States subject to the provisions, terms, conditions, and limitations prescribed in the Act entitled "An Act to provide for agricultural entries on coal lands," approved June twenty-second, nineteen hundred and ten. [37 Stat. L. 90.]


An Act To supplement the Act of June twenty-second, nineteen hundred and ten, entitled "An Act to provide for agricultural entries on coal lands."


[Disposal of surface of coal lands to states, etc.] That from and after the passage of this Act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands or are valuable for coal shall, in addition to the classes of entries or filings described in the Act of Congress approved June twenty-second, nineteen hundred and ten, entitled "An Act to provide for agricultural entries on coal lands," be subject to selection by the several States within whose limits
the lands are situate, under grants made by Congress, and to disposition, in the discretion of the Secretary of the Interior, under the laws providing for the sale of isolated or disconnected tracts of public lands. It: there shall be a reservation to the United States of the coal in all such lands so selected or sold and of the right to prospect for, mine, and remove the same in accordance with the provisions of said Act of June twenty-second, nineteen hundred and ten, and such lands shall be subject to all the conditions and limitations of said Act. [37 Stat. L. 105.]

The Act of June 22, 1910, ch. 318, mentioned in the text, is given supra, p. 690.

An Act To provide for agricultural entries on oil and gas lands.

[Act of August 24, 1912, ch. 367, 37 Stat. L. 496.]

[Sec. 1.] [Classified oil and gas lands open to entry of surface — limit to desert entries — incomplete entries may be perfected, etc.] That from and after the passage of this Act unreserved public lands of the United States in the State of Utah, which have been withdrawn or classified as oil lands, or are valuable for oil, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, by selection by the State of Utah under grants made by Congress and under section four of the Act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the Act approved June seventeenth, nineteen hundred and two, known as the reclamation Act, and to disposition in the discretion of the Secretary of the Interior under the law providing for the sale of isolated or disconnected tracts of public lands. whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the oil and gas in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: Provided, That those who have initiated nonmineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as oil lands, may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this Act. [37 Stat. L. 496.]

The homestead laws, the desert land law, and the Carey Act of August 18, 1894, ch. 301, § 4, mentioned in the text, are given in PUBLIC LANDS.

The Reclamation Act of June 17, 1902, ch. 1003, mentioned in the text, is given in WATERS.

Sec. 2. [Applications to recognize reservation of oil or gas.] That any person desiring to make entry under the homestead laws or the desert-land law, and the State of Utah desiring to make selection under section four of the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, or under grants made by Congress, and the Secretary of the Interior in withdrawing under the reclamation Act lands classified as oil lands, or valuable for oil, with a view of securing or passing title to the same in accordance with the provisions of said Acts, shall state in the application
for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this Act. [37 Stat. L. 496.]

See the notes to the preceding section of this Act.

Sec. 3. [Patent to contain reservation of oil or gas rights.] That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made and of this Act the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the oil and gas in the lands so patented, together with the right to prospect for, mine, and remove the same upon rendering compensation to the patentee for all damages that may be caused by prospecting for and removing such oil or gas. The reserved oil and gas deposits in such lands shall be disposed of only as shall he [be] hereafter expressly directed by law. [37 Stat. L. 496.]

See the notes to section 1 of this Act, supra, p. 612.

An Act To authorize the issuance of unqualified patents to public lands in certain cases.

[Act of April 14, 1914, ch. 53, 38 Stat. L. 335.]

[Patents — noncoal lands — supplemental patents.] That the Secretary of the Interior be, and he is hereby, authorized and directed in cases where patents for public lands have been issued to entrymen under the provisions of the Acts of Congress approved March third, nineteen hundred and nine, and June twenty-second, nineteen hundred and ten, reserving to the United States all coal deposits therein, and lands so patented are subsequently classified as noncoal in character, to issue new or supplemental patents without such reservation. [36 Stat. L. 335.]

The Act of March 3, 1909, ch. 270, mentioned in the text, is given supra, p. 608.
The Act of June 22, 1910, ch. 318, also mentioned in the text, is given, supra, p. 608.

An Act To provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals.


[Sec. 1.] [Lands containing phosphates, etc.—agricultural entry.] That lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: Provided, That all
applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act. [38 Stat. L. 509.]

Sec. 2. [Issuance of patents — reservations — contesting character of lands.] That upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made the locator, selectee, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages: Provided, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located are in fact nonmineral in character. [38 Stat. L. 509.]

Sec. 3. [Withdrawal of lands subsequent to entry thereon.] That any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same. [38 Stat. L. 510.]
An Act Providing for the purchase and disposal of certain lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County, formerly a part of the Rosebud Indian Reservation in South Dakota.


[South Dakota mineral lands — exploration and purchase — price — disposition of proceeds.] That all lands containing the minerals kaolin, kaolinite, fuller's earth, china clay, and ball clay, in Tripp County in what was formerly within the Rosebud Indian Reservation in South Dakota, as have heretofore been opened to settlement and entry under Acts of Congress which did not authorize the disposal of such mineral lands, shall be open to exploration and purchase and be disposed of under the general provisions of the mining laws of the United States, and the proceeds arising therefrom shall be deposited in the Treasury for the same purpose for which the proceeds arising from the disposal of other lands within the reservation in which such mineral-bearing lands are located were deposited: Provided, That the same person, association, or corporation shall not locate or enter more than one claim, not exceeding one hundred and sixty acres in area, hereunder: Provided further, That none of the lands or mineral deposits, the disposal of which is herein provided for, shall be disposed of at less price than that fixed by the applicable mining or coal-land laws, and in no instance at less than their appraised value to be determined by the Secretary of the Interior. [38 Stat. L. 792.]

An Act Validating locations of deposits of phosphate rock heretofore made in good faith under the placer-mining laws of the United States.


[Lands containing phosphate rock — validation of locations.] That where public lands containing deposits of phosphate rock have heretofore been located in good faith under the placer-mining laws of the United States and upon which assessment work has been annually performed, such locations shall be valid and may be perfected under the provisions of said placer-mining laws, and patents whether heretofore or hereafter issued thereon shall give title to and possession of such deposits: Provided, That this Act shall not apply to any locations made subsequent to the withdrawal of such lands from location, nor shall it apply to lands included in an adverse or conflicting lode location unless such adverse or conflicting location is abandoned. [38 Stat. L. 792.]

III. PROTECTION OF MINERS

An Act for the protection of the lives of miners in the Territories.

[Act of March 3, 1891, ch. 564, 26 Stat. L. 1104.]

[Sec. 1.][Inspectors of coal mines in Territories — bonds.] That in each organized and unorganized Territory of the United States wherein are
located coal mines, the aggregate annual output of which shall be in excess of one thousand tons per annum, the President shall appoint a mine inspector, who shall hold office until his successor is appointed and qualified. Such inspector shall, before entering upon the discharge of his duties, give bond to the United States in the sum of two thousand dollars, conditioned for the faithful discharge of his duties. [26 Stat. L. 1104.]

SEC. 2. [Qualifications of inspector.] That no person shall be eligible for appointment as mine inspector under section one of this act, who is not either a practical miner or mining engineer and who has not been a resident for at least six months in the Territory for which he shall be appointed; and no person who shall act as land agent, manager, or agent of any mine, or as mining engineer, or be interested in operating any mine in such Territory shall be at the same time an inspector under the provisions of this act. [26 Stat. L. 1104.]

SEC. 3. [Duties of inspector — reports.] That it shall be the duty of the mine inspector provided for in this act to make careful and thorough inspection of each coal mine operated in such Territory, and to report at least annually upon the condition of each coal mine in said Territory with reference to the appliances for the safety of the miners, the number of air or ventilating shafts, the number of shafts or slopes for ingress or egress, the character and condition of the machinery for ventilating such mines, and the quantity of air supplied to same. Such report shall be made to the governor of the Territory in which such mines are located and a duplicate thereof forwarded to the Secretary of the Interior, and in the case of an unorganized Territory directly to the Secretary of the Interior. [26 Stat. L. 1104.]

SEC. 4. [Notification of unsafe condition of mines.] That in case the said mine inspector shall report that any coal mine is not properly constructed or not furnished with reasonable and proper machinery and appliances for the safety of the miners and other employees it shall be the duty of the governor of such organized Territory it shall be the duty [sic] of the Secretary of the Interior to give notice to the owners and managers of said coal mine that the said mine is unsafe and notifying them in what particular the same is unsafe, and requiring them to furnish or provide such additional machinery, slopes, entries, means of escape, ventilation, or other appliances necessary to the safety of the miners and other employees within a period to be in said notice named, and if the same be not furnished as required in such notice it shall be unlawful after the time fixed in such notice for the said owners or managers to operate said mine. [26 Stat. L. 1105.]

The above reading is the language of the Statutes at Large.

SEC. 5. [Two shafts or outlets for each mine.] That in all coal mines in the Territories of the United States the owners or managers shall provide at least two shafts, slopes, or other outlets, separated by natural strata of not less than one hundred and fifty feet in breadth, by which shafts, slopes, or outlets distinct means of ingress and egress shall always be available to the persons employed in said mine. And in case of the failure of
any coal mine to be so provided it shall be the duty of the mine inspector to make report of such fact, and thereupon notice shall issue, as provided in section four of this act, and with the same force and effect. [26 Stat. L. 1105.]

Sec. 6. [Ventilation — coal dust.] That the owners or managers of every coal mine shall provide an adequate amount of ventilation of not less than eighty-three and one-third cubic feet of pure air per second, or five thousand cubic feet per minute for every fifty men at work in said mine, and in like proportion for a greater number, which air shall by proper appliances or machinery be forced through such mine to the face of each and every working place, so as to dilute and render harmless and expel therefrom the noxious or poisonous gases. Wherever it is practicable to do so the entries, rooms, and all openings being operated in coal mines shall be kept well dampened with water to cause the coal dust to settle, and that when water is not obtainable at reasonable cost for this purpose accumulations of dust shall be taken out of the mine, and shall not be deposited in way places in the mine where it would be again distributed in the atmosphere by the ventilating currents: Provided, That all owners, lessees, operators of, or any other person having the control or management of any coal shaft, drift, slope or pit in the Indian Territory, employing twenty or more miners to work in the same, shall employ shot firers to fire the shots therein. Said shots shall not be fired to exceed one per day; at twelve o'clock noon in cases where the miners work but half a day, and at five o’clock in the evening when the mine is working three-quarters or full time, and they shall not be fired until after all miners and other employees working in said shafts, drifts, slopes, or pits, shall be out of same. The violation of this Act shall constitute a misdemeanor and any person convicted of such violation shall pay a fine of not exceeding five hundred dollars. [26 Stat. L. 1105, as amended by 32 Stat. L. 631.]

This section was amended to read as above by the Act of July 1, 1902, ch. 1356, 32 Stat. L. 631.

It originally read as follows:

"Sec. 6. That the owners or managers of every coal mine at a depth of one hundred feet or more shall provide an adequate amount of ventilation of not less than fifty-five cubic feet of pure air per second, or thirty-three hundred cubic feet per minute, for every fifty men at work, and in like proportions for a greater number; (2) proper appliances and machinery to force the air through the mine to the face of working places; (3) keeping all workings free from standing gas. If either of these three requirements was neglected to the injury of the plaintiff’s intestates the defendant was liable." It does not give to mine owners the privilege of reasoning on the sufficiency of appliances for ventilation or leave to their judgment the amount of ventilation that is sufficient for the protection of miners. The provisions of the statute impose an imperative duty, and the consequence of neglecting it cannot be excused because some workmen may disregard instructions. Deserant v. Cerillos Coal R. Co., (1900) 178 U. S. 409, 20
S. Ct. 967, 44 U. S. (L. ed.) 1127, reversing (1807) 9 N. M. 49, 49 Pac. 807, and (1898) 9 N. M. 495, 55 Pac. 290.

Duty of mine owner.—This section is sufficiently complied with where air is forced through certain working places in a mine and the places not fit for working places on account of the accumulation of gas are properly dead-lined, signals being there placed warning employees not to enter such places. Central Coal, etc., Co. v. Gregory, (1906) 78 Ark. 43, 93 S. W. 56.

Negligence of fellow servants.—In an action by a servant under this Act requiring working places in coal mines to be properly ventilated, for injuries received as a result of an explosion of gas in a coal mine, evidence that the defendant forced air through to the working place in the mine, dead-lining such places as were not safe, and that, with knowledge of such danger signals and of the defendant's rules forbidding employees to cross such dead lines, certain of defendant's employees did cross the lines with open lamps, thereby igniting the gas, which exploded, was held to show that the injury was caused solely by the negligence of plaintiff's fellow servants. Central Coal, etc., Co. v. Gregory, (1906) 78 Ark. 43, 93 S. W. 56.

SEC. 7. [Penalty for failure to comply.] That any mine owner or manager who shall continue to operate a mine after failure to comply with the requirements of this act and after the expiration of the period named in the notice provided for in section four of this act, shall be deemed guilty of a misdemeanor, and shall be fined not to exceed five hundred dollars. [26 Stat. L. 1105.]

SEC. 8. [Furnace shaft.] That in no case shall a furnace shaft be used or for the purposes of this act be deemed an escape shaft. [26 Stat. L. 1105.]

SEC. 9. [Construction of escape shafts.] That escape shafts shall be constructed in compliance with the requirements of this act within six months from the date of the passage hereof, unless the time shall be extended by the mine inspector, and in no case shall said time be extended to exceed one year from the passage of this act. [26 Stat. L. 1105.]

SEC. 10. [Speaking tubes.] That a metal speaking-tube from the top to the bottom of the shaft or slope shall be provided in all cases, so that conversation may be carried on through the same. [26 Stat. L. 1105.]

SEC. 11. [Safety catches.] That an approved safety catch shall be provided and sufficient cover overhead on every carriage used in lowering or hoisting persons. And the mine inspectors shall examine and pass upon the adequacy and safety of all such hoisting apparatus. [26 Stat. L. 1105.]

SEC. 12. [Children under twelve not to work under ground — penalty for violation.] That no child under twelve years of age shall be employed in the underground workings of any mine. And no father or other person shall misrepresent the age of anybody so employed. Any person guilty of violating the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed one hundred dollars. [26 Stat. L. 1105.]

SEC. 13. [Men in charge of hoisting apparatus.] That only experienced and competent and sober men shall be placed in charge of hoisting apparatus or engines. And the maximum number of persons who may ascend or descend upon any cage or hoisting apparatus shall be determined by the mine inspector. [26 Stat. L. 1106.]
SEC. 14. [Inspection — how and when made — owners to furnish means for.] That it shall be lawful for any inspector to enter and inspect any coal mine in his district and the work and machinery belonging thereto at all reasonable times, but so as not to impede or obstruct the working of the mine; and to make inquiry into the state of the mine, works, and machinery, and the ventilation and mode of lighting the same, and into all matters and things connected with or relating to the safety of the persons employed in or about the same, and especially to make inquiry whether the provisions of this act are complied with; and the owner or agent is hereby required to furnish means necessary for such entry, inspection, examination and inquiry, of which the said inspector shall make an entry in the record in his office, noting the time and material circumstances of the inspection. [26 Stat. L. 1106.]

SEC. 15. [Fatal accidents to be reported.] That in all cases of fatal accident a full report thereof shall be made by the mine owner or manager to the mine inspector, said report to be in the [sic] writing and made within ten days after such deaths shall have occurred. [26 Stat. L. 1106.]

SEC. 16. [Injunction to prevent working of mine.] That as a cumulative remedy, in case of the failure of any owner or manager of any mine to comply with the requirements contained in the notice of the Governor of such Territory or the Secretary of the Interior, given in pursuance of this act, any court of competent jurisdiction, or the judge of such court in vacation, may, on the application of the mine inspector in the name of the United States and supported by the recommendation of the governor of said Territory, or of the Secretary of the Interior, issue an injunction restraining the further operation of such mine until such requirements are complied with, and in order to obtain such injunction no bond shall be required. [26 Stat. L. 1106.]

SEC. 17. ["Owner or manager" defined.] That wherever the term "owner or manager" is used in this act the same shall include lessees or other persons controlling the operation of any mine. And in case of the violation of the provisions of this act by any corporation the managing officers and superintendents, and other managing agents of such corporation, shall be personally liable and shall be punished as provided in act for owners and managers. [26 Stat. L. 1106.]

SEC. 18. [Inspectors' salary and expenses.] That the mine inspectors provided for in this act shall each receive a salary of two thousand per annum, and their actual traveling expenses when engaged in their duties. [26 Stat. L. 1106.]

SEC. 19. [Territorial statute to supersede this law.] That whenever any organized Territory shall make or has made provision by law for the safe operation of mines within such Territory, and the governor of such Territory shall certify said fact with a copy of the said law to the Secretary of the Interior, then and thereafter the provisions of this act shall no longer be enforced in such organized Territory, but in lieu thereof the statute of such Territory shall be operative in lieu of this act. [26 Stat. L. 1106.]
IV. CALIFORNIA DEBRIS COMMISSION AND REGULATION OF
HYDRAULIC MINING

An act to create the California Debris Commission and regulate hydraulic
mining in the State of California

[Act of March 1, 1893, ch. 183, 27 Stat. L. 507.]

[Sec. 1.] [Appointment of commission — authority and powers.] That
a commission is hereby created, to be known as the California Debris Com-
mission, consisting of three members. The President of the United States
shall, by and with the advice and consent of the Senate, appoint the com-
mission from officers of the Corps of Engineers, United States Army.
Vacancies occurring therein shall be filled in like manner. It shall have
the authority, and exercise the powers hereinafter set forth, under the
supervision of the Chief of Engineers and direction of the Secretary of
War. [27 Stat. L. 507.]

Constitutionality.—This statute is con-
stitutional. In the exercise of its domi-
nion and control over the navigable waters,
Congress can determine and declare what
constitutes an obstruction, injury, or in-
terference to the navigable waters of the
state, or an obstruction to the commerce
thereof, as well as determine and declare
what acts shall be performed and what
character of works shall be constructed
in order to prevent injury to the naviga-
ble waters or an obstruction to commerce.
North Bloomfield Gravel Min. Co. v. U. S.,
(C. C. A. 9th Cir. 1898) 88 Fed. 664, 59

Construction of statute.—While the
purpose of this Act was to prevent in-
juries from the discharge of debris from
hydraulic mines, it was not intended to
exonerate the miner from liability there-
for, nor to limit the powers of the state
courts to protect private property from
threatened injury, and to redress inflicted
injury thereto from the operation of hy-
draulic mines, though carried on under
a permit and in strict compliance with the
plans of the commission. Sutter County
v. Nicol, (1908) 162 Cal. 688, 93 Pac.
572, 14 Am. Cas. 900, 15 L. R. A. (N. S.)
616.

Operation of statute.—The provisions
of this statute are mandatory. North
Bloomfield Gravel Min. Co. v. U. S.,
(C. C. A. 9th Cir. 1898) 88 Fed. 664, 59 U. S.
App. 377, 32 C. C. A. 84.

Status of commissioners.—The Cali-
forina Debris Commissioners act under
the direction of the Secretary of War,
and do not, within the meaning of R. S.
sec. 1222 (title War Department and
Military Establishment), hold any
civil office or neglect any military duty.
The commissioners remain members of the
corps of engineers, merely detailed upon
special duty, and do not cease to be of-
ficers of the army, and their commissions

Injunction by federal court.—The nav-
higable rivers being "the property of the
nation," a court of equity in protecting
such property rights has the jurisdiction
and power to issue an injunction in aid
of the enforcement of the regulation which
Congress has prescribed in order to pre-
serve the right. North Bloomfield Gravel
Min. Co. v. U. S., (C. C. A. 9th Cir. 1898)
C. A. 84.

Sections 5, 20, and 22 give to the com-
mmission ample means for ascertaining
the method of conduct of the mining industry
with a view to the protection of the naviga-
table waters concerned and the punish-
ment of violations of the law; and such
means necessarily include the right to
enter upon and inspect premises. In the
absence of an express provision for the
enforcement of the right of the commis-
sioners to enter upon lands for the exami-
nation of mines, there may be filed a bill
in equity praying for an injunction to
restrain the defendants from preventing
the entry of the commission, and for an
injunction restraining the defendants
from mining during the time the com-
mission is excluded by it and pending
the investigation. (1894) 21 Op. Atty.-
Gen. 62.

Injunction by state court.—The Su-
perior Court of Sutter county, California,
granted a temporary injunction in a suit
by the county of Sutter restraining a min-
ing company, which was operating under
a license from the California debris com-
mission, from mining by the hydraulic
process. The Attorney-General advised
that in the absence of any question touch-
ing the validity of the powers granted to
the California debris commission the gov-
ernment should not intervene in the suit.
SEC. 2. [Organisation — compensation — rules of procedure.] That said commission shall organize within thirty days after its appointment by the selection of such officers as may be required in the performance of its duties, the same to be selected from the members thereof. The members of said commission shall receive no greater compensation than is now allowed by law to each, respectively, as an officer of said Corps of Engineers. It shall also adopt rules and regulations, not inconsistent with law, to govern its deliberations and prescribe the method of procedure under the provisions of this act. [27 Stat. L. 507.]

By a provision of the Act of June 6, 1900, ch. 791, § 1, infra, p. 828, officers of the commission were authorized to receive the mileage allowed by law.

SEC. 3. [Jurisdiction over hydraulic mining — injurious mining prohibited.] That the jurisdiction of said commission, in so far as the same affects mining carried on by the hydraulic process, shall extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the State of California. Hydraulic mining, as defined in section eight hereof, directly or indirectly injuring the navigability of said river systems, carried on in said territory other than as permitted under the provisions of this act is hereby prohibited and declared unlawful. [27 Stat. L. 507.]

SEC. 4. [Duties of commission.] That it shall be the duty of said commission to mature and adopt such plan or plans, from examinations and surveys already made and from such additional examinations and surveys as it may deem necessary, as will improve the navigability of all the rivers comprising said systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from debris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, the navigability of said rivers to the condition existing in eighteen hundred and sixty, and permitting mining by the hydraulic process, as the term is understood in said state, to be carried on, provided the same can be accomplished, without injury to the navigability of said rivers or the lands adjacent thereto. [27 Stat. L. 507.]

SEC. 5. [Surveys for debris reservoirs — study of methods.] That it shall further examine, survey, and determine the utility and practicability, for the purposes hereinafter indicated, of storage sites in the tributaries of said rivers and in the respective branches of said tributaries, or in the plains, basins, sloughs, and tule and swamp lands adjacent to or along the course of said rivers, for the storage of debris or water or as settling reservoirs, with the object of using the same by either or all of these methods to aid in the improvement and protection of said navigable rivers by preventing deposits therein of debris resulting from mining operations, natural erosion, or other causes, or for affording relief thereto in flood time and providing sufficient water to maintain scouring force therein in the summer season; and in connection therewith to investigate such hydraulic and other mines as are now or may have been worked by methods intended to restrain the debris and material moved in operating such mines by
impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as science, experience, and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid. [27 Stat. L. 507.]

SEC. 6. [Noting effects on navigable channels.] That the said commission shall from time to time note the conditions of the navigable channels of said river systems, by cross-section surveys or otherwise, in order to ascertain the effect therein of such hydraulic mining operations as may be permitted by its orders and such as is caused by erosion, natural or otherwise. [27 Stat. L. 508.]

SEC. 7. [Annual reports.] That said commission shall submit to the Chief of Engineers, for the information of the Secretary of War, on or before the fifteenth day of November of each year, a report of its labors and transactions, with plans for the construction, completion, and preservation of the public works outlined in this act, together with estimates of the cost thereof, stating what amounts can be profitably expended thereon each year. The Secretary of War shall thereupon submit same to Congress on or before the meeting thereof. [27 Stat. L. 508.]

SEC. 8. [Terms defined.] That for the purposes of this act "hydraulic mining" and "mining by the hydraulic process," are hereby declared to have the meaning and application given to said terms in said State. [27 Stat. L. 508.]

SEC. 9. [Petitions for mining to be filed.] That the individual proprietor or proprietors, or in case of a corporation its manager or agent appointed for that purpose, owning mining ground in the territory in the State of California mentioned in section three hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition, setting forth such facts as will comply with law and the rules prescribed by said commission. [27 Stat. L. 508.]

Section 3 of this Act, mentioned in the text is given, supra, p. 621.

SEC. 10. [Surrender to United States of right to regulate debris—other processes not affected.] That said petition shall be accompanied by an instrument duly executed and acknowledged, as required by the law of the said State, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may heretofore be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the debris resulting from the working of said mine or mines shall be restrained, and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said State: Provided, That they shall not interfere with the navigability of the aforesaid rivers. [27 Stat. L. 508.]
Sec. 11. [Joint petition by mining claim owners requiring a common dumping ground.] That the owners of several mining claims situated so as to require a common dumping ground or dam or other restraining works for the débris issuing therefrom in one or more sites may file a joint petition setting forth such facts in addition to the requirements of section nine hereof; and where the owner of a hydraulic mine or owners of several such mines have and use common dumping sites for impounding débris or as settling reservoirs, which sites are located below the mine of an applicant not entitled to use same, such fact shall also be stated in said petition. Thereupon the same proceedings shall be had as provided for herein. [27 Stat. L. 508.]

Sec. 12. [Publication of petition — examination — hearings.] A notice specifying briefly the contents of said petition and fixing a time previous to which all proofs are to be submitted shall be published by said commission in some newspaper or newspapers of general circulation in the communities interested in the matter set forth therein. If published in a daily paper such publication shall continue for at least ten days; if in a weekly paper in at least three issues of the same. Pending publication thereof said commission, or a committee thereof, shall examine the mine and premises described in such petition. On or before the time so fixed all parties interested, either as petitioners or contestants, whether miners or agriculturists, may file affidavits, plans, and maps in support of their respective claims. Further hearings, upon notice to all parties of record, may be granted by the commission when necessary. [27 Stat. L. 508.]

Purpose of notice.—The provisions of this Act directing notice to be given and authorizing a hearing at which all persons interested may appear were not intended to conclude and estop the owners of lands below with respect to subsequent injuries that might be inflicted, but were designed to enable the commission in reaching its decision to obtain all aid which it could derive from the suggestions of all interested persons. Sutter County v. Nicol, (1898) 152 Cal. 688, 93 Pac. 872, 14 Ann. Cas. 900, 15 L. R. A. (N. S.) 618.

Sec. 13. [Order directing methods of mining, etc.— expenses — hydraulic mining without impounding works, etc.] That in case a majority of the members of said Commission, within thirty days after the time so fixed, concur in the decision in favor of the petitioner or petitioners, the said Commission shall thereupon make an order directing the methods and specifying in detail the manner in which operations shall proceed in such mine or mines; what restraining or impounding works, if any, if facilities therefor can be found, shall be built and maintained; how and of what material; where to be located; and in general set forth such further requirements and safeguards as will protect the public interest and prevent injury to the said navigable rivers and the lands adjacent thereto, with such further conditions and limitations as will observe all the provisions of this Act in relation to the working thereof and the payment of taxes on the gross proceeds of the same: Provided, That all expense incurred in complying with said order shall be borne by the owner or owners of such mine or mines: And provided further, That where it shall appear to said Commission that hydraulic mining may be carried on without injury to the navigation of said navigable rivers and the lands adjacent thereto, an order may be made
authorizing such mining to be carried on without requiring the construction of any restraining or impounding works or any settling reservoirs: And provided also, That where such an order is made a license to mine, no taxes provided for herein in the gross proceeds of such mining operations shall be collected. [27 Stat. L. 508, as amended by 34 Stat. L. 1001.]

This section was amended to read as given in the text by an Act of Feb. 27, 1907, ch. 2077, 34 Stat. L. 1001, entitled "An Act To amend section thirteen of an Act of March first, eighteen hundred and ninety-three, entitled 'An Act to create the California Debris Commission and regulate hydraulic mining in the State of California.'"

The amendment consisted in the insertion of the words "if any" after the words "restraining or impounding works" and the addition of the last two provisos of the section.

SEC. 14. [Submission of plans and work thereunder — permission to commence mining.] That such petitioner or petitioners must within a reasonable time present plans and specifications of all works required to be built in pursuance of said order for examination, correction, and approval by said commission; and thereupon work may immediately commence thereon under the supervision of said commission or representative thereof attached thereto from said Corps of Engineers, who shall inspect same from time to time. Upon completion thereof, if found in every respect to meet the requirements of the said order and said approved plans and specifications, permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of this act. [27 Stat. L. 509.]

SEC. 15. [Conditions as to commencing operations.] That no permission granted to a mine owner or owners under this act shall take effect, so far as regards the working of a mine, until all impounding dams or other restraining works, if any are prescribed by the order granting such permission, have been completed and until the impounding dams or other restraining works or settling reservoirs provided by said commission have reached such a stage as, in the opinion of said commission, it is safe to use the same: Provided, however, That if said commission shall be of the opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said systems and the work of said commission, then the owner or owners of such mine or mines may be permitted to commence operations. [27 Stat. L. 509.]

SEC. 16. [Allotment of expenses for common dumping ground among mine owners.] That in case the joint petition referred to in section eleven hereof is granted, the commission shall fix the respective amounts to be paid by each owner of such mines toward providing and building necessary impounding dams or other restraining works. In the event of a petition being filed after the entry of such order, or in case the impounding dam or dams or other restraining works have already been constructed and accepted by said commission, the commission shall fix such amount as may be reasonable for the privilege of dumping therein, which amount shall be divided between the original owners of such impounding dams or other restraining works in proportion to the amount respectively paid by each party owning same. The expense of maintaining and protecting such joint dam or works shall be divided among mine-owners using the same in such proportion as
the commission shall determine. In all cases where it is practicable, restrain-
ing and impounding works are to be provided, constructed, and maintained
by mine-owners near or below the mine or mines before reaching the main
tributaries of said navigable waters. [27 Stat. L. 509.]

SEC. 17. [Limit of débris washed away.] That at no time shall any
more débris be permitted to be washed away from any hydraulic mine or
mines situated on the tributaries of said rivers and the respective branches
of each; worked under the provisions of this act, than can be impounded
within the restraining works erected. [27 Stat. L. 509.]

SEC. 18. [Commission may reduce or revoke authority.] That the said
commission may at any time, when the condition of the navigable rivers or
when the capacities of all impounding and settling facilities erected by
mine-owners or such as may be provided by Government authority require
same, modify the orders granting the privilege to mine by the hydraulic
mining process so as to reduce amount thereof to meet the capacities of the
facilities then in use, or if actually required in order to protect the navig-
able rivers from damage, may revoke same until the further notice of the
commission. [27 Stat. L. 509.]

SEC. 19. [Penalty for violating conditions.] That an intentional viola-
tion on the part of a mine owner or owners, company, or corporation, or the
agents or employees of either, of the conditions of the order granted pursu-
ant to section thirteen, or such modifications thereof as may have been made
by said commission, shall work a forfeiture of the privileges thereby con-
ferred, and upon notice being served by the order of said commission upon
such owner or owners, company, or corporation, or agent in charge, work
shall immediately cease. Said commission shall take necessary steps to
enforce its orders in case of the failure, neglect, or refusal of such owner
or owners, company, or corporation, or agents thereof, to comply therewith,
or in the event of any person or persons, company, or corporation work-
ning by said process in said territory contrary to law. [27 Stat. L. 510.]

Injury to navigable stream.—When the
operations of a mining company threaten
injury to the navigability of a stream,
and the company has not made applica-
tion to mine, nor has it made the sur-
render referred to in section ten of this
Act, the commission has the power to take
such necessary steps as may be required
to prevent or restrain the operations
threatening injury before resorting to the
harsh and drastic remedies of the law,
and the commission should call the atten-
tion of the offending company to the pro-
visions of the statute, and to the acts and
conduct of the company which appear to
be in violation of this provision, to the en-
end that the evil complained of may be
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SEC. 20. [Examination of mines — report.] That said commission, or a
committee therefrom, or officer of said corps assigned to duty under its
orders, shall, whenever deemed necessary, visit said territory and all mines
operating under the provisions of this act. A report of such examination
shall be placed on file. [27 Stat. L. 510.]

SEC. 21. [Use of public lands and material — withdrawal from sale and
entry.] That the said commission is hereby granted the right to use any of
the public lands of the United States, or any rock, stone, timber, trees, brush, or material thereon or therein, for any of the purposes of this act; and the Secretary of the Interior is hereby authorized and requested, after notice has been filed with the Commissioner of the General Land Office by said commission, setting forth what public lands are required by it under the authority of this section, that such land or lands shall be withdrawn from sale and entry under the laws of the United States. [27 Stat. L. 510.]

SEC. 22. [Wilful injury to works — violations injuring navigation—penalty.] That any person or persons who willfully or maliciously injure, damage, or destroy, or attempt to injure, damage, or destroy, any dam or other work erected under the provisions of this act for restraining, impounding, or settling purposes, or for use in connection therewith, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed the sum of five thousand dollars or be imprisoned not to exceed five years, or by both such fine and imprisonment, in the discretion of the court. And any person or persons, company or corporation, their agents or employees, who shall mine by the hydraulic process directly or indirectly injuring the navigable waters of the United States, in violation of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court: Provided, That this section shall take effect on the first day of May, eighteen hundred and ninety-three. [27 Stat. L. 510.]

SEC. 23. [Tax on gross proceeds of hydraulic mines — "Débris Fund" created — advances from mine-owners.] That upon the construction by the said commission of dams or other works for the detention of debris from hydraulic mines and the issuing of the order provided for by this act to any individual, company, or corporation to work any mine or mines by hydraulic process, the individual, company or corporation operating thereunder working any mine or mines by hydraulic process, the debris from which flows into or is in whole or in part restrained by such dams or other works erected by said commission, shall pay a tax of three per centum on the gross proceeds of his, their, or its mine so worked; which tax of three per centum shall be ascertained and paid in accordance with regulations to be adopted by the Secretary of the Treasury, and the Treasurer of the United States is hereby authorized to receive the same. All sums of money paid into the Treasury under this section shall be set apart and credited to a fund to be known as the "Débris Fund," and shall be expended by said commission under the supervision of the Chief of Engineers and direction of the Secretary of War, in addition to the appropriations made by law in the construction and maintenance of such restraining works and settling reservoirs as may be proper and necessary: Provided, That said commission is hereby authorized to receive and pay into the Treasury from the owner or owners of mines worked by the hydraulic process, to whom permission may have been granted so to work under the provisions hereof, such money advances as may be offered to aid in the construction of such impounding dams or other restraining works, or settling reservoirs, or sites therefor, as may be deemed necessary by said commission to protect the navigable channels of said river systems, on condition that all moneys so advanced shall
be refunded as the said tax is paid into the said debris fund: And provided further, That in no event shall the Government of the United States be held liable to refund same except as directed by this section. [27 Stat. L. 510.]

Sec. 24. [Consultation with state engineers.] That for the purpose of securing harmony of action and economy in expenditures in the work to be done by the United States and the State of California, respectively, the former in its plans for the improvement and protection of the navigable streams and to prevent the depositing of mining debris or other materials within the same, and the latter in its plans authorized by law for the reclamation, drainage, and protection of its lands, or relating to the working of hydraulic mines, the said commission is empowered to consult thereon with a commission of engineers of said State, if authorized by said State for said purpose, the result of such conference to be reported to the Chief of Engineers of the United States Army, and if by him approved shall be followed by said commission. [27 Stat. L. 511.]

Sec. 25. [Restraining dams and settling reservoirs — to be built from special appropriations or debris fund.] That said commission, in order that such material as is now or may hereafter be lodged in the tributaries of the Sacramento and San Joaquin River systems resulting from mining operations, natural erosion, or other causes, shall be prevented from injuring the said navigable rivers or such of the tributaries of either as may be navigable and the land adjacent thereto, is hereby directed and empowered, when appropriations are made therefor by law, or sufficient money is deposited for that purpose in said debris fund, to build at such points above the head of navigation in said rivers and on the main tributaries thereof, or branches of such tributaries, or at any place adjacent to the same, which in the judgment of said commission, will effect said object (the same to be of such material as will insure, safety and permanency), such restraining or impounding dams and settling reservoirs, with such canals, locks, or other works adapted and required to complete same. The recommendations contained in Executive Document Numbered Two hundred and sixty-seven, Fifty-first Congress, Second session, and Executive Document Numbered Ninety-eight, Forty-seventh Congress, First session, as far as they refer to impounding dams, or other restraining works, are hereby adopted, and the same are directed to be made the basis of operations. The sum of fifteen thousand dollars is hereby appropriated, from moneys in the Treasury not otherwise appropriated, to be immediately available to defray the expenses of said commission. [27 Stat. L. 511.]

[Sec. 1.] [Mileage in lieu of traveling expenses.] * * * That so much of the Act of March third, eighteen hundred and ninety-nine, as provides that the members of the California Debris Commission shall receive only actual expenses in lieu of mileage while traveling on duty is hereby repealed, and hereafter the officers of the commission shall receive the mileage allowed by law. [31 Stat. L. 631.]

This is from the Sundry Civil Appropriation Act of June 6, 1900, ch. 791. The provisions of the Act of March 3, 1899, ch. 424, 30 Stat. L. 1109, repealed by the provisions in the text, were as follows: "California Debris Commission: * * * That officers of the commission traveling on duty in connection with the commission's work may be paid their actual traveling expenses in lieu of mileage allowed by law, and shall hereafter receive no mileage."

[Sec. 1.] [Contracts may be made, half to be paid by state of California.] * * * For the purpose of carrying out the following provisions of the river and harbor Act of eighteen hundred and ninety-six: "For the construction of restraining barriers for the protection of the Sacramento and Feather rivers in California, two hundred and fifty thousand dollars, such restraining barriers to be constructed under the direction of the Secretary of War in accordance with the recommendations of the California Debris Commission, pursuant to the provisions of, and for the purposes set forth in, section twenty-five of the Act of the Congress of the United States, entitled, 'An Act to create the California Debris Commission and regulate hydraulic mining in the State of California,' approved March first, eighteen hundred and ninety-three: Provided, That the Treasurer of the United States be, and he is hereby, authorized to receive from the State of California, through the debris commission of said State, or other officer thereunto duly authorized, any and all sums of money that have been, or may hereafter be, appropriated by said State for the purposes herein set forth. And said sums when so received and hereby appropriated for the purposes above named, to be expended in the manner above provided," and for the further purpose of making available to the United States the appropriation, or any part thereof, made by the provisions of an act of the legislature of the State of California, approved March seventeenth, eighteen hundred and ninety-seven, entitled "An act to amend an act entitled 'An act to provide for the appointment, duties, and compensation of a debris commissioner, and to make appropriation to be expended under his direction in the discharge of his duties as such commissioner, approved March twenty-fourth, eighteen hundred and ninety-three,'" and of said amended act, the Secretary of War is hereby authorized, in the preparation for and construction of the proposed works authorized and appropriated for by the aforesaid provisions, to enter into an agreement that the contractor shall look solely to the State of California for one-half of such expense, to be paid out of said State appropriation, and the United States shall in no manner be liable for said one-half. [30 Stat. L. 631.]

This is from the Sundry Civil Appropriation Act of July 1, 1898, ch. 548. It might be considered as temporary were it not for the reference thereto made in the second paragraph of the Act of March 3, 1899, ch. 425, given in the following paragraph of the text.
[Sec. 1.] [Acceptance of appliances authorized — payments for work.]

The Secretary of War is hereby authorized to accept from the State of California the use of any dredger, or appliances owned or controlled by said State, conformably to any offer thereof by the said State; and the Secretary of War is hereby authorized to use any such dredger or appliances in any river or harbor improvement that may be prosecuted therein by the United States, either on the part of the United States alone or conjointly with said State: Provided, That nothing shall be paid to the State of California for the use of the said dredger, and that nothing herein contained shall create any liability against the United States.

That the provisions of an Act of Congress, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirty-first, eighteen hundred and ninety-nine, and for other purposes," approved July first, eighteen hundred and ninety-eight, authorizing the Secretary of War, in expending certain specified appropriations in the preparation for and construction of certain works for the restraining or impounding of mining débris in the State of California, to enter into a contract or contracts wherein the contractor or contractors shall look solely to that State for one-half of such expense, and that the United States shall in no wise be liable for said one-half, are hereby extended to any appropriations, when made, that may hereafter be made for said purposes.

That the Secretary of War, in carrying out the provisions of any Act of Congress providing for the restraining or impounding of mining débris in California, may, in his discretion, when in his judgment the aggregate of appropriations already made by said State and Congress and available therefor are sufficient to complete the same, undertake the works necessary thereto by hired labor and by purchase of supplies and materials therefor, and may accept payments on account thereof as the work progresses under and according to the provisions of the acts of the legislature of said state for such purposes. [30 Stat. L. 1148.]

This is from the River and Harbor Appropriation Act of March 3, 1899, ch. 425. The provisions of the Act of July 1, 1898, ch. 546, § 1, mentioned in the text are given in the preceding paragraph of the text.

MINER'S LABOR LIEN ACT

See Alaska

MINISTERS

See Diplomatic and Consular Officers

MINTS

See Coinage, Mints, and Assay Offices
MISBRANDING
See FALSE STAMPING; FOOD AND DRUGS

MISSISSIPPI RIVER COMMISSION
See RIVERS, HARBORES AND CANALS

MISSOURI RIVER COMMISSION
See RIVERS, HARBORES AND CANALS

MOIETY ACT
See CUSTOMS DUTIES

MONEY ORDERS
See POSTAL SERVICE
MONEY PAID INTO COURT


CROSS-REFERENCE

Receiving loan on deposit from officer of court, or failure of officer of United States Court to deposit moneys, see PENAL LAWS.

Sec. 995. [Moneys paid into court, where and how deposited.] All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court: Provided, That nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court. [R. S.]


"Moneys."—When a decree ordering a judicial sale authorizes the special master to accept checks, he is not required to pay them into the depository of the court. The statute refers only to moneys, and not to properties of other kinds which come into the hands of the master. Curtis v. Crawford County Bank, (W. D. Ark. 1903) 124 Fed. 919. See also Thomas v. Chicago, etc., R. Co., (E. D. Mich. 1889) 37 Fed. 548; Easton v. Houston, etc., R. Co., (E. D. Tex. 1891) 44 Fed. 718.


Bankruptcy proceedings.—In an early opinion of the Attorney-General it was held that this statute had no application to moneys paid into the United States courts or received by officers of such courts in bankruptcy proceedings, and that the deposit of such moneys was governed by the provisions of the bankruptcy acts and the rules prescribed in pursuance thereof. (1874) 14 Op. Atty.-Gen. 362.

But in State Nat. Bank v. Dodge, (1888) 124 U. S. 333, 8 S. Ct. 521, 31 U. S. (L. ed.) 458, which was a bankruptcy proceeding, moneys were deposited in accordance with this section without comment as to whether it applied to such proceedings.

Default of recognizance.—Where pending a judgment of default of recognizance in a criminal case and acire facias proceedings the sureties pay money to the clerk it should be deposited in accordance with the terms of this section. U. S. v. Smart. (C. C. A. 8th Cir. 1916) 237 Fed. 978, 150 C. C. A. 628.

Moneys received by master in foreclosure proceedings.—Money received by a master in payment of property sold upon the foreclosure of a mortgage ought to be deposited with a designated depository of the United States. Thomas v. Chicago, etc., R. Co., (E. D. Mich. 1889) 37 Fed. 548.

But the proviso "seems to leave it within the power of the parties, under direction of the court, to have the fund disbursed by the master to those entitled, as a delivery on security satisfactory to those interested. No reason appears for construing this section of the statute as depriving the court of authority to make such special order as is deemed wise and prudent with regard to the special case, leaving the statute to cover cases where no disposition of the fund is made by decree." Northwestern Mut. Life Ins. Co. v. Quinn, (W. D. Mich. 1893) 69 Fed. 462.

Moneys received by a marshal as proceeds of an execution should either be immediately deposited by him, or paid to the clerk and by him deposited. Fagan v. Cullen. (E. D. Mich. 1886) 25 Fed. 841.

The duty to keep detailed accounts in respect of the causes to which the deposited moneys appertain does not seem to be imposed by the statute. (1874) 14 Op. Atty.-Gen. 392.

Liability of depository.—"When such money is deposited with the treasurer or an assistant treasurer, where it is mingled with the public money, it is undoubtedly
intrusted to the custody of the government, but when deposited in a bank, though a designated depository, it would still seem to be the private deposit of trust funds for the security of which the credit of the bank and not of the government is taken." Branch's Case, (1876) 12 Ct. Cl. 281. See also Coudert v. U. S., (1899) 175 U. S. 178, 20 S. Ct. 58, 44 U. S. (L. ed.) 122.

Liability on clerk's bond.—This section, in connection with certain other sections, proceeds upon the ground that money paid into court, under its sanction, may be received by the clerk, his duty upon receiving it being forthwith to deposit the amount with the treasurer, assistant treasurer, or designated depository of the United States, in the name and to the credit of the court. As soon as he receives the money he becomes responsible for it under his bond, and that responsibility does not cease until he deposits it as required by law. If after receiving the money he appropriates it to his own use, or, which is the same thing, if he deposits it in bank to his individual credit, he becomes liable on his bond for the amount so misappropriated. Howard v. U. S., (1902) 184 U. S. 676, 22 S. Ct. 543, 46 U. S. (L. ed.) 754, affirming (W. D. Mo. 1899) 93 Fed. 719.

Money exempt from process.—When a deposit of money has been made in a bank, under this section, it must be treated as the fund of the court as fully as though it were in the personal possession of its clerk, and therefore subject in all respects to its summary control and disposition, and entitled to protection in all particulars, in order that it may be free at all times for such disposition. Such a deposit is as exempt from the process of a litigant, without the consent of the court first obtained, as though it had remained in the personal custody of the court's immediate officials. Jones v. Merchants Nat. Bank, (C. C. A. 1st Cir. 1898) 76 Fed. 883, 33 U. S. App. 703, 22 C. C. A. 483, 35 L. R. A. 898. See also The Lottawanna, (1873) 20 Wall. 201, 22 U. S. (L. ed.) 259; In re Forsyth, (N. D. Cal. 1897) 78 Fed. 296; Gregory v. Merchants' Nat. Bank, (1898) 171 Mass. 67, 50 N. E. 520.

Money in the custody of the federal court is not subject to attachment under a process issuing out of a state court. D. B. Martin Co. v. Shannonhouse, (E. D. N. C. 1913) 203 Fed. 517, wherein the court said: "The power and duty of a court to decide for itself whether property in its possession or under its control can be taken from it by process issuing from another court is essential to its right and duty to administer to its suitors such remedy as according to the law they may be entitled, and to enforce its judgments."

Sec. 996. [Moneys paid into court, how withdrawn — unclaimed moneys.] No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said court, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn.

In every case in which the right to withdraw money so deposited has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, it shall be the duty of the judge or judges of said court, or its successor, to cause such money to be deposited in the Treasury of the United States, in the name and to the credit of the United States: Provided, That any person or persons or any corporation or company entitled to any such money may, on petition to the court from which the money was received, or its successor, and upon notice to the United States attorney and full proof of right thereto, obtain an order of court directing the payment of such money to the claimant, and the money deposited as aforesaid shall constitute and be a permanent appropriation for payments in obedience to such orders, and this Act is applicable to all money deposited in the Treasury of the United States in accordance with section nine hundred and ninety-six, Revised Statutes of the United States, as amended February nineteenth, eighteen hundred and ninety-seven. [R. S.]
by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn."


It was first amended by an Act of Feb. 19, 1897, ch. 265, § 3, 29 Stat. L. 578, by adding to the section, as originally enacted, the following provision: "And it shall be the duty of the judge or judges of said courts, respectively, to cause any moneys deposited as aforesaid, which have remained in the registry of the court unclaimed for ten years or longer, to be deposited in a designated depository of the United States, to the credit of the United States."

It was again amended by an Act of March 3, 1911, ch. 224, 36 Stat. L. 1083, to read as given in the text. The amendment consisted in the re-enactment of the section as originally enacted, and the insertion of the second paragraph of the text beginning with the words: "In every case," to the end of said section, in lieu of the paragraph added by the previously cited Act of Feb. 19, 1897, ch. 265.

Constitutionality of amendment.—The amendment of 1897 requiring money deposited in a federal court unclaimed for ten years to be turned over to the United States, was held to be unconstitutional, as depriving the owners thereof of their property without due process of law, in American Shoe V. American V. American Sash & Door Co., (W. D. Ky. 1908) 159 Fed. 775, wherein the court said: "We need not contend, in respect to property of which there is no individual ownership ascertainable, that the powers of the appropriate government may not be exercised to forfeit or escheat it, but if a government inherently possesses such a right and might enforce it by due proceedings, the proposition here is to enforce or assert the right by mere legislative enactment without any proceeding whatever, either by a court or by a duly authorized public officer. In many of the states, and in all other countries where the common law has prevailed, so far as we can ascertain, there must be a proceeding instituted—formerly a writ of escheat or inquest of office—in which either actual or constructive notice is given to all persons in interest before a judgment declaring the property to have been forfeited or to have escheated can be entered by a court. Here Congress has undertaken to take the power of adjudication or ascertainment from the courts in whose hands the property is, and to whose credit it had been placed in a depository, and itself to exercise that power, making indeed not the 'court' but the 'judge' the person to execute its decree, ipso facto the lapse of a certain length of time, all without requiring notice to anybody (not even the parties to the suit) and without any power in the court to exercise any discretion even though the litigation might still be in progress... It will also be remembered that the Constitution of the United States, which definitely fixes the rights surrendered by the states to the nation, makes no provision for escheats, and though article 3, section 2, gives Congress the power to declare the punishment of treason, yet, even as to treason, it provides that no forfeiture of property shall be for more than 'the life of the person attained.' Section 996, Rev. Stat., proposes much more, and that not for the high crime of treason, but for mere neglect or omission to claim what is one's own. Furthermore, escheats are always bottomed upon the fundamental proposition that an owner of property has died entirely without heirs, if any, or are found the estate always fails. Section 996 does not proceed upon any notion that there are no heirs, nor does it make any provision for ascertaining the facts in the premises, but goes altogether upon a mere failure for ten years to withdraw money from the court's registry, thus entirely ignoring the prime factor in escheats, namely, failure of heirs, and arbitrarily forfeits the money to the government. All that is necessary is the lapse of ten years. Now, there is nothing magical in the period of ten years fixed by the statute. If that period may be fixed so may one of five years, or of one year, or one month, and Congress might as well assume the judicial function and once for all direct the court or the judge thereof to make any other order in a case; as one requiring money, under the control of the court, but payable ultimately to the persons entitled, to be paid over to the United States although the United States is not a party to the litigation, and shows no right to the money unless the statute ex proprio vigore confers it. Compare In re Moneys in Registry of District Court, (E. D. Pa. 1909) 170 Fed. 470, wherein the court said: "Section 996 does not attempt to forfeit or escheat the money described therein; it merely changes the depository. Instead of allowing the fund to remain in the registry of the court, the money is to be deposited in a designated depository to the credit of the United States. So far as appears, this is (in theory at least) no more than a substitution of depositories, or a change in the name in which the fund is to be credited, and does not in any manner affect the right of the true owner to pursue his claim upon the money. Instead of coming into court, however, he must now deal with the treasury, and no doubt the practical result of the substitution, especially where only small sums are concerned, will be to give to the United States the perpetual use of the sums so
transferred. But I am not concerned with the practical effect of the statute. Its meaning seems to be clear, and I am bound to obey its direction."

Withdrawal of funds pending proceedings.—In U. S. v. Mackey, (1872) 2 Dill. 290, 26 Fed. Cas. No. 15,696, it was held that where a fund arising from the sale of distillery property under condemnation proceedings, was in the District Court, and the proceedings were there still pending, the Circuit Court, on an original bill in chancery, could not withdraw that fund from the district court, or direct how it should be distributed.

Duty of bank to honor checks drawn by court.—When the deposits are made in the name of the court, the bank is authorized and required to honor all checks drawn by the court, and to pay them generally out of such deposits. A memorandum or reference number on the order or check for withdrawing the money, stating the cause in or on account of which it was drawn, imposes no duty upon the bank, but only operates for the convenience of the court and its officers, in keeping its accounts. State Nat. Bank v. Dodge, (1888) 124 U. S. 333, 8 S. Ct. 521, 31 U. S. (L. ed.) 458, construing R. S. sec. 906 as first amended.

Special orders in pending cases for special deposits.—In U. S. v. Conway Lumber Co., (D. C. N. H. 1916) 234 Fed. 961, the facts showed that large sums of money having been paid into court by the government as compensation for lands taken, and controversies having arisen as to what parties were entitled to the damages awarded, it was ordered that certain sums should be held in abeyance to await the disposition of questions arising from conflicting claims; and, the parties interested having expressly stipulated to the end that such sums might be withdrawn from the registry of the court and deposited in certain other national banks in order that interest should accrue while the funds were held in abeyance, the clerk, under such stipulations and orders thereon, withdrew the funds and deposited the same in certain specially designated national banks, other than the generally designated depositary of the United States. The question under consideration was whether the act of the clerk was in violation of section 99 of the Penal Laws. (See Penal Laws.) It was held that it was not. The court said: "There can be no doubt of a court's authority to make special orders in pending cases for special deposits, to the end that the funds shall be safeguarded in the interests of the parties concerned. Section 996 of the Revised Statutes sustains this view. It is true that section 5153 [see National Banks] declares that banking associations designated by the Secretary of the Treasury shall be depositaries of the public money, but this statute has reference to public moneys in the broad and general sense, and it would seem that it should not be accepted as absolutely controlling courts in respect to moneys paid into court as indemnity or compensation for private rights. In such a situation, it must be within the general powers of courts, quite independent of statutes, to safeguard a fund deposited with clerks in pending cases as compensation to private individuals for rights taken. Although the government has paid the money into court to answer the damages awarded in pending causes, thereby, in a sense, changing the fund from its character as public funds to that of a private fund, it still has an interest to see that the money is taken care of, and that the right party gets it, and it is for this reason that I required notice to the district attorney. I see nothing wrong about the disposition of the money. The money is in a depositary of the United States under special orders of court rather than under a general order, and, moreover, the special orders are founded upon stipulations formally entered into by the parties interested in the fundamental and substantial right. It cannot be possible that section 99 has any application to such a situation."

Erroneous order of court for payment of moneys.—Where in an attachment suit the attached property is sold and the proceeds deposited in accordance with the terms of the preceding section and later those proceeds are paid to the attaching plaintiff under an erroneous order of the court the sureties in the attachment bond are not liable to the defendant for loss sustained by virtue of such erroneous order. Files v. Davis, (E. D. Ark. 1903) 119 Fed. 1002.

"Moneys received by the marshal should be immediately deposited by him, or paid to the clerk, and by him deposited. In either case it can be withdrawn only upon the order of the judge entered of record by the clerk, and upon such moneys the clerk is clearly entitled to his commission. The practice in this district is for the judge to sign, and the clerk to certify the check." Fagan v. Cullen, (E. D. Mich. 1886) 28 Fed. 843.
MONEYS PAYABLE TO OR BY OR RECEIVABLE BY UNITED STATES

R. S. 2366. What Coins Receivable in Payment for Public Lands, 635.
R. S. 3473. Duties and Other Debts to United States, in What Currency to Be Paid, 635.
R. S. 3474. What Coin Receivable, 636.

CROSS-REFERENCES

Gold and Silver Certificates, Silver and Foreign Coins, see COINAGE, MINTS, AND ASSAY OFFICES.
Legal Tender, see LEGAL TENDER.
National Banks and National Bank Notes, see NATIONAL BANKS.

Sec. 2366. [What coins receivable in payment for public lands.] The gold coins of Great Britain and other foreign coins shall be received in all payments on account of public lands, at the value estimated annually by the Director of the Mint, and proclaimed by the Secretary of the Treasury, in accordance with the provisions of section thirty-five hundred and sixty-four, Title, "THE COINAGE." [R. S.]

For R. S. sec. 3564 mentioned in the text and the provisions superseding it see COINAGE, MINTS AND ASSAY OFFICES, vol. 2, p. 314.
For general provisions relating to public lands see PUBLIC LANDS.

Sec. 3473. [Duties and other debts to United States, in what currency to be paid.] All duties on imports shall be paid in gold and silver coin only, coin certificates or in demand Treasury notes, issued under the authority of the acts of July seventeen, eighteen hundred and sixty-one, chapter five; and February twelve, eighteen hundred and sixty-two, chapter twenty; and all taxes and all other duties and demands than duties on imports, accruing or becoming due to the United States, shall be paid in gold and silver coin, Treasury notes, United States notes, or notes of national banks. [R. S.]


This section was amended to read as above by Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 249. The amendment consisted in adding after the word "only" the words "coin certificates," and in striking out at the end of the section the words "and upon every such payment credit shall be given for the amount of principal and interest due on any Treasury notes not received in payment on the day when the same are received." See COINAGE, MINTS, AND ASSAY OFFICES; CUSTOMS DUTIES.

State taxes.—In Lake County v. Oregon, (1868) 7 Wall. 71, 19 U. S. (L. ed.) 101, it was held that the Acts of 1861 and 1862, making the United States notes [636]
a legal tender for debts, has no reference to taxes imposed by state authority.

Effect of taking drafts in payment of taxes soon after civil war.—When a collector of internal revenue in a rural district of Mississippi, where, owing to the lawless condition in which the rebellion, then but recently suppressed, had left the region, it was not safe to have gold and silver in one's house—in violation of the provisions of the Independent Treasury Act, but with an apparently good motive—openly and without indirection, and because he thought it more safe thus to act than to take gold and silver, took in payment of taxes on cotton accepted drafts drawn by the shippers of it on consignees of it in New Orleans (which was the place of deposit for taxes collected in Mississippi), afterwards (the drafts not being paid, and he having in his accounts with the government charged himself and been charged by it with the tax as if paid in gold and silver), sued the acceptors, the fact that in taking the drafts instead of gold and silver, he had acted in violation of the statutes of the United States, did not so taint his act with illegality as that he could not recover on them; the government not having repudiated his act nor called on the shipper to pay, but on the contrary, leaving the account of the collector open to see if he could not himself get the amount from the acceptor of the drafts. As between the parties the collector's charging himself with the tax and reporting it to the government as paid would be payment by the collector of the tax. Miltenerger v. Cooke, (1873) 18 Wall. 421, 21 U. S. (L. ed.) 864.

Sec. 3474. [What coin receivable.] No gold or silver other than coin of standard fineness of the United States, shall be receivable in payment of dues to the United States except as provided in section twenty-three hundred and sixty-six, Title "PUBLIC LANDS," and in section thirty-five hundred and sixty-seven, Title "COINAGE, WEIGHTS, AND MEASURES." [R. S.]

R. S. sec. 2366 is given supra, p. 635. See the note thereto.
R. S. sec. 3567 is given under the title COINAGE, MINTS, AND ASSAY OFFICES.

Sec. 3475. [National bank notes receivable for debts of United States, except.] The notes of national banks shall be received at par for all debts and demands owing by the United States to any person within the United States, except interest on the public debt, or in redemption of the national currency. [R. S.]

For other provisions relating to national bank notes see NATIONAL BANKS.

Sec. 3476. [Treasury notes payable for debts of United States.] Treasury notes bearing interest may be paid to any creditor of the United States at their face value, excluding interest, or to any creditor willing to receive them at par, including interest. [R. S.]


MONOPOLIES

See Trade Combinations and Trusts

MORRILL ACTS

See Education
MOTHER'S DAY

Res. of May 8, 1914, No. 13, 637.
Sec. 1: Display of Flag, 637.

Joint Resolution Designating the second Sunday in May as Mother's Day, and for other purposes.


[Sec. 1.] [Display of flag.] That the President of the United States is hereby authorized and requested to issue a proclamation calling upon the Government officials to display the United States flag on all Government buildings, and the people of the United States to display the flag at their homes or other suitable places, on the second Sunday in May, as a public expression of our love and reverence for the mothers of our country. [38 Stat. L. 770.]

This was the first section of the "Mother's Day Act," and was preceded by the following preamble:
"Whereas the service rendered the United States by the American mother is the greatest source of the country's strength and inspiration; and
"Whereas we honor ourselves and the mothers of America when we do anything to give emphasis to the home as the fountain head of the State; and
"Whereas the American mother is doing so much for the home, the moral uplift and religion, hence so much for good government and humanity: Therefore be it Resolved," etc.

Sec. 2. [Designation of day.] That the second Sunday in May shall hereafter be designated and known as Mother's Day, and it shall be the duty of the President to request its observance as provided for in this resolution. [38 Stat. L. 771.]

[637]
MOTION PICTURES


Sec. 1. Transportation or Importation of Prize Fight Films, 638.
2. Receiving, etc., Unlawful, 640.

An Act To prohibit the importation and the interstate transportation of films or other pictorial representations of prize fights, and for other purposes.


[Sec. 1.] [Transportation or importation of prize fight films.] That it shall be unlawful for any person to deposit or cause to be deposited in the United States mails for mailing or delivery, or to deposit or cause to be deposited with any express company or other common carrier for carriage, or to send or carry from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or to bring or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition.

[37 Stat. L. 240.]

The Underwood Tariff Act of Oct. 3, 1913, ch. 16, Schedule N, § 380, after imposing a duty on all photographic film negatives and positives, further provided as follows:

"That all photographic films imported under this section shall be subject to such censorship as may be imposed by the Secretary of the Treasury." See Customs Duties, vol. 2, p. 837.


"The act of July 31, 1912, sec. 1, c. 263, 37 Stat. 240, makes it unlawful to bring or cause to be brought into the United States from abroad any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition." With this provision in force, in April, 1915, the appellant brought to the port of entry of the City of Newark in the state of New Jersey photographic films of a pugilistic encounter or prize fight which had taken place at Havana and demanded of the deputy collector of customs in charge the right to enter the films. On refusal of the official to permit the entry appellant filed his bill of complaint to enforce the right to enter by a mandatory injunction and by other appropriate relief to accomplish the purpose in view. The ground relied on for the relief was the averment that the prohibition of the act of Congress in question was repugnant to the Constitution because in enacting the same "Congress exceeded its designated powers under the Constitution and therefore on the face of the bill there was no jurisdiction to award the relief sought. The motion was sustained and a decree of dismissal was rendered, and it is this decree which it is sought to reverse by the appeal which is before us, the propositions relied upon to "accomplish that result but referring in various forms of statement the contention as to the repugnancy to the Constitution of the provision of the act of Congress. But in view of the complete power of Congress over foreign commerce and its authority to prohibit the importation of foreign articles recognized and
enforced by many previous decisions of this court, the contentions are so devoid of merit as to cause them to be frivolous. Butterfield v. Stranahan, [1904] 192 U. S. 470 [24 S. Ct. 349, 48 U. S. (L. ed.) 525]; The Ahler Dodge [1898] 131 U. S. 169, 176, 17 S. Ct. 68 [32 S. Ct. 310, 56 U. S. (L. ed.) 390]; Brolan v. U. S., [1915] 236 U. S. 216, 35 S. Ct. 285, 59 U. S. (L. ed.) 544. It is true that it is sought to take this case out of the long-recognized rule by the proposition that it has no application because the asailed provision was enacted to regulate the exhibition of photographic films of prize fights in the United States and hence it must be treated not as prohibiting the introduction of the films, but as forbidding the public exhibition of the films after they are brought in— a subject to which, it is insisted, the power of Congress does not extend. But aside from the fictitious assumption on which the proposition is based, it is obviously only another form of denying the power of Congress to prohibit, since if the imaginary premise and proposition based on it were accepted, the contention would inevitably result in denying the power in Congress to prohibit importation as to every article which after importation would be subject to any use whatever. Moreover, the proposition plainly is wanting in merit, since it rests upon the erroneous assumption that the motive of Congress in enacting its plenary power may be taken into view for the purpose of refusing to give effect to such power when exercised.


"Brought into United States."—In Pantomimic Corp. v. Malone, (C. C. A. 2d Cir. 1916) 239 Fed. 153, 151 C. C. A. 211, the facts were as follows: April 5, 1915, one Jess Willard and one Jack Johnson engaged in a prize fight at the city of Havana, Cuba. Moving pictures of the fight were taken on negative film, from which positives were developed for public exhibition. Early in April, 1916, a moving picture camera was set up eight inches on the American side of the international boundary between the state of New York and the Dominion of Canada, with the lens directed towards Canada. About eight inches on the Canadian side of the boundary a box was set up facing the camera. An original positive film taken from the negative film made at Havana was run on a reel through the box in front of an electric light on the Canadian side. An unexposed film was run from a reel through the camera on the American side directly opposite it. The two reels were connected by an endless chain, so that the result was that an exact negative reproduction was taken on the film of the positive film on the Canadian side. From this secondary negative, rephotographed by another camera, a positive film capable of public exhibition could be made and was made. It was held that these facts showed a violation of the statute. The court said: "It will be seen that neither the original nor the original positive taken at Havana were ever in the United States, and that the secondary negative and positive which are now in the United States were produced here by means of light rays crossing from a box in Canada to a camera in New York and there making a picture of the positive film in Canada on a sensitized negative film in New York. As the United States has no right to exercise police power, pure and simple, within the states, the legislation must rest upon the power of Congress to regulate commerce. The Supreme Court has held the act constitutional in Weber v. Freed, [1915] 239 U. S. 325, 35 S. Ct. 131, 60 U. S. (L. ed.) 308, Ann. Cas. 1916C 317. It is quite apparent that the only prohibition in the language of the act that can apply in this case is that against bringing or causing to be brought in the film in question or a pictorial reproduction of the fight to be used or that may be used for purposes of public exhibition. Judge Hand held that such pictorial reproduction was so brought in and we agree with him. The transaction is plainly within the mischief of the statute, but the appellant contends that the statute only prohibits the importation of something physical or corporeal, whereas nothing but rays of light were brought in on this occasion. Generally speaking, this may be so; but we think that, when parties on each side of the boundary co-operate, by means of two plants connected together, to transfer a prohibited picture from Canada to New York, they are carrying on foreign commerce and do cause the picture to be brought into the United States, within the meaning of the act, even though rays of light are necessary to the result. Certainly the objection rested in producing a picture in New York of the picture in Canada. In Kalisthenic Exhibition Co. v. Emmons, [D. C. Me. 1915] 225 Fed. 902, the complainant sought to bring in a negative film of the same fight on the ground that it could not be used for purposes of exhibition, because a positive film would have first to be taken from it, which positive film could be so used; but the court held that the negative film was a pictorial representation within the meaning of the act, and the Circuit Court of Appeals was of the same opinion. [C. C. A. 1st Cir. 1916] 229 Fed. 124, 143 C. C. A. 400."

"Conspiracy to commit offense."—In U. S. v. Johnston, (N. D. N. Y. 1916) 232 Fed. 970, an indictment for conspiracy to violate this section was sustained on demurrer.
Sec. 2. [Receiving, etc., unlawful.] That it shall be unlawful for any person to take or receive from the mails, or any express company or other common carrier, with intent to sell, distribute, circulate, or exhibit any matter or thing herein forbidden to to [sic] be deposited for mailing, delivery, or carriage in interstate commerce. [37 Stat. L. 241.]

Sec. 3. [Punishment for violations.] That any person violating any of the provisions of this Act shall for each offense, upon conviction thereof, be fined not more than one thousand dollars or sentenced to imprisonment at hard labor for not more than one year, or both, at the discretion of the court. [317 Stat. L. 241.]

MOTOR BOAT REGULATIONS ACT
See Motor Boats

MOTOR BOATS

Act of Jan. 18, 1897, ch. 61, 640.
Regulations as to Motor Boats, 640.

Sec. 1. Motor Boats — Vessels Included — Inspection, 641.
2. Classification, 642.
3. Lights Required, 642.
5. Life-preservers — Boats Carrying Passengers for Hire — Licensed Navigator — Other Officers, 643.
7. Penalty, 644.
10. Effect, 644.

CROSS-REFERENCE
International Rules for Preventing Collision at Sea, see COLLISIONS.

An Act Providing for certain requirements for vessels propelled by gas, fluid, naphtha, or electric motors.

[Act of Jan. 18, 1897, ch. 61, 29 Stat. L. 489.]

[Regulations as to motor boats.] That all vessels of above fifteen tons burden, carrying freight or passengers for hire, propelled by gas, fluid, naphtha, or electric motors, shall be, and are hereby, made subject to all the provisions of section forty-four hundred and twenty-six of the Revised Statutes of the United States, relating to the inspection of hulls and boilers.
and requiring engineers and pilots; and all vessels so propelled, without regard to tonnage or use, shall be subject to the provisions of section forty-four hundred and twelve of the Revised Statutes of the United States, relating to the regulation of steam vessels in passing each other; and to so much of sections forty-two hundred and thirty-three and forty-two hundred and thirty-four of the Revised Statutes, relating to lights, fog signals, steering, and sailing rules, as the Board of Supervising Inspectors shall, by their regulations, deem applicable and practicable for their safe navigation. [29 Stat. L. 489.]

For R. S. sec. 4426 mentioned in the text see Steam Vessels.
For R. S. secs. 4412, 4233, see Collisions, vol. 2, p. 372.
R. S. sec. 4234 mentioned was expressly repealed by an Act of March 3, 1897, ch. 389, § 16, 29 Stat. L. 691.

Licensed officers.—This Act is an amendment to R. S. sec. 4426 (in Steam Vessels), and the statute requires that no such vessel shall be navigated without a licensed engineer and a licensed pilot. U. S. v. Nash, (W. D. Ky. 1901) 111 Fed. 525.

A person who runs a vessel within the description of this Act without a licensed engineer is liable to the penalty provided by R. S. sec. 4500 (set out in the title Steam Vessels), notwithstanding the provisions of R. S. secs. 4498 and 4499 (also set out in the title Steam Vessels). U. S. v. Nash, (W. D. Ky. 1901) 111 Fed. 525.

Inspection.—There is nothing in this Act which forbids the owner of a vessel of the character described therein from navigating it without a license or certificate of inspection nor from navigating it before it has been inspected. U. S. v. Nash, (W. D. Ky. 1901) 111 Fed. 525.

Steam vessels employed in inland navigation.—The provisions of this Act apply to vessels propelled by gas, fluid, naphtha, or electric motors, and do not relate to steam vessels employed in inland navigation. Beck v. Johnson, (W. D. Ky. 1909) 106 Fed. 104.

Computation of tonnage.—The superstructure of an inclosed cabin on a gasoline boat, which cabin extends from the bottom of the boat above the deck, having windows in the superstructure, but which adds nothing to the carrying capacity of the boat in either passengers or cargo, is not a "closed-in space . . . available for cargo or stores or for the berthing or accommodation of passengers or crew," which under R. S. sec. 4153 (set out in the title Shipping and Navigation) is to be added to the space below deck in computing the vessel's tonnage, and where without it the boat is not over fifteen tons burden she is not subject to inspection, etc., under the provisions of this Act. The Messenger, (C. C. A. 7th Cir. 1909) 168 Fed. 908, 94 C. C. A. 312.

Forfeiture.—This Act which makes all vessels of above fifteen tons burden carrying freight or passengers for hire, propelled by gas, fluid, naphtha, or electric motors, subject to the provisions of certain enumerated sections of the Revised Statutes relating to river navigation and to inspection and employment of engineers and pilots by steam vessels, does not have the effect of extending to such vessels the provisions of R. S. sec. 4499 (set out in the title Steam Vessels), imposing penalties upon "any vessel propelled in whole or in part by steam," which shall be navigated without complying with the terms of such title, and such a vessel is not subject to seizure and forfeiture thereunder. The Ben R., (C. C. A. 6th Cir. 1904) 134 Fed. 784, 67 C. C. A. 290.

An Act To amend laws for preventing collisions of vessels and to regulate equipment of certain motor boats on the navigable waters of the United States.


[Sec. 1.] [Motor boats — vessels included — inspection.] That the words "motor boat" where used in this Act shall include every vessel propelled by machinery and not more than sixty-five feet in length except tug boats and tow boats propelled by steam. The length shall be measured from end to end over the deck, excluding sheer: Provided, That the engine, boiler,
or other operating machinery shall be subject to inspection by the local inspectors of steam vessels, and to their approval of the design thereof, on all said motor boats, which are more than forty feet in length, and which are propelled by machinery driven by steam. [36 Stat. L. 462.]

This is the first section of the "Motor Boat Regulations Act."

This Act repealed R. S. sec. 4438 (set out in the title STEAM VESSELS), in so far as that section required inspection of small steam vessels of the motor-boat class, but it did not repeal prior laws relating to the inspection of motor boats propelled otherwise than by steam. (1911) 29 Op. Atty.-Gen. 112.

Inspection of steam motor boats.—The engine, boiler or other operating machinery of a steam motor boat more than 40 feet in length is subject to inspection by the local inspectors of steam vessels and the design thereof is subject to their approval, under the proviso of this section. (1911) 29 Op. Atty.-Gen. 112.

Sec. 2. [Classification.] That motor boats subject to the provisions of this Act shall be divided into classes as follows:

Class one. Less than twenty-six feet in length.

Class two. Twenty-six feet or over and less than forty feet in length.

Class three. Forty feet or over and not more than sixty-five feet in length. [36 Stat. L. 462.]

Sec. 3. [Lights required.] That every motor boat in all weathers from sunset to sunrise shall carry the following lights, and during such time no other lights which may be mistaken for those prescribed shall be exhibited.

(a) Every motor boat of class one shall carry the following lights:

First. A white light aft to show all around the horizon.

Second. A combined lantern in the fore part of the vessel and lower than the white light aft showing green to starboard and red to port, so fixed as to throw the light from right ahead to two points abaft the beam on their respective sides.

(b) Every motor boat of classes two and three shall carry the following lights:

First. A bright white light in the fore part of the vessel as near the stem as practicable, so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel, namely, from right ahead to two points abaft the beam on either side. The glass or lens shall be of not less than the following dimensions:

Class two. Nineteen square inches.

Class three. Thirty-one square inches.

Second. A white light aft to show all around the horizon.

Third. On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side. On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side. The glasses or lenses in the said side lights shall be of not less than the following dimensions on motor boats of —

Class two. Sixteen square inches.

Class three. Twenty-five square inches.
MOTOR BOATS

On and after July first, nineteen hundred and eleven, all glasses or lenses prescribed by paragraph (b) of section three shall be Fresnel or fluted. The said lights shall be fitted with inboard screens of sufficient height and so set as to prevent these lights from being seen across the bow and shall be of not less than the following dimensions on motor boats of,—

Class two. Eighteen inches long.

Class three. Twenty-four inches long: Provided, That motor boats as defined in this Act, when propelled by sail and machinery or under sail alone, shall carry the colored lights suitably screened but not the white lights prescribed by this section. [36 Stat. L. 463.]

SEC. 4. [Sound signals.] (a) Every motor boat under the provisions of this Act shall be provided with a whistle or other sound-producing mechanical appliance capable of producing a blast of two seconds or more in duration, and in the case of such boats so provided a blast of at least two seconds shall be deemed a prolonged blast within the meaning of the law.

(b) Every motor boat of class two or three shall carry an efficient fog horn.

(c) Every motor boat of class two or three shall be provided with an efficient bell, which shall be not less than eight inches across the mouth on board of vessels of class three. [36 Stat. L. 463.]

SEC. 5. [Life-preservers — boats carrying passengers for hire — licensed navigator — other officers.] That every motor boat subject to any of the provisions of this Act, and also all vessels propelled by machinery other than by steam more than sixty-five feet in length, shall carry either life-preservers or life belts, or buoyant cushions, or ring buoys or other device, to be prescribed by the Secretary of Commerce and Labor, sufficient to sustain afloat every person on board and so placed as to be readily accessible. All motor boats carrying passengers for hire shall carry one life-preserver of the sort prescribed by the regulations of the board of supervising inspectors for every passenger carried, and no such boat while so carrying passengers for hire shall be operated or navigated except in charge of a person duly licensed for such service by the local board of inspectors. No examination shall be required as the condition of obtaining such a license, and any such license shall be revoked or suspended by the local board of inspectors for misconduct, gross negligence, recklessness in navigation, intemperance, or violation of law on the part of the holder, and if revoked the person holding such license shall be incapable of obtaining another such license for one year from the date of revocation: Provided, That motor boats shall not be required to carry licensed officers, except as required in this Act. [36 Stat. L. 463.]

Provisions somewhat similar to those of the text were made by R. S. sec. 4426 as subsequently amended. See Steam Vessels.

By the Act of March 4, 1913, ch. 141, § 1, 37 Stat. L. 736, there was created a Department of Labor, and the Secretary of Commerce and Labor was designated the Secretary of Commerce. See Commerce Department; Labor Department.

SEC. 6. [Extinguishing gasoline.] That every motor boat and also every vessel propelled by machinery other than by steam, more than sixty-five feet in length, shall carry ready for immediate use the means of promptly and effectually extinguishing burning gasoline. [36 Stat. L. 163.]
Sec. 7. [Penalty.] That a fine not exceeding one hundred dollars may be imposed for any violation of this Act. The motor boat shall be liable for the said penalty and may be seized and proceeded against, by way of libel, in the district court of the United States for any district within which such vessel may be found. [36 Stat. L. 463.]

Sec. 8. [Regulations.] That the Secretary of Commerce and Labor shall make such regulations as may be necessary to secure the proper execution of this Act by collectors of customs and other officers of the Government. And the Secretary of the Department of Commerce and Labor may, upon application therefor, remit or mitigate any fine, penalty, or forfeiture relating to motor boats except for failure to observe the provisions of section six of this Act. [36 Stat. L. 463.]

As to the Secretary of Commerce and Labor see the note to section 5 of this Act, supra, p. 643.

Sec. 9. [Repeal — International rules not affected.] That all laws and parts of laws only in so far as they are in conflict herewith are hereby repealed. Provided, That nothing in this Act shall be deemed to alter or amend Acts of Congress embodying or revising international rules for preventing collisions at sea. [36 Stat. L. 463.]

For the international rules for preventing collisions at sea see Collisions.

Sec. 10. [Effect.] That this Act shall take effect on and after thirty days after its approval. [36 Stat. L. 463.]

MURDER
See Penal Laws

MUSEUMS
See Education; Smithsonian Institution

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See Articles for the Government of the Navy; Articles of War; Seamen

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See National Banks

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NATIONAL BANKS

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I. ORGANIZATION AND POWERS

An act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes.

[Act of June 20, 1874, ch. 343, 18 Stat. L. 123.]

[Sec. 1.] ["The national bank act."] That the act entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, eighteen hundred and sixty-four, shall hereafter be known as "the national-bank act." [18 Stat. L. 123.]

Sections 2, 3, 4 and 5 of this Act are given infra, pp. 810, 811, 735, 736.
Section 6 of the Act limiting the amount of United States notes in circulation is given under CURRENCY, vol. 2, p. 707.
Sections 7, 8 and 9 of the Act were as follows:

"Sec. 7. That so much of the act entitled 'An act to provide for the redemption of the three per centum temporary loan certificates, and for an increase of national bank notes' as provides that no circulation shall be withdrawn under the provisions of section six of said act, until after the fifty-four millions granted in section one of said act shall have been taken up, is hereby repealed; and it shall be the duty of the Comptroller of the Currency, under the direction of the Secretary of the Treasury, to proceed forthwith, and he is hereby authorized and required, from time to time, as applications shall be duly made therefor, and until the full amount of fifty-five million dollars shall be withdrawn, to make requisitions upon each of the national banks described in said section, and in the manner therein provided, organized in States having an excess of circulation, to withdraw and return so much of their circulation as by said act may be apportioned to be withdrawn from them, or, in lieu thereof, to deposit in the Treasury of the United States lawful money sufficient to redeem such circulation, and upon the return of the circulation required, or the deposit of lawful money, as herein provided, a proportionate amount of the bonds held to secure the
circulation of such association as shall make such return or deposit shall be surrendered to it." [18 Stat. L. 124.]

"Sec. 8. That upon the failure of the national banks upon which requisition for circulation shall be made, or of any of them, to return the amount required, or to deposit in the Treasury lawful money to redeem the circulation required, within thirty days, the Comptroller of the Currency shall at once sell, as provided in section forty-nine of the national-currency act, approved June third, eighteen hundred and sixty-four, bonds held to secure the redemption of the circulation of the association or associations which shall so fail, to an amount sufficient to redeem the circulation required of such association or associations, and with the proceeds, which shall be deposited in the Treasury of the United States, so much of the circulation of such association or associations shall be redeemed as will equal the amount required, and not redeemed, and if there be any excess of process over the amount required for such redemption, it shall be returned to the association or associations whose bonds shall have been sold. And it shall be the duty of the Treasurer, assistant treasurers, designated depositaries, and national bank depositaries of the United States, who shall be kept informed by the Comptroller of the Currency of such associations as shall fail to return circulation as required, to assist and return to the Treasury for redemption the notes of such associations as shall come into their hands until the amount required shall be redeemed, and in like manner to assist and return to the Treasury, for redemption, the notes of such national banks as have failed, or gone into voluntary liquidation for the purpose of winding up their affairs, and of such as shall hereafter so fail or go into liquidation." [18 Stat. L. 125.]

"Sec. 9. That from and after the passage of this act it shall be lawful for the Comptroller of the Currency, and he is hereby required, to issue circulating-notes without delay, as applications therefor are made, not to exceed the sum of fifty-five million dollars, to associations organized, or to be organized, in those States and Territories having less than their proportion of circulation, under an apportionment made on the basis of population and of wealth, as shown by the returns of the census of eighteen hundred and seventy; and every association hereafter organized shall be subject to, and be governed by, the rules, restrictions, and limitations, and possess the rights, privileges, and franchises, now or hereafter to be prescribed by law as to national banking associations, with the same power to amend, alter, and repeal provided by the national bank act; Provided, That the whole amount of circulation withdrawn and redeemed from banks transacting business shall not exceed fifty-five million dollars, and that such circulation shall be withdrawn and redeemed as it shall be necessary to supply the circulation previously issued to the banks in those States having less than their apportionment: And provided further, That not more than thirty million dollars shall be withdrawn and redeemed as herein contemplated during the fiscal year ending June thirtieth, eighteen hundred and seventy-five." [18 Stat. L. 125.]

All three of the last two sections were superseded by the Act of Jan. 14, 1876, ch. 15, § 3, infra, p. 736, which repealed all provisions of law for the withdrawal and redistribution of national-bank currency.

The provisions of the Act of June 3, 1864, mentioned in the text and there designated "the National-Bank Act," were incorporated in R. S. secs. 5133–5243, following.

Sec. 5133. [Formation of national banking associations.] Associations for carrying on the business of banking under this Title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall be forwarded to the Comptroller of the Currency, to be filed and preserved in his office. [R. S.]
For treatment of the foregoing subjects-matter in the present title, see the analysis, infra, p. 737.

Provisions for the conversion of national gold banks into currency banks as authorized by the text were made by the Act of Feb. 14, 1850, ch. 25, infra, p. 737.


Purpose.—The national bank system was devised to provide a national currency secured by a pledge of United States bonds, and national banks are agencies or instruments of the government for that purpose. Davis v. Elmira Sav. Bank, (1896) 101 U. S. 275, 1 S. Ct. 502, 40 U. S. (L. ed.) 700; Pollard v. State, (1880) 65 Ala. 628; Stetson v. Bangor, (1868) 56 Me. 274; Pittsburgh v. Pittsburgh First Nat. Bank, (1867) 55 Pa. St. 45.

State control and regulation.—In general.—"National banks are instrumentalities of the federal government, created for a public purpose and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void wherever such attempted exercise of authority expressly conflicts with the laws of the United States and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created. These principles are axiomatic and are sanctioned by the repeated adjudications of this court." Davis v. Elmira Sav. Bank, (1896) 161 U. S. 275, 15 S. Ct. 502, 40 U. S. (L. ed.) 700; Pollard v. State, (1880) 65 Ala. 628; Stetson v. Bangor, (1868) 56 Me. 274. To the same effect see Larabee v. Dolley, (C. C. Kan. 1909) 175 Fed. 365; Elizabeth town First Nat. Bank v. Com., (1911) 143 Ky. 516, 137 S. W. 516; Farmers Deposit Nat. Bank v. Western Pennsylvania Fuel Co., (1906) 215 Pa. St. 115, 64 Atl. 374, 114 A. S. R. 949; Green v. Bennett, (Tex. 1908) 110 S. W. 108; State v. Clement Nat. Bank, (1911) 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912D 22.

The rule that a state can exercise no control over a national bank, or in any manner affect its operation except as Congress may permit, except the bank only from such state legislation as tends to impair its utility as an instrumentality of the federal government. State v. Clement Nat. Bank, (1911) 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912D 22.

In Merchants' Nat. Bank v. Ford, (1907) 124 Ky. 403, 99 S. W. 260, it was held that a state statute placing notes payable and negotiable at banks organized in the state under the state or federal laws, and indorsed to, or discounted by, any such bank, on the same footing as foreign bills of exchange, violates no rights secured to national banks by Acts of Congress, such banks being subject to the control of the state in which they are situated, as regards the construction of contracts, the transfer of property, or creation of debts and liability to suit.

Criminal liability.—In Easton v. Iowa, (1903) 188 U. S. 220, 23 S. Ct. 298, 47 U. S. (L. ed.) 452, it was held that a state law which forbade a bank when insolvent to accept as negotiable a deposit, and made the officer who accepted such deposit with knowledge of the insolventy criminally liable therefor, was invalid so far as it applied to national banks, the court saying: "Our conclusions upon principle and authority are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the secretary of the treasury and the comptroller of the currency, who are authorized to suspend the operations of the bank and appoint receivers thereof when they become insolvent or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition and business by the officer of Iowa, visited by federal officers; that it is not competent for the state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government." In Allen v. Carter, (1888) 119 Pa. St. 192, 13 Atl. 70, it was held that the state law which forbade "any cashier of any bank" to "engage directly or indirectly in the purchase or sale of stock or in any other profession, occupation, or calling other than that of his duty as cashier" and declaring the same to be a misdemeanor, was not applicable to national banks.

In Com. v. Ketter, (1880) 92 Pa. St. 572, 37 Am. Rep. 692, it was held that a state law punishing the offense of embezzlement by an officer of "any bank" was not applicable to national banks, and
a similar holding was made in People v. Fonda, (1866) 62 Mich. 401. 29 N. W. 26; Com. v. Felton, (1869) 101 Mass. 204.

Access to books.—A state statute giving to stockholders reasonable access to the books and papers of the bank for inspection and examination has been held applicable to national banks located within the state and the right enforced by mandamus against the officer having charge of the books. Winter v. Baldwin, (1859) 89 Ala. 483, 7 So. 734. And the right of access to books and papers of a national bank has also been enforced in the absence of a statute. Tuttle v. Iron Nat. Bank, (1902) 170 N. Y. 9, 62 N. E. 761.

Sec. 5134. [Requisites of organisation certificate.] The persons uniting to form such an association shall, under their hands, make an organisation certificate, which shall specifically state:

First. The name assumed by such association; which name shall be subject to the approval of the Comptroller of the Currency.

Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory, or district, and the particular county and city, town, or village.

Third. The amount of capital stock and the number of shares into which the same is to be divided.

Fourth. The names and places of residence of the shareholders and the number of shares held by each of them.

Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this Title. [R. S.]


Any national banking association was authorized to change its name by the Act of May 1, 1866, ch. 73, § 2, infra, p. 721.

Requisites of organisation.—There is no right to organize and carry on the business of a national bank except upon the conditions and in the way prescribed by the Acts of Congress, of which all must take notice. Capitol Hill First Nat. Bank v. Murray, (C. C. A. 8th Cir. 1914) 212 Fed. 140, 128 C. C. A. 85.

Name and place of business.—Name.—The association may adopt any name that the comptroller approves. Baltimore Third Nat. Bank v. Teal, (C. C. Md. 1881) 5 Fed. 503.

Stockholders of an expiring corporation may organize a new banking association under the name of the old corporation with the approval of the Comptroller of the Currency. (1882) 17 Op. Atty.-Gen. 388.

Place of transacting business.—Branch banks.—While this provision does not expressly prohibit the carrying on of a general banking business outside of the place designated in the certificate, yet it is agreed that the clear implication therefore is that the power of the bank to carry on such business cannot be exercised elsewhere than in such place and there is certainly no implication or intimation in the second clause that the association may establish an unlimited number of banks or branches within the designated place. (1911) 29 Op. Atty.-Gen. 81.

Under this section it was held that a national bank, the articles of which fixed its principal place of business at Johnson City, Tenn., should be regarded as a resident of that state, within the Tennessee statute (Acts Tenn. 1877, p. 45, ch. 31, § 5), giving to resident creditors of an insolvent foreign corporation priority in the payment of debts over all other creditors. In re Standard Oak Veneer Co., (E. D. Tenn. 1909) 173 Fed. 103.

Change of name or place of business.—See section 2 of Act of May 1, 1886, ch. 73, infra, p. 721.

Judicial notice of incorporation.—A state court will take judicial notice of the general laws of the United States, and such being the fact it is competent for an association to prove by parol that it is carrying on a general banking business as a national bank authorized by the general laws of the United States under the name by which it sues. Yakima Nat. Bank v. Knipe, (1893) 8 Wash. 348, 35 Pac. 534, followed in National Bank of Commerce v. Balland, (1896) 14 Wash. 502, 45 Pac. 35.


Organization in Hawaii is authorized by virtue of the Act of April 30, 1900, ch. 339, § 5, in title HAWAIIAN ISLANDS,

Sec. 5135. [How certificate shall be acknowledged and filed.] The organization certificate shall be acknowledged before a judge of some court of record, or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office. [R. S.]

R. S. sec. 885 provided that copies of the organization certificate of any national banking association, duly certified by the Comptroller of the Currency and authenticated by his seal of office, should be evidence in all courts and places within the jurisdiction of the United States of the existence of the association and of every matter which could be proved by the production of the original certificate. See Evidence, vol. 3, p. 199.

Sec. 5136. [Corporate powers of associations.] Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power —

First. To adopt and use a corporate seal.

Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons.

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this Title.
NATIONAL BANKS

But no association shall transact any business except such as is incidental
and necessarily preliminary to its organization, until it has been authorized
by the Comptroller of the Currency to commence the business of banking.

[R. S.]


Provisions for the extension of the corporate succession of national banks
were made by the Act of July 12, 1882, ch. 290, § 1, infra, p. 716. and the Act of April 12,
1902, ch. 503, infra, p. 722.

National banks were authorized to make loans on farm lands by the Federal Reserve
Act of Dec. 23, 1913, ch. 6, § 24, infra, p. 841, and to act as trustee, etc., of stocks and
bonds by section 11, par. (k) of said Act, infra, p. 829.

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I. BANKS AS BODIES CORPORATE

1. Time When Powers Accrue

   After quoting the text section 5136 and
   R. S. secs. 5139, 5140, infra, pp. 688, 697,
   the court said: "From these provisions of
   the statute it is clear that from the time
   the Comptroller of the Currency issues
   the certificate to the bank, certifying to
   its constitution, it becomes a body corporate,
   endowed with the powers of a banking
   1898) 89 Fed. 11, judgment affirmed
   (C. C. A. 8th Cir. 1899) 97 Fed. 865, 38
   C. C. A. 510.

   "Congress has intrusted to the Com-
   troller of the Currency the power and the
   duty of making a careful examination into
   the condition of the association, including
   the amount of the capital stock actually
   paid in, and its compliance with the re-
   quirements of the statute in other respects,
   and, if the result of his examination is
   satisfactory, of granting to the association
   an official certificate that it is authorized
   to commence the business of banking; and
   has forbidden the corporation to transact
   any business whatever, except so far as is
   required to perfect its organization, until
   it has received the certificate of the
   Comptroller." McCormick r. Market Nat.
   Bank, (1897) 163 U. S. 538, 17 S. Ct. 433,
   41 U. S. (L. ed.) 817, affirming (1896)
   162 Ill. 100, 44 N. E. 391.

   Unless the articles of association, to-
   gether with the certificate of organization,
   are filed with the Comptroller of the Cur-
   rency conformably to the requirements of
   R. S. sec. 5133, supra, p. 651, and the
   text section 5136, the bank does not be-
   come a corporation. Register r. Medailef,
   (1886) 71 Md. 528, 18 Atl. 966.
2. Amendment of Articles


An association organized for a period of less than twenty years from the date of its charter cannot by amending its articles extend the period to twenty years from such date. National Banking Assoc., (1882) 17 Op. Atty.-Gen. 288.

3. Power to Sue and be Sued

See, in general, as to actions by and against national banks, infra, this title, div. VI, p. 927.

The effect of the provision in subdivision 4 of this section is not to give to the corporation the capacity to sue in every court within the United States, whether state or federal, or to give to every such court jurisdiction over every suit which may be brought in it wherein the corporation is defendant. Its only proper effect as regards the corporation when a defendant, is to provide that when the corporation has been brought as a suitor, into a court which has jurisdiction of the suit, it shall stand in court in all respects in the same position as regards its own rights or the rights of others against it as to the subject-matter of the suit in which a natural person who is a suitor in such court can stand; and the provision leaves the question as to the proper court in which the suit is to be brought in respect of jurisdiction to be determined by other provisions of law. Manufacturers' Nat. Bank v. Baack, (1871) 8 Blatchf. 137, 16 Fed. Cas. No. 9,062; St. Louis Nat. Bank v. Brinkman, (C. C. Kan. 1880) 1 Fed. 48; St. Louis Nat. Bank v. Allen, (C. C. Ia. 1881) 5 Fed. 551. But see Continental Nat. Bank v. Folsom, (1887) 78 Ga. 449, 3 S. E. 269.

4. Organization of New Corporation


5. Effect of Expiration of Charter

On the expiration of the time limit of its charter the bank still continues to exist as a person in law capable of suing and being sued until its affairs are completely settled. Farmers' Nat. Bank v. Backus, (1888) 74 Minn. 264, 77 N. W. 149.

6. Conversion into State Bank

A national banking association upon the expiration of the period limited for its duration may be converted into a state bank under the laws of the state provided it has liquidated its affairs agreeably to the National Bank Act. National Banking Assoc., (1882) 17 Op. Atty.-Gen. 288.

II. CONTRACTS IN GENERAL

See infra, this note, div. V, p. 663.

Contracts not incidental to banking business.—A bank has no power to enter into contracts not incidental to the banking business, such as a subscription to a public or private enterprise, for instance, to build a paper mill in its locality. Robertson v. Buffalo County Nat. Bank, (1894) 40 Neb. 235, 58 N. W. 715. Or an agreement to furnish a certain amount of fire insurance business to an insurance agent in consideration of the procurement of a certain customer for the bank. Dresser v. Traders' Nat. Bank, (1896) 165 Mass. 120, 42 N. E. 567.

Procuring signature to a note for another bank.—The procurement of a signature to a note for another bank, in order that it may lend money to a third person, and a representation that the signature is genuine, are not within the powers of a national bank, and it is not liable where the note turns out to be a forgery. Commercial Nat. Bank v. Cuero First Nat. Bank, (1903) 97 Tex. 536, 80 S. W. 604, 104 A. S. R. 879, reversing (Tex. Civ. App. 1903) 77 S. W. 239.

III. DIRECTORS, PRESIDENT AND OTHER OFFICERS

1. Directors

Directors "are not called upon to devote themselves to the details of the business management, and may properly commit these to clerks and bookkeepers, and to the superintendence of the cashier. They are not required to adopt any system of espionage over their cashier, or any of their subordinate agents, or to entertain suspicion without some apparent reason, and, until some circumstance transpires to awaken a just apprehension of their want of integrity, have a right to assume that they are honest and faithful." Warner v. Penoyer, (C. C. A. 2d Cir. 1888) 91 Fed. 587, 61 U. S. App. 372, 33 C. C. A. 222, 44 L. R. A. 781.

"The power to compromise or release a debt, which is not an ordinary transaction, involves the exercise of the discretion that properly belongs to the board of directors, and not (in the absence of an express or implied obligation of such power) to either the president or cashier or any other merely executive officer of the bank." Farmers' Nat. Bank v. Templeton, (Tex. Civ. App. 1896) 40 S. W. 412.

Liability of directors for losses caused by their mismanagement, see R. S. sec. 6280 and notes thereto, infra, p. 873.
2. Authority of Officers, in General

A national bank has power under the banking laws of the United States to intrust to its agents such authority as is required or needful to meet the legitimate demands of its authorized business and to conduct its affairs within the scope of its charter. Ricker Nat. Bank v. Stone, (1908) 21 Okla. 583, 97 Pac. 577.

Borrowing money.—The executive officers of a national bank may legitimately borrow money for the bank’s use, in the usual course of business, without special authority from their board of directors. Cherry v. Kansas City Nat. Bank, (C. C. A. 8th Cir. 1908) 144 Fed. 587, 75 C. C. A. 543.

3. President

Chosen from board of directors.—“Conceding, but not admitting, that the Act of Congress does not require, it certainly does not prohibit, the board from choosing one of its members president of the association, nor from adopting articles and by-laws to that effect.” Rankin v. Tygard, (C. C. A. 8th Cir. 1912) 198 Fed. 796, 119 C. C. A. 591.

Term of office.—In Rankin v. Tygard, (C. C. A. 8th Cir. 1912) 198 Fed. 795, 119 C. C. A. 591, rejecting the contention that there can be no legal term of office of the president of a national bank because he is subject to removal at any time at the pleasure of the board of directors, the court said: “An election or appointment to the office for a specified term subject to the precedent expressed condition that the elective or appointive power may remove at will at any time during the term is consistent with such a removal without cause and it is as much an election or appointment for a legal term as an election or appointment without such a reservation. It is an election or appointment for a fixed term subject to recall and the legal term is the time the person elected or appointed will hold his office if the power to recall is not exercised.”

Powers.—“There can be no doubt that the president of a national bank, virtute officii, has necessarily the power to draw checks against the account kept with another bank by the bank of which he is president.” Putnam v. U. S., (1898) 162 U. S. 887, 16 S. Ct. 923, 40 U. S. (L. ed.) 1118.

It is competent for the directors to empower the president or cashier, or both, to indorse the paper of the bank. ‘Anten v. U. S. National Bank, (1889) 174 U. S. 125, 19 S. Ct. 628, 43 U. S. (L. ed.) 920.

“The board of directors of a national bank has the power under section 5136, U. S. Revised Statutes, to authorize the president of the bank to discount commercial paper and to do any other act within the power of the cashier or of any other officer of the bank, and where it has by resolution expressly authorized, or by acquiescence for a reasonable length of time permitted him to participate in the actual management of its daily business affairs, his authority to discount commercial paper and to do other acts in its behalf within the scope of the authority of its ministerial officers is established.” Rankin v. Tygard, (C. C. A. 8th Cir. 1912) 198 Fed. 795, 119 C. C. A. 591.

The president and chief managerial manager of a bank “had ample authority from it, by virtue of his official position, to borrow money, to provide a discount of its notes, to agree on its behalf to repay the money borrowed, and to contract on its behalf to pay the discounted notes as they matured.” Hanover Nat. Bank v. Burlingame First Nat. Bank, (C. C. A. 8th Cir. 1901) 109 Fed. 421, 48 C. C. A. 482.

“There are some authorities, it is true, which maintain that the president of a bank has no implied power to bind the bank by an indorsement of commercial paper, and that, when an indorsement by the president is relied upon as transferring a title thereto, a special authority to indorse must be shown. Smith v. Lawson, [1881] 18 W. Va. 212, 228 [44 Am. Rep. 898]; Hallowell et al., v. Bank of Smith, [1817] 14 Mass. 178, 180; Gibson v. Goldthwaite, [1845] 7 Ala. 281, 293 [42 Am. Dec. 592]. But we think the weight of reason and authority is in favor of the view that it is within the scope of the implied powers of the president of a bank to indorse negotiable paper in the ordinary transaction of the bank’s business, and that a special authority to that end need not be conferred by the board of directors. Such implied power is generally conceded to bank cashiers, and we know of no reason why the implied powers of the chief executive officer of a bank should be more limited in this respect than those of its cashier. Farmers’ etc., Nat. Bank v. Smith (C. C. A. 8th Cir. 1897) 74 Ind. 129, 136 [40 U. S. (App.) 690], 23 C. C. A. 80; Fleckner v. U. S. Bank, [1823] 2 Wheat. 338, 360 [5 U. S. (L. ed.) 681]; Wild v. Passamaquoddy Bank, [1825] 3 Mason 505, [29] Fed. Cas. No. 17,616; City Bank v. Perkins, [1864] 29 N. Y. 554, 569; [86 Am. Dec. 323]; Cooke v. State Nat. Bank, [1873] 62 N. Y. 96] 114, 115, [11 Am. Rep. 667]; State Bank v. Wheeler, [1883] 21 Ind. 90; Merchants’ Nat. Bank v. State Nat. Bank, [1871] 10 Wall. 604, 650 [19 U. S. (L. ed.) 1008]. It can hardly be expected that the cashier of a bank will be in attendance on all occasions when it becomes necessary for the bank to indorse notes and bills, draw drafts and checks, certify checks, or issue certificates of deposit. Such transactions as these are of hourly occurrence in all banks located in large business centers, and the exigencies of business demand that the power to perform such acts should be vested in some other officer as well as in the cashier. Our observation

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teaches us that such power is very generally exercised by bank presidents; and in ordinary transactions, no loyalty, duty, etc., we think, would hesitate to accept negotiable paper which had passed through a bank, because it was indorsed by the president, rather than by the cashier. In its practical operation the rule that a bank president has no implied power to indorse commercial paper for and in behalf of his bank would seriously interfere with the transaction of business, and put the public to great inconvenience, while it would have no marked tendency to prevent fraud or breaches of trust on the part of bank officers. The public interest requires that the same presumptions should attend an individual indorsement made by the president of a bank which exist in favor of an indorsement made by a cashier, and that banks should be held bound by acts of that nature when done by either of such officers in the ordinary course of business. Aside from these considerations, we think that it has been settled, so far as the federal courts are concerned, by the decision in Peoples’ Bank v. Manufacturers’ Nat. Bank, (1879) 101 U. S. 181, 25 U. S. (L. ed.) 907 that the president of a national bank, by virtue of his office, does possess the power to bind his bank by a contract of indorsement or guaranty made in the usual course of business.” U. S. National Bank v. Little Rock First Nat. Bank, (C. C. A. 8th Cir. 1897) 79 Fed. 296, 49 U. S. App. 67, 24 C. C. A. 597.

The president of a bank is not entitled, by virtue of his office, to bind the bank by a certificate to a surety company as to the efficiency, fidelity, or integrity of the cashier, in order that the latter might procure a bond and become qualified to act as cashier. It was “no part of the ordinary routine of the business of a bank president.” American Surety Co. v. Pauly, (1898) 170 U. S. 133, 18 S. Ct. 552, 42 U. S. (L. ed.) 977.

“The president of a bank has no power inherent in his office to bind the bank by the execution of a note in its name, yet the power to do so may be conferred upon him by the board of directors, either expressly, by resolution to that effect, by subsequent ratification, or by acquiescence in transactions of a similar nature, and of which the directors have knowledge.” National Bank of Commerce v. Atkinson, (C. C. Kan. 1893) 55 Fed. 465.

A bank is not bound by the agreement of its president to donate a sum of money to an individual to aid him in building a paper mill. Robertson v. Buffalo County Nat. Bank, (1894) 40 Neb. 236, 58 N. W. 715.

In absence of evidence that the president and cashier of a national bank were the agents of a depositor in transferring to their account money of the depositor, which they agreed to loan on real estate security, and that the depositor knew at any time that they were acting for her in that capacity, it was held that the bank and its receiver were liable to the depositor for her funds so transferred, though it could not lend money on such security. Short v. Butler, (1909) 138 Mo. App. 356, 117 S. W. 114.

The Act which authorizes banks to elect boards of directors to which are committed the management and control of the bank, and which are empowered to select one of their number as president, in the absence of any by-law or any other fact extending the authority of the president elected by the directors, a statement by him that a note which was in fact a forgery was properly signed by the purported signer is without authority from the bank and not binding upon it. Commercial Nat. Bank v. Cuero First Nat. Bank, (1904) 97 Tex. 536, 80 S. W. 601, 104 A. S. R. 879, reversing (Tex. Civ. App. 1903) 77 S. W. 239.

Where the president of a bank certified a noncommercial instrument for the accommodation of the drawers solely in his official capacity and ultra vires the bank’s powers, he was not individually liable on such certificate. Maryland Fidelity, etc., Co. v. National Bank of Commerce, (1908) 48 Tex. Civ. App. 301, 106 S. W. 782.

4. Vice-President

Where the vice-president of a national bank, contemporaneously with a sale of certain notes of another bank, guaranteed their payment, it was held that the latter bank could rightfully presume, without inquiry, that the vice-president had authority to exercise the guaranty. People’s Bank v. Manufacturers’ Nat. Bank, (1880) 101 U. S. 191, 25 U. S. (L. ed.) 907.

In an action on a note representing a loan made by plaintiff national bank to the defendant, where it appeared that the negotiations for the loan were carried on by one M., plaintiff’s vice-president, and that as a result of such negotiations the loan was made to defendant, M. was an agent of the bank, and evidence as to what officers regularly had authority to make loans was immaterial. National Bank of North America v. Thomas, (1910) 30 R. I. 294, 74 Atl. 1092.

5. Cashier

In U. S. v. City Bank, (1899) 21 How. 366, 18 U. S. (L. ed.) 130, it was said: "The court defines the cashier of the bank to be an executive officer, by whom its debts are received and paid, and its securities taken and transferred, and that the acts, to be binding upon a bank, must be done within the ordinary course of his duties. His ordinary powers are to keep all the funds of the bank, its notes, bills and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, all moneys and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank where they have been deposited, and, as the executive officer of the bank, transacts most of its business. Nor has it ever been decided that a cashier could purchase or sell the property, or create an agency of any kind for a bank which he had not been authorized to make by those to whom has been confided the power to manage its business, both ordinary and extraordinary." Followed in Winsor v. Lafayette County Bank, (1895) 18 Mo. App. 665. "This may well be accepted as the general rule of law applicable in such cases. Bank of Commerce v. Hart, (1893) 37 Neb. 163, 66 N. W. 831, 20 L. R. A. 780, 40 A. S. R. 479; Taylor v. Commercial Bank, (1903) 174 N. Y. 181, 66 N. E. 726, 62 L. R. A. 783, 95 A. S. R. 564." Spongberg v. Montpelier First Nat. Bank, (1910) 18 Idaho 524, 110 Pac. 716, Ann. Cas. 1912A 95, 31 L. R. A. (N. S.) 736.

"The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities." Merchants’ Bank v. Boston State Nat. Bank, (1871) 10 Wall. 604, 19 U. S. (L. ed.) 1088.

The cashier is the executive officer who transacts the daily affairs of the bank. The directors may properly entrust to him all the discretionary powers which usually appertain to the immediate management of the business. Warner v. Penoyer, (C. C. A. 2d Cir. 1898) 91 Fed. 587, 61 U. S. App. 372, 33 C. C. A. 222, 44 L. R. A. 761, modifying decree in (N. D. N. Y. 1897) 82 Fed. 181.

The plaintiff bought a mortgage bond from a national bank either knowing or having sufficient reason to believe that the bank was acting merely as a broker. After the purchase he accepted a guaranty from the cashier of the bank against a loss which might be sustained owing to a prior incumbrance on the premises. The cashier in making the guaranty acted wholly without authority, but the plaintiff relied on the assumption that the act was within the scope of his ordinary duties. The bank received no part of the proceeds of the sale of the bond, and did not profit to any extent by the unauthorized act of its cashier. It was held that the bank was not bound by the guaranty, and was not estopped from denying the cashier’s authority to execute it. Farmers, etc., Nat. Bank v. Smith, (C. C. A. 8th Cir. 1896) 77 Fed. 129, 40 U. S. App. 690, 23 C. C. A. 80.

"While it may be, and we think usually is the ordinary practice for the cashiers of the general average of banks to do the leasing of any of its extra rooms or banking houses, still as a matter of law we take it to be well-settled that the selling or leasing of the bank property is outside of the ordinary business and duties of the cashier, unless he is specially authorized to do so." Spongberg v. Montpelier First Nat. Bank, (1910) 18 Idaho 524, 110 Pac. 716, Ann. Cas. 1912A 95, 31 L. R. A. (N. S.) 736.

"The duties of the cashier of a bank, as commonly understood, do not warrant representations on his part as to the solvency or credit of business corporations who are indebted to the bank. His powers are strictly executive and ministerial." Crawford v. Boston Store Mercantile Co., (1893) 67 Mo. App. 39.

The cashier, as one of the executive officers of the bank, prima facie had authority to receive in its behalf a savings bank book for collection and to receive the money collected. "The cashier of a national bank stands no differently in this respect from the cashiers of other banks of discount." Hanson v. Heard, (1897) 69 N. H. 190, 38 Atl. 788.


"The rule that a bank is bound by the acts of its cashier in accepting deposits which came within the scope and meaning of the term ‘special deposits,’ has become so well settled as to admit of but little question." American Nat. Bank v. Adams, (1914) 44 Okla. 129, 143 Pac. 508, L. R. A. 1915B 542.

The cashier of a national bank, who is its active executive officer and is intrusted
with the duty of selling lands acquired by the bank in satisfaction of debts, and who has authority to employ a broker to sell such lands, acts within the scope of his authority in designating to the broker the lands to be offered for sale, and a mistake in such designation is likewise within the scope of his authority, and is in effect the act of the bank, for which it is responsible. Arnold v. National Bank, (1905) 126 Wis. 362, 105 N. W. 828, 3 L. R. A. (N. S.) 580.

8. General Manager

"No such office as that of 'general manager' is known or named in the national bank acts, nor does any such office exist by usage." Western Nat. Bank v. Armstrong, (1894) 152 U. S. 346, 14 S. Ct. 572, 38 U. S. (L. ed.) 470.

7. Discount Clerk

In Slade v. Squier, (1909) 133 App. Div. 666, 118 N. Y. S. 278, it was held that the discount clerk of a national bank had no authority by virtue of his office or his agency resulting from the assignment to him of a bond and mortgage for the use of the bank to secure a debt due to the bank to bind the bank by a stipulation in a suit to which it was not a party, to the effect that he was the holder and owner of the bond and mortgage, where he had executed an unrecorded assignment thereof to the bank.

8. Other Officers

A "solicitor of business" is not within the phrase "and other officers," in the fifth clause of this section, giving a national bank power to appoint a president, vice-president, cashier, and other officers, and dismisss such officers at pleasure; but under clauses 3 and 7 of said section, empowering such a bank to make contracts and to exercise, by duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the banking business, it may employ a solicitor of business for a year. Case v. Brooklyn First Nat. Bank, (1908) 59 Misc. 269, 109 N. Y. S. 1119.

9. Removal of Officers


IV. By-Laws

"There are many things done daily in every bank which are in fact and in law the acts of the bank, and of which no mention is made in the by-laws." In re Bowen v. Union Nat. Bank, (1881) 99 Ill. 622.

Adoption of by-laws.—A majority of the directors at a regularly or legally called meeting when a quorum is present is sufficient to enact by-laws, and a by-law informally adopted may be subsequently ratified, and without any record of adoption may be proved by the usage and acts of the bank and parties dealing with it. Lockwood v. Mechanics' Nat. Bank, (1869) 9 R. I. 306, 11 Am. Rep. 283.

By-law void in part.—By-laws are, so far as they are not inconsistent with the Act of Congress, the law of the bank and under the familiar rule that, where a part of a law is void and a part valid and the void part is readily separable from the valid part, the latter may be sustained and the former disregarded, unless the void part is so connected with the general scope of the law as to make it impossible, if it is stricken out to give effect to the apparent intention of the legislative body which enacted it,—if a void provision in a by-law does not destroy or weaken the effect of the remaining provisions of the articles of association and by-laws, the latter must stand. Rankin v. Tygard, (C. C. A. 6th Cir. 1912) 198 Fed. 795, 119 C. C. A. 591.

Regulation of business by bank.—A by-law giving to the bank a lien on shares of its stockholders while debtors of the bank, or which prohibits a transfer while the stockholder is indebted to the bank, is not a "regulation of its business and the conduct of its affairs" within the meaning of this section, and is not such a regulation as national banks have a right to make, and such by-law is invalid for any purpose. Bullard v. National Eagle Bank, (1873) 18 Wall. 589, 21 U. S. (L. ed.) 923, quoted in the next following paragraph; Evansville Nat. Bank v. Metropolitan Nat. Bank, (1871) 2 Biss. 527, 8 Fed. Cas. No. 4,573; Louisville Second Nat. Bank v. National State Bank, (1874) 10 Bush (Ky.) 367; Hagar v. Attorney Nat. Bank, (1874) 63 Me. 595; Delaware, etc., R. Co. v. Oxford Iron Co., (1884) 35 N. J. Eq. 340; Rosenbllack v. Salt Springs Nat. Bank, (1868) 53 Barb. (N. Y.) 492; Conklin v. Oswego Second Nat. Bank, (1871) 45 N. Y. 655; Buffalo German Ins. Co. v. Buffalo Third Nat. Bank, (1900) 162 N. Y. 169, 56 N. E. 521, 48 L. R. A. 107; Goodbar v. City Nat. Bank, (1890) 78 Tex. 461, 14 S. W. 851; Fekheimer v. National Exch. Bank, (1884) 79 Va. 80. The following cases holding or intimating a contrary doctrine are either expressly or by implication
occr'd by the cases above cited: Mat-


print) 21, 1 Am. L. Rec. 383.

In Bullard v. National Eagle Bank, (1874) 18 Wall. 589, 21 U. S. (L. ed.) 923, the opinion by Mr. Justice Strong is as follows: "The first question upon which the judges of the circuit court divided in opinion is, whether a national bank organized under and controlled by the Act of 1864, can acquire a valid lien upon the shares of its stockholders by the articles of association or by-laws proved in the case. Those articles were formed on the 28th day of March, 1865, and they contain the provision that the directors of the association shall 'have the power to make all by-laws that it may be proper and convenient for them to make under said Act, for the general regulation of the business of the association and the entire management and administration of its affairs, which by-laws may prohibit, if the directors so determine, the transfer of stock owned by any stockholder who may be liable to the association, either as principal debtor or otherwise, without the consent of the board.' Subsequently, on the 22d of November, 1871, at a meeting of the directors, the following by-law was adopted: 'In pursuance of one of the articles of association and to carry the same into effect, and in the exercise of an authority conferred by an Act under which the bank was organized to define and regulate the manner in which its stock may be transferred, it is hereby declared: All debts actually due and payable to the bank (days of grace for payment being passed) by a stockholder, as principal debtor or otherwise, requesting a transfer, must be satisfied before such transaction can be made, unless the board of directors shall direct to the contrary.' And on the 7th of December, 1871, this by-law was amended by adding the words: 'And no person indebted to the bank shall be allowed to sell or transfer his or her stock without the consent of a majority of the directors, and this whether liable as principal or surety, and whether the debt of liability be due or not.'

"The extent of the powers of national banking associations is to be measured by the Act of Congress under which such associations are organized. The 5th section of that Act, 12 Stat. at L. 500, enacts that the article of association 'shall specify in general terms the object for which the association is formed, and may contain any other provisions not inconsistent with the provisions of this Act, which the association may see fit to adopt for the regulation of the business of the association and the conduct of its affairs.' And the 5th section of the same Act empowers the board of directors, 'to define and regulate by by-laws, not inconsistent with the provisions of this Act, the manner in which its stock shall be transferred.' There are other powers conferred by the Act, but unless these confer authority to make and enforce a by-law giving a lien on the stock of debtors to a banking association, very plainly it has not been given.

"What, then, were the intentions of Congress respecting the powers and rights of banking associations? The Act of 1864 was enacted as a substitute for a prior Act, enacted February 25, 1863 (12 Stat. at L. 665), and in many particulars the provisions of the two acts are the same. But the earlier statute, in its 36th section, declared that no shareholder in any association under the Act should have the power to transfer or sell any share held in his own right so long as he should be liable, either as principal debtor, surety, or otherwise, to the association for any debt which had become due and remained unpaid.

"This section was left out of the substituted Act of 1864, and it was expressly repealed. Its repeal was a manifestation of a purpose to withhold for banking associates a lien upon the stock of their debtors. Such was the opinion of this court in South Bend First Nat. Bank v. Lanier, (1871) 11 Wall. 309, 20 U. S. (L. ed.) 172. In that case it appeared that a bank had been organized under the Act of 1863, and that it had adopted a by-law, which had not been repealed, that the stock of the bank should be assignable only on its books, subject to the provisions and restrictions of the Act of Congress, among which provisions and restrictions was the one contained in the 36th section, that no shareholder should have power to sell or transfer any share so long as he should be liable to the bank for any debt due and unpaid. And when the bank was sued for refusing to permit a transfer of stock, it set up, in defense, that the stockholder was indebted to it, and that under the by-law he had no right to make the transfer. But this court said, 'Congress evidently intended, by leaving out of the Act of 1864 the 36th section of the Act of 1863, to relieve the holders of the bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were, in effect, notified that thereafter, they must deal with their shareholders as they
dealt with other people. As the restriction will so did that part of the by-law relating to the subject fall with them. But this could have been only because the restriction was regarded as inconsistent with the policy and spirit of the Act of 1864. It cannot truly be said that the by-law was founded upon the 36th section, though it does reference to that section. It was not in that the power to make by-laws was given. The 11th section was the one which authorized associations to make by-laws, not inconsistent with the provisions of the Act, for the management of their property, the regulation of their affairs, and for the transfer of their stock; and that was substantially re-enacted in the Act of 1864. Moreover, the 62d section of the latter Act, while repealing the Act of 1863, omitted 5th section, should not affect any appointments made, acts done, or proceedings had, or the organization, acts, or proceedings of any association organized, or in process of organization under the Act aforesaid, and gave to such associations all the rights and privileges granted by the Act, and subjected them to all the duties, liabilities, and restrictions imposed by it. It is, therefore, manifest that it was not the repeal of the 36th section which caused the by-law to fall. It fell because it was considered a regulation inconsistent with the new currency Act, the policy of which was to permit no lien in favor of a bank upon the stock of its debtors. It is impossible, therefore, to see why the decision in the case of South Bend First Nat. Bank v. Lanier does not require that the certified question should be answered in the negative.

"An attempt was made in the argument to distinguish that case from the present by the fact that the articles of association of the Eagle Bank contain the provision to which we have referred, namely: That the directors should have the power to make by-laws which may prohibit the transfer of stock owned by any stockholder, who may be a debtor to the association, without the consent of the board, a provision, which, it is said, the associates were justified in making by the 5th section of the Act of 1864. The argument is that, though the Act of Congress does not itself create a lien on a debtor's stock, as did the Act of 1863, it does by the words of its 5th section authorize the creation of such a lien by the articles of association, and by by-laws made under them. This leads to the inquiry whether the 5th section does authorize any provision in the articles of association that by-laws may be made prohibiting the transfer of stock of debtors to a bank, for if it does not the foundation of the argument is gone. Certainly there is no express grant of authority to make such a prohibition contained in that section. There is no specification of such a power. And if such a grant could be implied from the words used by Congress, the implication would be in direct opposition to the policy indicated by the repeal of the 36th section of the Act of 1863, and the failure to re-enact it, as well as by the provisions of the 35th section, which prohibit loans and discounts by any bank on the security of any shares of its capital stock, and prohibit, also, every bank from purchasing or holding any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith. Surely an implication is inadmissible which contradicts either the letter or the spirit of the Act. Surely when the statute has prohibited all express agreements for a lien in favor of a bank upon the stock of its debtors, there can be no implication of a right to create such a lien by by-laws."

"But were there no such policy manifest in the Act, the words of the 5th section would not bear the meaning attributed to them. The articles of association required by that section to be made into the general terms of the object for which the association is formed, and may contain any other provisions, not inconsistent with the provisions of the Act, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. To us it seems that a by-law giving to the bank a lien upon its stock, as against indebted stockholders, ought not to be considered as a regulation of the business of the bank or a regulation for the conduct of its affairs. That Congress did not understand the section as extending to the subject of stock transfers is very evident in view of the fact that in another part of the statute express provision was made for such transfers. The 5th section empowers the board of directors of every banking association, in its by-laws, not inconsistent with the provisions of the Act, the manner in which the stock shall be transferred. This would be superfluous if the power had been previously given in the 5th section. That Congress considered it necessary to make such an enactment is convincing evidence that they thought it had not elsewhere been made. Whatever power, therefore, the directors of a bank possess to regulate transfers of its stock, they derive, not from the 5th section of the Act, and not from the articles of association, but from the 8th and 12th sections by express and direct grant. It cannot, therefore, be maintained that the present case is not governed by the decision made in South Bend First Nat. Bank v. Lanier, because the articles of association for the Eagle Bank authorized the directors to make a by-law restricting the transfer of stock. In that case there was a by-law prohibiting the transfer, as in this. Independent of the 36th section.
of the Act of 1863, there was as much authority to make and enforce such a by-law as is given by the Act of 1864. The 11th and 12th sections of the Act of 1863 enacted that associations formed under it might make by-laws, not inconsistent with the laws of the United States or the provisions of the Act, for the transfer of their stock, and that the stock should be transferable on the books of the association 'in such manner as might be prescribed in the by-laws or articles of association.' These powers given to the associates under that Act are quite as large as those given by the Act of 1864. Yet this court held that after the passage of the latter Act a by-law giving a lien upon a debtor's stock was inconsistent with its provisions and invalid. Of course, if the Act destroyed an existing by-law, it must prevent the adoption of a new one to the same effect.

"We hold, therefore, on the authority of South Bend First Nat. Bank v. Lanier, that the first question certified must be answered in the negative." Mr. Justice Clifford dissentied "for the reasons assigned in the opinion delivered by me in the case of Knight v. Old Nat. Bank, (1871) 3 Cliff. 429, [14 Fed. Cas. No. 7,885]."

As to issuance of new certificate of stock—A by-law of a national bank necessitating the production of an old certificate of stock before the issuance of a new certificate to take its place will not impair the authority of the court to order the bank to issue a new certificate of stock where the person in possession of the old certificate after service of constructive process fails to appear. Letcher v. German Nat. Bank, (1900) 134 Ky. 24, 119 S. W. 236, 20 Ann. Cas. 815.

V. "INCIDENTAL POWERS AS SHALL BE NECESSARY, ETC."

1. Banking Powers in General


"The extent of the powers of national banking associations is to be measured by the Act of Congress under which such associations are organized." Bullard v. National Eagle Bank, (1874) 18 Wall. (U. S.) 589, 593, 21 U. S. (L. ed.) 923, 925.

Subdivision 7 of the above section contains five distinct grants of power, and no one grant is a limitation upon the others. Shoemaker v. National Mechanics' Bank, (1869) 1 Hughes 101, 21 Fed. Cas. No. 12,801; Cleveland v. Shoeman, (1883) 40 Ohio St. 176.

Such powers are not the incidental powers given generally to all bank institutions, but are only those incidental to banks allowed to do such things as are prescribed by the National Bank Act. Seligman v. Charlottesville Nat. Bank, (1879) 3 Hughes 647, 21 Fed. Cas. No. 12,642.

"A national bank may lawfully do many things in securing and collecting its loans, in the enforcement of its rights and the conservation of property previously acquired, which it is not authorized to engage in as a private business. . . . In Cooper v. Hill, [C. C. A. 8th] 94 Fed. 892, 36 C. C. A. 402, a national bank owned an abandoned mining property. The shaft and drifts were filled with water, the machinery silent and the tools gone.' It was held that under its incidental and implied powers the bank had authority to expend money in putting the property in presentable condition to attract purchasers. Such cases are sufficient to illustrate the latitude that is permitted national banks, not in the character of the acts they may primarily engage in as a business, but in the management and protection of property and property rights acquired in the usual course of banking transactions, and to include such minor incidental powers as may be reasonably adapted to the ends in view." Morris v. Springfield Third Nat. Bank, (C. C. A. 8th Cir. 1905) 142 Fed. 25, 73 C. C. A. 211.

United States Supreme Court final authority.—"Whenever the power or liability of a national bank is called into question, the United States Supreme Court is the ultimate and paramount authority on the subject; and all authorities of state courts to the contrary, must yield." Hansford v. National Bank, (1912) 10 Ga. App. 270, 73 S. E. 405.

"The powers of a national bank under the national banking act are essentially matters for federal construction and interpretation, and whatever rules may obtain in the several states as to the powers of corporations under state statutes, all state courts must yield to the decisions of the Supreme Court of the United States construing the powers of national banks under the national banking act." Moscow First Nat. Bank v. America Nat. Bank, (1903) 173 Mo. 153, 72 S. W. 1059.

Beyond state regulation.—As to national banks "it must be obvious that
their operations cannot be limited or controlled by state legislation, and the Supreme Court of Iowa was in error when it held that national banks are organized and their business protected for private gain, and that there is no reason why the offering of such loans should be exempt from the penalties prescribed for fraudulent banking. . . . Our conclusions upon principle and authority are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations." Easton v. Iowa, (1903) 188 U. S. 220, 23 S. Ct. 288, 47 U. S. (L. ed.) 452.

2. Branch Bank
Branch bank—None of the provisions of this section contains an express or necessarily implied power to establish a branch bank. Such power is in no sense essential to the exercise of any of the incidental powers named in the statute or of any power which is incident to the carrying on of a general banking business. (1911) 29 Op. Att'y-Gen. 81.

3. Borrowing Money
In general.—It was said by Mr. Justice Shiras, delivering the opinion of the court in Western Nat. Bank v. Armstrong, (1894) 152 U. S. 346, 14 S. Ct. 572, 38 U. S. (L. ed.) 470: "The power to borrow money or to give notes is not expressly given by the Act. The business of the bank is to lend, not to borrow money; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court in the case of Charlotte First Nat. Bank v. National Exch. Bank, [1875] 92 U. S. [122], 127, [23 U. S. (L. ed.) 679], 'authority is thus given in the Act to transact such a banking business as is specified, and all incidental powers necessary to carry it on are included.' These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs within the scope of its charter safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.'"

"A bank in certain circumstances may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank, has special authority to borrow money." Western Nat. Bank v. Armstrong, (1894) 152 U. S. 346, 14 S. Ct. 672, 38 U. S. (L. ed.) 470.


A national bank has the power to borrow money on call for the purpose of its business by giving a certificate of deposit to and receiving a credit for the amount from the lender bank. Armstrong v. Chemical Nat. Bank, (C. C. A. 6th Cir. 1897) 83 Fed. 556, 54 U. S. App. 462, 27 C. C. A. 601, affirming (S. D. Ohio 1896) 76 Fed. 339.

Extent of power.—The legal power of a bank to borrow money does not depend upon any exigency or upon the existence of a critical condition of its affairs, or upon the actual necessity for the immediate use of the sum borrowed. It may borrow money to conduct and carry on the business of banking and for the express purpose of lending the money borrowed, either by discounting the notes, bills, or drafts of others, or on personal security, with a view to profit by the transaction. National Bank of Commerce v. National Bank, (1878) 30 Fed. Cas. No. 18,310; Aldrich v. Chemical Nat. Bank, (1900) 176 U. S. 618, 20 S. Ct. 498, 44 U. S. (L. ed.) 611.

The president of the defendant national bank being largely interested in a railroad, and being unable to secure a loan therefor from his own bank, applied to the plaintiff bank for a loan, and was informed that the loan could not be made to him individually, as the bank was near
the limit allowed by law for individual loans, but that the amount needed could be deposited with the defendant bank if desired. This proposition was accepted, and it was agreed that the deposit should draw interest at six per cent, and that collateral should be deposited as security. The loan was due, but the defendant bank paid interest thereon at two separate times and subsequently failed. It was held in a suit to recover the amount of such loan that the deposit or loan was in the scope of the defendant's power, and it and not its president was liable therefor. Eastern Tpa. Bank v. Vermont Nat. Bank, (C. C. Vt. 1884) 22 Fed. 186.

Where a valid loan is made to the bank a recovery in an action against it for money can be as well defeated on the ground that a certificate of stock was issued as collateral for such loan without authority of law. Williams v. American Nat. Bank, (C. C. A. 8th Cir. 1898) 85 Fed. 378, 56 U. S. App. 316, 29 C. C. A. 293.


In Greenville First Nat. Bank v. Greenville Oil, etc., Co., (1901) 24 Tex. Civ. App. 645, 60 S. W. 828, a national bank guaranteed a feed bill under an agreement whereby the debtor became a depositor of the bank and gave a mortgage on his herd of cattle to cover such liability and advances. The bank, having received the proceeds of the sale of the cattle, was held to be liable on its guaranty.
A national bank cannot loan its credit by promising to pay drafts drawn on it where it has no security or funds on deposit to meet them. A promise by the national bank to the drawee of drafts held by the bank for collection that if the drawee would pay such drafts the bank would pay the drawee's drafts on the drawers for the amount he claimed such drafts to be overdrawn is unenforceable as a loaning of credit. Groos v. Brewster, (Tex. Civ. App. 1900) 56 S. W. 550.

A national bank may warrant the title to property it conveys, or become liable as an indorser or guarantor of obligations which it rediscounts or sells, but it cannot lend its credit to another by becoming surety, indorser, or guarantor for him, such an act being ultra vires, and, when its true character is known, no rights grow out of it, though it has taken on in part the garb of a lawful transaction. Merchants' Bank v. Baird, (C. C. A. 8th Cir. 1908) 100 Fed. 624, 90 C. C. A. 399, 17 L. R. A. (N. S.) 526.

Where a national bank, in order to induce a person to purchase certain steamship stocks owned by it, agreed to take such person's note for $30,000 for the stock and hold the stock as collateral security, and to guarantee him against any loss in the transaction from the execution and delivery of the note, it was held that such guaranty was not an ordinary commercial guaranty, but one outside the ordinary business of banking, and ultra vires. Barron v. McKinnon, (C. C. Mass. 1910) 179 Fed. 759.

A state bank, at the request of a national bank, loaned $12,000 to a third person on his personal obligation. The national bank guaranteed the repayment of the loan. The third person, pursuant to his previous agreement with the national bank, paid to it $10,000 of the loan, though he was not indebted to it in any amount. It was held that the national bank's contract of guaranty was void as ultra vires that no action could be maintained thereon. Appleton v. Citizens' Cent. Nat. Bank, (1906) 116 App. Div. 404, 101 N. Y. S. 1027.

But an agreement by a national bank to assume all the liabilities of another national bank in consideration of the transfer to it of the furniture and fixtures of its banking office and sufficient of its assets to cover the assumed liability is not ultra vires. Schofield v. State Nat. Bank, (C. C. A. 8th Cir. 1899) 97 Fed. 282, 38 C. C. A. 179, p. 741. The cashier of the bank, who was secretary and treasurer of the borrower, notified another of such fact and induced him to lend the bank's borrower an additional sum upon the guaranty of the cashier individually, and of the bank through the cashier, of the payment thereof. It was held that the bank could not ratify such ultra vires act of the cashier, and that the cashier's object in inducing the other person to make the loan was to secure to the bank payment of the amount lent by it, and to release the cashier from his liability in making the excessive loan, and that the fact that the bank received a considerable portion of the amount borrowed from it did not estop it from setting up the invalidity of its guaranty. Tallapoosa First Nat. Bank v. Monroe, (1911) 135 Ga. 614, 69 S. E. 1123, 32 L. R. A. (N. S.) 560.


Even if a guaranty of checks from one national bank to another for clearing-house purposes is ultra vires, this fact will not avail the drawers of a check who are not in privity of contract with the bank, which in compliance with such guaranty had paid the checks and became an assignee thereof after the drawee became insolvent. Volts v. National Bank, (1895) 158 Ill. 532, 32 N. E. 698, 32 L. R. A. 155, affirming (1894) 57 Ill. App. 360.

A national bank which, in pursuance of a previous agreement with its debtor that he will devote to the discharge of his indebtedness a part of the proceeds of a loan to be obtained by him from another bank, requests the making of such loan, and guarantees its payment at maturity, must account to the lending bank for the sum which it receives for its own use in the execution of the agreement, even though such guaranty is beyond its powers under the national banking statutes. Citizens' Cent. Nat. Bank v. Appleton, (1910) 216 U. S. 196, 30 S. Ct. 364, 54 U. S. (L. ed.) 443 (affirming (1906) 190 N. Y. 417, 83 N. E. 470, 32 L. R. A. (N. S.) 349), in which case the loan was obtained from the Cooper Exchange Bank and the receiver of the latter then sued the Citizens' Central National Bank,
which, by a consolidation, had succeeded to the liabilities of the Central National Bank. The court said: "The plaintiff in error insists that the guaranty given by the Central National Bank to the Cooper Exchange Bank was beyond its power, was in violation of the national banking act, and, therefore, could not be made the foundation of an action against the guarantor bank. But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank, whereby the latter, under the circumstances disclosed by the record, came under a duty to account to the former for the $10,000 of the $12,000 actually paid to Samuels at its request and on its guaranty. The law would be very impotent to do justice if it could not, under those circumstances, and without violating established legal principles, compel the Central National Bank to a true accounting and discharge that duty. Samuels owed the Central National Bank $10,000, and — with knowledge, perhaps, of his financial condition — he was put forward by that bank to obtain $12,000 from the Cooper Exchange Bank, so that it could get $10,000 out of that sum, for its own use. The circumstances show that the latter bank would not have loaned the money to Samuels except at the request and on the guaranty of the Central National Bank. All this, it may be observed, occurred under a previous agreement between the Central National Bank and Samuels, that that bank was to have $10,000 of the $12,000 in discharge of its claim upon him. In short, the Central National Bank, by means of the device mentioned, got $10,000 of the money of the Cooper Exchange Bank for its own use, and having used it for its own benefit, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We know of no adjective case that stands in the way of relief being granted as asked by the plaintiff. But there are many that will authorize such relief."

"In Logan County Nat. Bank v. Townsend, [1891] 139 U. S. 67, 74, 35 U. S. (L. ed.) 107, 110, 11 S. Ct. 496, it appears that a national bank purchased, at a stipulated price, certain municipal bonds, which it agreed to return to the seller upon demand, or replace them at the same or a less price. Demand was subsequently made on the bank to return or replace the bonds according to the agreement. But it failed to do either, and when sued for the value of the bonds it pleaded, as a defense, the absence, under the law of its creation, of any authority or power on its part to makithat agreement. This court said: 'If it be assumed, in accordance with the bank's contention, that it was without power to purchase these bonds, to be replaced to the plaintiff, on demand, the question would still remain, whether, notwithstanding the act of Congress defining and limiting its powers, it was exempt from liability to the plaintiff for the value of the bonds, if it refused, upon demand, to replace or surrender them at the same or a less price. . . . And from the time of such demand and its refusal to return the bonds to the vendor or owner, it becomes liable for their value upon grounds apart from the contract under which it obtained them. It could not rightfully hold them under or by virtue of the contract, and, at the same time, refuse to comply with the terms of purchase. If the bank's want of power, under the statute, to make such a contract of purchase, may be pleaded in bar of all claims against it based upon the contract, — and we are assuming, for the purposes of this case, that it may be — it is bound, upon demand, accompanied by a tender of half of the price it paid, to surrender the bonds to its vendor. The bank, in this case, insisting that it obtained the bonds of the plaintiff in violation of the act of Congress, is bound, upon being made whole, to return them to him. No exemption or immunity from this principle of right and duty is given by the national banking act. "The obligation to do justice," this court said in Marsh v. Fulton County, [1871] 10 Wall. 676, 684, 10 U. S. (L. ed.) 1040, 1043, "rests upon all persons, natural and artificial; and if a county obtains the money or property of others without authority, the law, independently of any statute, will compel restitution or compensation."

"The case of Aldrich v. Chemical Nat. Bank, [1800] 176 U. S. 618, 44 U. S. (L. ed.) 611, 20 S. Ct. 498, is equally in point. A vice president of a national bank, without authority from it, borrowed money from another national bank, and placed the amount in still another bank to the credit of the bank which he assumed to represent in the transaction. The national bank in whose name the money was deposited drew the money out by check and applied it in discharge of its own valid obligations; and when it was sought to hold it liable, the defense, in part, was that the original borrowing was not only unauthorized by it, but was in violation of the national banking act. Upon an extended review of the authorities, this court said: 'As the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank, who assumed to represent it in the transaction, and, as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the latter having enjoyed the fruits of the transaction, cannot avoid accountability to the New York bank, even if it were true, as contended,
that the Fidelity Bank could not, con-
sistently with the law of its creation, have itself borrowed the money. . . . If
the latter bank in this way used the money
obtained from the Chemical Bank, it is
under an implied obligation to pay it
back or account for it to the New York
bank. It cannot escape liability on the
ground merely that it was not permitted
by its charter to obtain money from
another bank. Suppose the Fidelity Bank,
by its check upon the Chemical Bank,
had drawn the whole $300,000 at one
time, and now had the money in its pos-
session, unused? It would not be allowed
to hold the money even if it were without
power, under its charter, to have borrowed
it from the Chemical Bank for use in its
business. Or suppose a national bank, in
violation of the act of Conspiracy, takes it
as security for a loan made by it a deed
of trust of real estate, and subsequently
causes the property to be sold and the
proceeds applied in payment of its claim
against the borrower, a surplus being left
in its hands, which it uses in its busi-
ness or in discharge of its obligations.
If sued by the borrower for the amount
of such surplus, could the bank success-
fully resist payment upon the ground that
the statute forbade it to make a loan
of money on real estate security? Com-
mon honesty requires this question to be
answered in the negative. But it could
not be so answered if it be true that the
Fidelity Bank could use in its business
and for its benefit money obtained by
one of its officers from another bank, under
the pretense of a loan, and be dis-
charged from liability therefor upon the
ground that it could not itself have
directly borrowed from the other bank the
money so obtained and used. There is
nothing in the acts of Congress authoriz-
ing or permitting a national bank to
appropriate and use the money or property
of others for its benefit without liability
for so doing."

"These views are supported by many
other adjudged cases. In Central Transp.
Co. v. Pullman's Palace Car Co., [1891]
190 U. S. 24, 60, 35 U. S. (L. ed.) 55,
63, 11 S. Ct. 475, the court, speaking by
Mr. Justice Gray, said: 'A contract ultra-
vires being unlawful and void, not because
it is in itself immoral, but because the
corporation, by the law of its creation, is
incapable of making it, the courts, while
refusing to maintain any action upon the
unlawful contract, have always.striven
to do justice between the parties, so far
as could be done consistently with ad-
dherence to law, by permitting property or
money, parted with on the faith of the
unlawful contract, to be recovered back,
or compensation to be made for it. In
such case, however, the action is not
maintained upon the unlawful contract,
nor according to its terms, but on an
implied contract of the defendant to re-
turn, or, failing to do that, to make com-
ensation for, property or money which
it has no right to retain. To maintain
such an action is not to affirm, but to
disfavor, the unlawful contract.' So, in
Pullman's Palace Car Co. v. Central
Transp. Co., [1895] 171 U. S. 133, 151,
43 U. S. (L ed.) 108, 114, 18 S. Ct. 500,
the court, speaking by Mr. Justice Peck-
ham, said: 'The right to a recovery of
the property transferred under an illegal
contract is founded upon the implied
promise to return or to make compensa-
tion for it.' Other cases are cited in the
margin.

"We need not go farther. It is en-
tirely clear that the judgment against the
defendant bank—which came into the
possession of the property, and was sub-
ject to the liabilities, of the Central Na-
tional Bank—was consistent with sound
legal principles and was intrinsically
right, even if the guaranty in question
was beyond the power of the guarantee-
ning bank, under the national banking
statutes. Whatever may be said as to
the validity of the written guaranty, now
alleged to be illegal, the judgment can
be supported as based wholly on the implied
contract, which made it the duty of the
Central National Bank, under the facts
disclosed, to account to the Cooper Ex-
change Bank for the money obtained from
the latter in execution of the agreement
made by the former with the borrower."

"Notice of invalidity of transaction.— In
Merchants' Bank v. Baird, (C. C. A. 8th
Cir. 1908) 160 Fed. 642, 90 C. C. A. 335,
17 L. R. A. (N. S.) 526, it was held that
a state bank was chargeable with notice
that the credit and resources of a national
bank were being unlawfully used, barring
recovery against the national bank's re-
ceiver on checks on the national bank by a
corporation, where the national bank's
president had written the state bank
obligating his bank unconditionally to pay
all checks of the corporation, not aggre-
grating more than $5,000 weekly, and the
national bank afterwards wired that it
would "protect" the corporation's checks
for $5,000 weekly in excess of "present
guaranty," and later that the state bank
could pay checks in excess of "guaranty"
drawn during the current week.

5. "Discounting and Negotiating
Evidence of Debt" a

a. In General

The words "by discounting and nego-
tiating promissory notes, drafts, bills of
exchange," and so forth, are not to be
read as limiting the mode of exercising
such incidental powers as shall be neces-
sary to carry on the business of banking,
but as descriptive of the kind of "bank-
ing" which is authorized. Charlotte First
Nat. Bank v. National Exch. Bank,
(1875) 92 U. S. 192, 23 U. S. (L. ed.)
The discount of negotiable paper is the form according to which national banks are authorized by this section to make their loans, and the terms "loans" and "discounts" are synonymous. National Bank v. Johnson (1851) 104 U. S. 271, 26 L. S. (L. ed.) 742.


b. Purchase of Notes, Etc.

In general.—It has been held that the right to discount and negotiate notes, etc., goes no further than to authorize the taking of them in return for a loan of money made on the strength of the promises contained in them, and does not contemplate a purchase in the market. Lazard v. National Union Bank, (1879) 52 Md. 78, 36 Am. Rep. 355; Rochester First Nat. Bank v. Pierson, (1877) 24 Minn. 140, 31 Am. Rep. 341.

But a larger number of cases have held that the right to "discount and negotiate" included the right to purchase. Morris v. Springfield Third Nat. Bank, (C. C. A. 8th Cir. 1905) 142 Fed. 25, 73 C. C. A. 211; Rochester First Nat. Bank v. Harris, (1871) 108 Mass. 514; National Pemberton Bank v. Porter, (1878) 125 Mass. 333, 28 Am. Rep. 235; Atlas Nat. Bank v. Savery, (1879) 125 Mass. 73; Prescott Nat. Bank v. Butler, (1893) 157 Mass. 548, 32 N. E. 909; Trenton First Nat. Bank v. Gillman, (1880) 72 Mo. 77. Nor where a national bank has bought notes and paid for them can it rescind the contract thus fully performed and executed, and recover back the money paid, upon the ground that it was a purchase which it had no authority to make. Attleborough Nat. Bank v. Rogers, (1878) 125 Mass. 339. Where the court said: "A corporation, acting without authority, is not in the position with the privileges of an infant to avoid an improvident contract, but in the position and subject to the disabilities of a wrongdoer, if it exceeds its authority."

c. Percentage of Discount

The Act of Congress does not prescribe the percentage that shall be charged as discount in order to make the purchase by discount not ultra vires or to give to the instrument the character of negotiable

S. C. 339, 55 Am. Rep. 26. See also Midtown First Nat. Bank v. New Kensington First Nat. Bank, (1915) 247 Pa. St. 40, 92 Atl. 1076, where the court said: "It is very clear that a contract to purchase bills of lading differs essentially from an agreement to purchase sight drafts. A bill of lading represents the goods which is in transit, and its purchase would mean the purchase and control of the goods. The trial judge very properly held that under the terms of its charter, a national bank had no authority to engage in such a transaction. On the other hand the purchase of drafts would clearly fall within the limits of the bank's authority.

A national bank may lawfully acquire title to commercial paper, although it may be unable to show that it has made a profit upon the purchase of the paper. Blairsville Nat. Bank v. Crabb, (1910) 44 Pa. Super. Ct. 454.

Purchasing notes at less than face value. —The power to discount promissory notes and other evidences of debt expressly given to national banks by this section is sufficiently comprehensive to include the purchase of notes at less than their face value. Morris v. Springfield Third Nat. Bank, (C. C. A. 8th Cir. 1905) 142 Fed. 25, 73 C. C. A. 211.

Effect of Ultra Vires Act.—But even assuming that national banks are not authorized under the law to go into the market and buy promissory notes from those who are selling them only as a commodity, and therefore that such purpose is ultra vires, yet such transaction being an ordinary contract, and not made penal nor expressly forbidden by law, the maker or indorser cannot defend on the ground that the bank obtained no title. National Pemberton Bank v. Porter, (1878) 125 Mass. 333, 28 Am. Rep. 235; Atlas Nat. Bank v. Savery, (1879) 125 Mass. 73; Prescott Nat. Bank v. Butler, (1893) 157 Mass. 548, 32 N. E. 909; Trenton First Nat. Bank v. Gillman, (1880) 72 Mo. 77. Nor where a national bank has bought notes and paid for them can it rescind the contract thus fully performed and executed, and recover back the money paid, upon the ground that it was a purchase which it had no authority to make. Attleborough Nat. Bank v. Rogers, (1878) 125 Mass. 339. Where the court said: 'A corporation, acting without authority, is not in the position with the privileges of an infant to avoid an improvident contract, but in the position and subject to the disabilities of a wrongdoer, if it exceeds its authority.'
paper. The per centum of discount is left optional with the bank so far as the title to the note and its negotiability are concerned. Nor does the Act of Congress require the bank to adopt any uniform per centum of discount; that matter is left optional with the bank, which may make the per centum of discount a subject of bargain upon the occasion of each purchase. Nicholson v. National Bank, (1891) 92 Ky. 251, 17 S. W. 627, 16 L. R. A. 223.

6. "Receiving Deposits"
   
a. Nature of Deposits


b. Special Deposits


See notes to R. S. sec. 5228, infra, p. 849.

It has been held that a national bank may make a lawful agreement to act as agent for the depositor in receiving his stolen deposit, at least where the bank’s property was stolen at the same time, and it will be liable for want of proper diligence, skill, and care in the performance of such undertaking. Wylie v. Northampton Bank, (1886) 119 U. S. 361, 7 S. Ct. 265, 30 U. S. (L. ed.) 455, reversing (S. D. N. Y. 1883) 15 Fed. 428.

Under its incidental powers a national bank may receive a deposit of bonds or other securities as collateral security for existing debts and for future loans and discounts, and its contract in such transaction is not a mere gratuitous bailment. Baltimore Third Nat. Bank v. Boyd, (1875) 44 Md. 47, 22 Am. Rep. 35.

So a national bank may become the depository of a fund which is to stand as security and be paid to a third person under certain contingency. Bushnell v. Chautauqua County Nat. Bank, (1878) 74 N. Y. 290; Sykes v. Canton First Nat. Bank, (1901) 2 S. D. 242, 49 N. W. 1068.

c. Deposits of Public Money

Under the grant of power to "make contracts" and to exercise "all such incidental powers," etc., a national bank may become a depository of public moneys, and may lawfully agree to pay interest on such deposits and to give a bond for such security. Nebraska v. Orleans First Nat. Bank, (C. C. Neb. 1899) 88 Fed. 947; Interstate Nat. Bank v. Ferguson, (1892) 48 Kan. 732, 20 Pac. 237.

Where a national bank in pursuance of a state law bids for the deposit of state moneys therein and becomes the depository of such funds, agreeing to pay interest on the daily balances, which are at all times subject to check, the transaction is a deposit and not a loan. Nebraska v. Orleans First Nat. Bank, (C. C. Neb. 1899) 88 Fed. 947.

A national bank, though not designated as a depository of public moneys, which accepts deposits by a postmaster of government money, is liable to the government as a bailee for all sums not withdrawn in the manner required by law, and it cannot apply on its personal claim against the postmaster a payment made by him to be applied toward making good a shortage in his balance. U. S. v. National Bank, (W. D. N. C. 1896) 73 Fed. 379.

A national bank which with knowledge of its officers receives funds of a city board deposited by the treasurer of such board to his personal account and used to reduce his liability to the bank, or deposited by him with a banking firm of which he was a member and placed to the credit of such firm with the bank, will be held liable as a party to the misappropriation. McNulta v. West Chicago Park Comrs., (C. C. A. 7th Cir. 1900) 99 Fed. 900, 40 C. C. A. 155.

A provision in the Bankruptcy Act, § 60a, is not created by the deposit of money to one’s credit in a bank. See cases cited in title BANKRUPTCY, vol. 1, p. 1013.
7. Loans, Collection and Security of Debts

a. Loan to Bank Officers

A loan may be made to the officers of the bank as well as to other persons. National Bank of Commerce v. National Bank, (1876) 30 Fed. Cas. No. 18,310.

b. Stipulations as to Attorneys' Fees

It has been held that a national bank has no power to insert in a note made to it a stipulation for an attorney's fee, and that such stipulation is not enforceable in an action on the note. Merchants' Nat. Bank v. Sevier, (E. D. Ark. 1882) 14 Fed. 662.

c. Collection and Security of Debts

In general—Under the grant of such "incidental powers," a national bank is authorized to adopt reasonable and necessary measures for the collection and security of debts (Shinkle v. Ripley First Nat. Bank, (1872) 22 Ohio St. 516; Cleveland v. Shoeman, (1883) 40 Ohio St. 176); such as taking an assignment of moneys due and to become due from a city to the bank's debtor on a contract for street paving (Ottawa First Nat. Bank v. Ottawa, (1890) 43 Kan. 294, 23 Pac. 485); taking a chattel mortgage (Gaar v. Centralia First Nat. Bank, (1886) 20 Ill. App. 611; Stafford v. Tama City First Nat. Bank, (1873) 37 Ia. 181, 18 Am. Rep. 6); taking possession of the mortgaged chattels (Cooper v. Washington First Nat. Bank, (1885) 40 Kan. 5, 18 Pac. 937); buying grain needed to seed a farm which the bank had been compelled to purchase on execution (Great Bend First Nat. Bank v. Bannister, (1888) 7 Kan. App. 787, 54 Pac. 20); taking an assignment of contracts of sale of grain for future delivery or of proceeds of grain shipped by the bank and sold for the debtor's benefit (Morris v. Dixon Nat. Bank, (1894) 55 Ill. App. 298); assigning a judgment in its favor (Emory v. Joice, (1879) 70 Mo. 537); selling grain and taking a seed grain lien (Parker First Nat. Bank v. Peavy Elevator Co., (1897) 10 S. D. 167, 72 N. W. 492).

A national bank may agree to pay taxes on shares of its stock assessed against the owners in consideration of being allowed to retain unpaid dividends and surplus. Lull v. Anamosa Nat. Bank, (1900) 110 Ia. 457, 81 N. W. 754.

A national bank, which, in the usual course of its business, has become the owner of notes secured by mortgage, may lawfully agree with others holding conflicting mortgages on the same property, to a joint action in an action to enforce the security, their respective rights in the proceeds to be subsequently determined, where such action was deemed best for its own interests, and, when vested with title to the other mortgages by proper assignments, its right to maintain the suit cannot be questioned by the defendant on the ground that its agreement was ultra vires. Morris v. Springfield Third Nat. Bank, (C. C. A. 8th Cir. 1905) 142 Fed. 25, 73 C. C. A. 211.

A national bank may not become the absolute owner, in satisfaction of a debt, of shares represented by transferable certificates in a partnership formed to purchase, improve, divide into lots, and sell a leasehold. Merchants' Nat. Bank v. Wehrmann, (1906) 202 U. S. 295, 26 S. Ct. 613, 50 U. S. (L. ed.) 1036 (reversing (1903) 69 Ohio St. 160, 66 N. E. 1004), where the court said: "This is a bill for the dissolution of a partnership, a receiver and an account. The partnership was formed to purchase, improve, divide into lots, and sell a leasehold. There were forty shares in the firm represented by transferable certificates. The plaintiff in error took nine of these shares as security for a debt, and afterwards became the owner of them in satisfaction of the debt, subject to the question whether the transaction was within the power of a national bank. It was found at the trial that the partners must contribute to pay the debts of the firm, and, some of them being insolvent, the bank was charged with the full share of a solvent partner. The supreme court of the state held this to be wrong, but decided that the bank became a part owner of the property, and that, as it joined in the management of the same, it was liable for nine fortieths of the expenses, which constituted the debts of the firm. [1903] 69 Ohio St. 160, 66 N. E. 1004. A decree was entered to that effect, and the bank brought the case here. . . ."

"The question of substantive law presented is not without difficulty. It is not disposed of by the general proposition that a national bank must take the way of security, property in which it is not authorized to invest, and may become owner of it by foreclosure or in satisfaction of a debt. It is not disposed of even by the decisions that it may acquire stock in a corporation in this way (Charlotte First Nat. Bank v. National Exch. Bank, (1876) 92 U. S. 122, 23 U. S. (L. ed.) 679), and so subject itself to the liability of a stockholder for the corporate debts (Germania Nat. Bank v. Case, (1879) 99 U. S. 628, 25 U. S. (L. ed.) 463; Cal-ifornia Sav. Bank v. Kennedy, (1897) 167 U. S. 362, 366, 367, 42 U. S. (L. ed.) 198, 200, 17 S. Ct. 831; Ottawa First Nat. Bank v. Converse, (1906) 200 U. S. 425, 438, 26 S. Ct. 306, (50 U. S. (L. ed.) 537, 542)—a proposition not shaken by Scott v. Dewees, (1901) 131 U. S. 262, 218, 45 U. S. (L. ed.) 822, 830, 21 S. Ct. 585. For it does not follow that because the interest in a partnership is represented by a paper certificate in form more or less resembling a certificate of stock in
a corporation and transferable like it, a national bank can take the partnership certificate to the same extent that it could take the stock.

"As the supreme court of Ohio assumes such partnerships and certificates to be valid, we are compelled to be correct. Wilson [1828] 3 Ohio 425; Walburn v. Ingilby [1833] 1 Myl. & K. (Eng.) 61, 76; In re Mexican, etc., Co. [1859] 27 Beav. (Eng.) 474, 481, 4 De G. & J. 320; Phillips v. Blatchford [1884] 157 Mass. 610. We may assume further, in accordance with a favorite speculation of these days, that philosophically a partnership and a corporation illustrate a single principle, and even that the certificate of a share in one represents property in very nearly the same sense as does a share in the other. In either case the members could divide the assets after paying the debts. But, from the point of view of the law, there is a very important difference. The corporation is legally distinct from its members, and its debts are not their debts. Therefore, when a paid-up share in a corporation is taken, no liability is assumed, apart from statute, but simply a right equal in value to a corresponding share in the assets and good will of the concern after its debts are paid. If the right is worth something, it is a proper security; and if it is worth nothing, no harm is done. It is true that a statute may add a liability, but when, as usual, this is limited to the par value of the stock, it has not been considered to affect the nature of the share so fundamentally as to prevent a national bank from taking it in pledge, with qualifications, as it might take land or bonds.

But to take a share by transfer on the books means to become a member of the concern. The person who appears on the books of the corporation as the stockholder is the stockholder as between him and the corporation, and his rights with regard to the corporate property are incident to his position as such. Germany Nat. Bank v. Case [1875] 99 U. S. 628, 631, 25 U. S. (L. ed.) 448, 449; Pullman v. Upton [1878] 96 U. S. 328, 24 U. S. (L. ed.) 818. This does not matter, or matters less, in the case of a corporation, for the reasons which we have stated. But when a similar transfer is made on the books in a partnership, it means that the transferee at once becomes a member of the firm and goes into its business with an unlimited personal liability,—in short, does precisely what a national bank has no authority to do. This the supreme court of Ohio rightly held beyond the powers of the bank. U. S. Rev. Stat. §§ 5136, 5137. It is true that it has been held that a pledgee may escape liability if it appears on the certificate and books of the bank that he is not a pledgee. Pennsylvania State Loan, etc., Co. [1897] 165 U. S. 606, 41 U. S. (L. ed.) 844, 17 S. Ct. 465; Robinson v. Southern Nat. Bank [1901] 180 U. S. 295, 45 U. S. (L. ed.) 536, 21 S. Ct. 353; Rankin v. Fidelity Ins. Co., etc., Co. [1903] 189 U. S. 242, 249, 47 U. S. (L. ed.) 792, 795, 23 S. Ct. 553. No doubt the security might be realized without the pledgee ever becoming a member of the firm. It is not necessary in this case to say that shares like the present could not be accepted as security in any form by a national bank. But such a bank cannot accept an absolute transfer of them to itself. It recently has been decided that a national bank cannot take stock in a new speculative corporation, with the common double liability, in satisfaction of a debt. Ottawa First Nat. Bank v. Converse [1800] 200 U. S. 425, 25 S. Ct. 308, 50 U. S. (L. ed.) 537. A tortorriari, it cannot take shares in a partnership to the same end.

"We are of opinion that with the liability as partner all liability fails. The transfer of the shares to the bank was not a direct transfer of a legal interest in the leasehold, which was in the hands of trustees. It was simply a transfer of a right to have the property accounted for and to receive a share of any balance left after paying debts, and the acquisition of this right was incident solely to membership in the firm. If the membership failed the incidental rights failed with it, and with the rights the liabilities also disappeared. Becoming a member of the firm was the condition of both consequences. As the bank was not estopped by its dealings to deny that it was a partner, it was not estopped to deny all liability for partnership debts. See California Sav. Bank v. Kennedy [1897] 167 U. S. 362, 367, 42 U. S. (L. ed.) 198, 200, 17 S. Ct. 831. It seems to us unnecessary to add more in order to show that the claim against the plaintiff in error must be dismissed."

A national bank has power to lend money upon the note or other personal obligation of the borrower secured by the pledge of a warehouse receipt for merchandise belonging to the creditor. Shoeman v. Shoe, (1883) 49 Ohio St. 176.

A creditor of a shipper of goods, who claims the goods on attachment as against a national bank which holds a bill of lading as security for moneys advanced on a draft for the price, cannot object that the bank had no authority to take the goods as security for a loan. Ayres, et al. v. Dorsey Produce Co., (1897) 101 Iowa 141, 70 N. W. 111, 63 A. S. R. 376.

The mere fact that certificates of stock originally issued to persons connected with a national bank are subsequently transferred to the bank, and some of the certificates are surrendered and reissued in the name of the bank, is not sufficient to show that the stock was acquired by the bank as collateral security. Chemical Nat. Bank v. Havermale, (1878) 120 Cal. 601, 52 Pac. 1071, 65 A. S. R. 206.


The omission of a national bank to take security for a loan of money is not available as a defense in an action to recover the amount. Union Gold Min. Co. v. Rocky Mountain Nat. Bank, (1873) 2 Colo. 248.


d. Ultra Vires Transaction

Under this section prescribing the powers of national banks, authorizing them to take personal property as security for loans or for bills of exchange purchased by them, but not to deal in merchandise of any kind, the fact that the transfer to a national bank of bills of lading attached to drafts on a purchaser of hay amounted to an incident of the banking business, and the final purchaser to recover from the bank for deficiency in the quality of the hay, since the transaction would be ultra vires. Leonhardt v. Small, (1906) 117 Tenn. 153, 66 S. W. 1051, 119 A. S. R. 994, 6 L. R. A. (N. S.) 387.

8. Collecting Agents

A national bank may engage in the business of collecting notes, checks, bills of exchange, and other evidences of debt as an incident of the banking business, although the authority is not expressly mentioned in the statute; and it is liable for negligence therein to the same extent as other banks and collecting agents.


Taking assignment of claims for collection.—A national bank may take an absolute assignment of a claim for collection, and agree to pay the proceeds thereof to another, and by such transfer the legal title passes to the bank, and its agent to collect the money thereon cannot refuse to pay it to the bank, on the ground that it had no legal right to own such claim. King v. Miller, (1908) 53 Ore. 53, 97 Pac. 542.

Acting as trustee and maintaining suit on commercial paper in hands for collection.—"A national bank cannot act as a technical trustee and hold land for the benefit of third persons. It cannot, for example, act as trustee under a railroad mortgage, nor take title to property to be held for the life of the grantor, with remainder to his children. Every such transaction would be voidable at the instance of the Government. . . . But under Revised Statutes, § 5130, it may exercise all such incidental powers as shall be necessary to carry on banking, and it may therefore act as a fiduciary and occupy a trust relation in matters connected with that business. It may do those acts and occupy those relations which are usual or necessary in making collections of commercial paper and other evidences of debt. It is both usual and proper for the legal title to negotiable instruments to be vested in a bank by mere endorsement for purposes of collection, holding the proceeds as the endorsement directs. There is no difference in law if the title is conveyed by a longer and more formal instrument. In both cases the bank takes the legal title for the purpose of demand and collection. In a proper case the bank might then take further action after it might not go further and institute suit thereon in its own name for the recovery of what may be due. If the transfer was made, or the suit was being maintained, for purposes not authorized by the charter of the bank, and if the defendant was in
a position where his rights were prejudiced thereby, it would be incumbent on him to raise that defense at the outset of the litigation, or as soon as he learned that fact." Miller v. King, (1912) 223 U. S. 605, 32 S. Ct. 243, 56 U. S. (L. ed.) 528.

9. Certification of Noncommercial Checks

Under this section, empowering national banks to perform all acts incident to the carrying on of banking business by discounting or negotiating notes, bills of exchange, or other evidence of debt, and by loaning money on personal security, etc., a bank had no power to certify an instrument by which the drawers agreed to pay their surety any amount the surety might be legally required to pay by virtue of such suretyship, not exceeding $10,150, to a check to be void in the absence of such liability; such instrument not being a commercial check, drawn in the ordinary course of banking business. Maryland Fidelity, etc., Co. v. National Bank of Commerce, (1863) 48 Tex. Civ. App. 301, 106 S. W. 782.

10. Agreement to Pay Draft


Contra.—It is not ultra vires for a national bank to promise to honor a draft upon a patron. Farmers' etc., Nat. Bank v. Illinois Nat. Bank, (1908) 146 Ill. App. 136.

In Hutchins v. Planter's Nat. Bank, (1901) 128 N. C. 72, 58 S. E. 232, the defendant national bank was held liable on its agreement to pay a draft drawn by the plaintiff on a certain firm for goods shipped to such firm, where such shipment was made in reliance upon the agreement of the bank.

A national bank may make a valid oral acceptance of a check or a valid oral promise to pay it where at the time there are sufficient funds of the drawer in the bank's hands to meet it. Merchants' Nat. Bank v. Wheeling First Nat. Bank, (1874) 7 W. Va. 544.

A national bank may make a valid conditional acceptance of a check by promising to pay it whenever a draft left with the bank for collection by the drawer, and sufficient in amount for the purpose, shall have been paid. Merchants' Nat. Bank v. Wheeling First Nat. Bank, (1874) 7 W. Va. 544.

A national bank may make a valid contract to protect the checks of a depositor to a certain amount in consideration of the deposit of negotiable railroad bonds as security, and such contract is not rendered invalid by the subsequent certification of such checks by the bank when the depositor has no deposit or funds on hand to pay such checks. Thompson v. St. Nicholas Nat. Bank, (1889) 113 N. Y. 325, 21 N. E. 57, affirmed (1889) 47 Hun (N. Y.) 621, 15 N. Y. St. Rep. 110.

11. Dealing in Bonds


While national banks have no right to deal in corporate bonds, yet it is no defense to a suit by a national bank on such bonds that the bank had no power under its charter to purchase them. Lexington v. Union Nat. Bank, (1897) 75 Miss. 1, 22 So. 291; and so where a bank has purchased such bonds under an agreement to resell them to the seller at the same or a smaller price, it cannot retain the bonds and still refuse to perform its agreement. Logan County Nat. Bank v. Townsend, (1891) 139 U. S. 67, 11 S. Ct. 496, 35 U. S. (L. ed.) 107.

Interest coupons under seal attached to municipal bonds are evidences of debt in the nature of promissory notes, and are not within the prohibition of dealing in such bonds. North Bennington First Nat. Bank v. Bennington, (1879) 16 Blatchf. 53, 9 Fed. Cas. No. 4,807.


12. Miscellaneous Transactions

a. Independent Business Enterprises

A national bank cannot engage in an independent business enterprise such as manufacturing, mining, etc. John A.

But where it has lawfully acquired a business enterprise, it may put the property in the hands of the purchasers, and may do such things as are necessary to secure its claim. John A. Roebling Sons’ Co. v. Richmond First Nat. Bank, (D. C. W. Va. 1887) 30 Fed. 744; Cockrill v. Abeeles, (C. C. A. 8th Cir. 1896) 86 Fed. 505, 58 U. S. App. 648, 30 C. C. A. 223; Cooper v. Hill, (C. C. A. 8th Cir. 1899) 94 Fed. 582, 36 C. C. A. 402.

The fact that the bank is engaged in an unlawful business is no defense to a suit by it to recover its property used therein. Thus, where a national bank joined with another person in a partnership to operate a mill, and lent money to the firm, the fact that the bank had no power to become a partner in a business enterprise was held to constitute no defense to an action to recover the sum lent. Cameron v. Decatur First Nat. Bank, (Tex. Civ. App. 1896) 34 S. W. 178, affirming (1893) 4 Tex. Civ. App. 309, 23 S. W. 334.

Nor can a national bank set up the fact that it is engaged in an unlawful business to defeat a claim against it to recover property of others used by it in such business. Thus, where a national bank, having taken an elevator as security for a pre-existing debt against a warehouse man, is carrying on the elevator business, it is still liable to the owner of a grain receipt, having grain in the elevator, for failure to deliver up the grain on demand. German Nat. Bank v. Meadowcroft. (1879) 4 Ill. App. 630, affirmed (1880) 96 Ill. 124, 35 Am. Rep. 137.

Where a national bank took over the operation of a creamery corporation which was largely indebted to it, and continued the operation of the creamery until a receiver was appointed for the bank, at which time it held certain funds actually identified in trust for the patrons of the creamery, it was no answer to the receiver’s obligation to pay over such funds that the bank had no power to engage in the creamery business. Emigh v. Earling, (1906) 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243.

b. Savings Bank Business

A national bank is not a savings bank, and it cannot transact the same kind of business that a savings bank is incorporated to do, and, though a national bank has a savings department, it does not receive deposits to be invested in specified securities under the supervision of the bank, and in any event it does not hold the deposits on a trust creating the relation of trustee and cestui que trust, but on a contract creating the relation of debtor and creditor. State v. People’s Nat. Bank, (1906) 75 N. H. 27, 70 Atl. 542, 21 Ann. Cas. 1204. See also Barrett v. Bloomfield Sav. Inst., (1904) 66 N. J. Eq. 431, 57 Atl. 1131.

If a national bank attempts to compete with a savings institution, the latter should apply to the proper national bank from seeking savings deposits. Barrett v. Bloomfield Sav. Inst., (1904) 66 N. J. Eq. 431, 57 Atl. 1131; affirming (1903) 64 N. J. Eq. 425, 54 Atl. 543.

Nature of agreement to pay interest.—A national bank receiving money from depositors for investment, under an agreement to pay a fixed rate of interest thereon, is a debtor to the depositors for the deposits and interest, for the interest agreed to be paid on the money received is not in the nature of a dividend of profits realized from the successful management of the bank, and the depositors’ security depends on the general solvency of the bank. State v. People’s Nat. Bank, (1905) 75 N. H. 27, 70 Atl. 542, 21 Ann. Cas. 1204.

c. Member of Partnership

A national bank cannot be a member of a partnership, or become liable as a partner. Merchants’ Nat. Bank v. Wehrman, (1903) 69 Ohio St. 160, 59 E. 1004, affirmed on this point, but reversed on another ground in (1906) 202 U. S. 295, 26 S. Ct. 613, 50 U. S. (L. ed.) 1036, the opinion in the latter case being quoted substantially in full, supra, this note, p. 671.

d. Acting as Broker

A national bank is not authorized to act as a broker in loaning the money of others. Grow v. Cockrill, (1897) 63 Ark. 418, 39 S. W. 60, 36 L. R. A. 89; Keyser v. Hitz, (1883) 2 Mackey (D. C.) 513.


In Decatur First Nat. Bank v. Priest, (1899) 50 Ill. 321, where a national bank had advanced a sum of money to the owner of a lot of whiskey, and was
employed by him to ship and sell the whiskey on commission and retain out of the proceeds the money advanced and a reasonable commission, the fact that the contract was ultra vires was held to be no defense to a suit to recover the balance, though the bank could have been held liable for negligence in the performance of the contract.

Allentown First Nat. Bank v. Hoch, (1879) 89 Pa. St. 324, 33 Am. Rep. 769, was an action against a national bank on a receipt given to the plaintiff, signed by the president of the bank, which acknowledged the receipt of a certain sum "to be invested" in certain municipal bonds, "interest on said deposit to be allowed from this date and to be accounted for on demand." The money was deposited to the individual account of a third person to be invested in such bonds. It was held that the primary purpose of the contract was the purchase of municipal bonds, and as such it was ultra vires, and the bank never having received the money was not liable.

A contract made by a national bank as broker for a client to sell stock of another corporation is ultra vires, and the purchaser cannot recover damages for its breach. Hotchkin v. Syracuse Third Nat. Bank, (1914) 219 Mass. 234, 108 N. E. 974, where the court said: "If the defendant had held the stock as collateral security for a loan it could upon default of the debtor have made the security available by enforcing its rights as pledgee, and, if necessary for its protection, it could become the owner at the sale and hence a shareholder in the transit company. It would have acquired title in the exercise of a power incidental to the making of the loan. Germania Nat. Bank v. Case, [1879] 99 U. S. 628, 25 U. S. (L. ed.) 448; Charlotte First Nat. Bank v. National Exch. Bank, [1876] 92 U. S. 122, 23 U. S. (L. ed.) 679. The stock when accepted as payment or in satisfaction of the loan can be subsequently converted into money, although so long as the bank remains a shareholder it is subject to the same liability as other shareholders. -Concord First Nat. Bank v. Hawkins, [1899] 174 U. S. 364, 365, 19 S. Ct. 739, 43 U. S. (L. ed.) 679. But such transactions are obviously distinguishable from the business of buying and selling stocks, as a source of revenue or profit, which would subject the capital contributed by the stockholders to the hazards of speculation, independently of the ordinary risks of banking. The power to engage in such an enterprise, however attractive it may be, is not expressly given by the statute, nor can it be implied as incident to the business of banking which it is chartered to transact. California Sav. Bank v. Kennedy, [1897] 167 U. S. 362, 17 S. Ct. 831, 42 U. S. (L. ed.) 193." e. Assuming Obligations of Insolvent Bank

Where a contract by which a national bank assumed all the obligations of an insolvent bank in consideration of a compliance with the regulations was fully explained at a meeting at which 1,665 out of 2,000 shares were represented, and after the contract was executed it was ratified by a vote exceeding the proportion of stock specified by R. S. (1912) 169, 2221, infra, pp. 843, 847, the stockholders were not thereafter entitled to claim that such contract was ultra vires. George v. Wallace, (C. C. A. 8th Cir. 1904) 135 Fed. 286, 68 C. C. A. 40.

f. Dealing in Stock of Other Corporations, Including National Banks


An agreement to purchase such stock is not enforceable. Tillinghast v. Carr, (C. C. Wash. 1897) 82 Fed. 298.

NATIONAL BANKS


In Concord First Nat. Bank v. Hawkins, (1899) 174 U. S. 364, 19 S. Ct. 739, 43 U. S. (L. ed.) 1007, reversing (C. C. A. 1st Cir. 1897) 79 Fed. 51, 33 U. S. App. 747, 24 C. C. A. 444, the court said: "The questions presented for our consideration in this case are whether one national bank can lawfully acquire and hold the stock of another as an investment, and, if no, whether, in the case of such an actual purchase, the bank is estopped to deny its liability, as an ap-
liability as a stockholder in another national bank, and that therefore it does not follow beyond question that the decision in the former case is decisive of the present one. 50 U. S. App. 178. No reason is given by the learned judge in support of the solidity of such a distinction, and none occurs to us. Indeed, we think that the reasons which disqualify a national bank from investing its money in the stock of another corporation are quite as obvious when that other corporation is a national bank as in the case of other corporations. The investment by national banks of their surplus funds in other national banks, situated, perhaps, in distant states, as in the present case, is plainly against the meaning and policy of the statutes from which they derive their powers, and evil consequences would be certain to ensue if such a course of conduct were countenanced as lawful. Thus, it is enacted, in section 5146, that ‘every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the state, territory, or district in which the association is located for at least one year immediately preceding their election, and must be residents therein during their continuance in office.’

‘One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may for that reason, be supposed to know the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money. But if the funds of a bank in New Hampshire, instead of being retained in the custody and management of its directors, are invested in the stock of a bank in Indiana, the policy of this wholesome provision of the statute would be frustrated. The property of the local stockholders, so far as thus invested, would not be managed by directors of their own selection, but by distant and unknown persons. Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that, in that way, the banking capital of a community might be concentrated in one concern, and business men be deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock and the methods to be pursued in increasing or reducing it. The smaller banks, in such a case, would be in fact, though not in form, branches of the larger one.

Section 5136 may also be referred to as indicating the policy of this legislation. It is in the following terms: ‘No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased and held, shall, within four months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association.' This provision forbidding a national bank to own and hold shares of its own capital stock would, in effect, be defeated if one national bank were permitted to own and hold a controlling interest in the capital stock of another.

‘Without pursuing this branch of the subject further, we are satisfied to express our conclusion, upon principle and authority, that the plaintiff in error, as a national banking association, had no power or authority to purchase with its surplus funds as an investment, and hold as such, shares of stock in the Indianapolis National Bank of Indianapolis.

‘The remaining question for our determination is whether the First National Bank of Concord, having, as a matter of fact, but without authority of law, purchased and held as an investment shares of stock of the Indianapolis National Bank, can protect itself from a suit by the receiver of the latter brought to enforce the stockholders’ liability, arising under an assessment by the comptroller of the currency, by alleging the unlawfulness of its own action.' The court then proceeded to hold that the bank was not estopped to deny such liability, and judgment against it by the court below was reversed.


g. Dealing in Mortgages


VI. BUSINESS PRELIMINARY TO ORGANIZATION

In general—‘Until the association has been authorized by the comptroller to commence the business of banking, § 5136 preemptorily forbids the corporation to transact any business whatever, whether appertaining or not to the business of banking, except such as is incidental and necessarily preliminary to its organization.' The only business which it is per-
mitted to transact is 'such as is incidental and necessarily preliminary,' not to carrying on, or even to commencing, the business of banking, but 'to its organization,' that is to say, such as is requisite to complete its organization as a corporation, which might doubtless include electing directors and officers, receiving subscriptions and payments for shares, procuring a corporate seal, and a book for recording its proceedings, temporarily hiring a room, and contracting any small debts incidental to the completion of its organization. McCormick's Market Nat. Bank, (1897) 165 U. S. 538, 17 S. Ct. 433, 41 U. S. (L. ed.) 817, affirming (1896) 162 Ill. 106, 44 N. E. 381.

"To take a lease is certainly to transact business, within the meaning of the statute; and a lease for a term of years at a large rent, of office to be occupied by the bank 'as a banking office, and for no other purpose,' however necessary it may be for the conducting, directing, or even for the commencing, of banking business by a corporation whose organization had been completed, and which had been lawfully authorized to commence the business of banking, is in no sense incidental or necessarily preliminary to the organization of the corporation." McCormick v. Market Nat. Bank, (1897) 165 U. S. 538, 17 S. Ct. 433, 41 U. S. (L. ed.) 817, affirming (1896) 162 Ill. 100, 44 N. E. 381.

The directors of a national bank, who execute a lease in the name of the bank for premises for the banking business before receiving a certificate of the comptroller authorizing the bank to do business, though after the bank has been completely organized, are not liable as co-partners, for in such case they are acting as agents not of an assumed corporation, but of a corporation de jure, yet powerless to make such a contract. Seeberger v. McCormick, (1899) 178 Ill. 404, 53 N. E. 340; Salem First Nat. Bank v. Almy, (1875) 117 Mass. 476. Subsequent directors may be liable on the subsequent abandonment of the organization and the surrender of the building in an action ex contractu upon their implied warranty of power to enter into the lease, where the lessor was ignorant of the fact that the bank had no certificate from the comptroller authorizing it to transact business. Seeberger v. McCormick, (1899) 178 Ill. 404, 53 N. E. 340.

Other transactions.—A bank is not liable on prohibited contracts entered into by its promoter and officer unless it has approved and adopted the contract subsequently to the issuance of the comptroller's certificate of authority to commence business. McDonough v. Houston First Nat. Bank, (1870) 34 Tex. 306.

An agreement by the promoters, who subsequently became directors of the bank, to pay one of their number for his services as an executive officer is not binding on the bank. Citizens' Nat. Bank v. Elliott, (1880) 55 Ia. 104, 7 N. W. 470, 39 Am. Rep. 167.

An agreement with a person to become cashier is not binding. Regester v. Medcalf, (1899) 71 Md. 598, 18 Atl. 866.

An agreement to pay for services in procuring subscriptions made by a promoter is not binding. Tift v. Quaker City Nat. Bank, (1891) 141 Pa. St. 550, 21 Atl. 660.


VII. ULTRA Vires TRANSACTIONS


Contra.—The following cases to the contrary may be considered as overruled:


Taking real estate security for contemporaneous debt.—In Baker v. Schofield, (C. C. A. Cir. 1915) 220 Fed. 322, 136 C. C. A. 320, the court ruled that "it is no longer open to controversy that the provisions of the statutes of the United States forbidding the taking of real estate security by a national bank for a debt coincidently contracted do not operate to make the security void, and thus enable the individual who has contracted with the bank to defeat recovery, but simply subject the bank to be called to account by the government for exceeding its powers."


In Aldrich v. Chemical Nat. Bank, (1900) 176 U. S. 618, 20 S. Ct. 498, 44 U. S. (L. ed.) 611, affirming (C. C. A. 6th Cir. 1897) 83 Fed. 556, 54 U. S. App. 462, 27 C. C. A. 601, the court said: "Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice-president of the Fidelity Bank who assumed to represent it in the transaction, and as the Fidelity Bank used the money so obtained in the banking business and for its own benefit, the latter bank, having enjoyed the fruits of the transaction cannot avoid accountability to the New York bank, even if it were true, as contended, that the Fidelity Bank could not consistently with the law of its creation have itself borrowed the money."

"After a contract has been ratified and the corporation has received the benefit of the agreement, it cannot hold the benefit and at the same time claim release from the agreement on the ground that it is ultra vires or beyond the power of the officer to make it." Lineville First Nat. Bank v. Exeter Bank, (1907) 152 Ala. 586, 44 So. 868.
A national bank, having lawfully received property, must account for it or its proceeds, notwithstanding some ultra vires agreement connected with the transaction; and it cannot escape liability to a depositor for money which he placed in its hands by pleading that it made with him an ultra vires agreement to pay out the money to some third person on deposit of collaterals for his benefit, when the evidence shows it paid out the money without taking the collaterals agreed on. Decatur First Nat. Bank v. Henry, (1906) 159 Ala. 367, 49 So. 97.

Sec. 5137. [Power to hold real property.] A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years. [R.S.]
I. "Purchase, hold, and convey real estate," 682
1. Power in general, 682
2. Effect of ultra vires acts, 682
II. For "immediate accommodation," etc., 685
III. Mortgage "security for debts previously contracted, 686
IV. Conveyance "in satisfaction of debts," 686
V. "Purchase at sales" or "to secure debts," 686
VI. Time limit of five years, 687

I. "PURCHASE, HOLD, AND CONVEY REAL ESTATE"

1. Power in General

"The object of the restrictions was obviously threefold. It was to keep the capital of the bank flowing in daily channels of commerce; to deter it from engaging in hazardous real-estate speculations; and to prevent the accumulations of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter of the statute, constitutes the law." Union Nat. Bank v. Matthews, (1875) 95 U. S. 621, 25 U. S. (L. ed.) 188, reversing (1876) 62 Mo. 329, 21 Am. Rep. 425. To the same point see Nashville Fourth Nat. Bank v. Stahlman, (1915) 132 Tenn. 367, 178 S. W. 942.


An indorsement of a promissory note by a married woman by its terms charging her separate estate with the payment of the note, is not a mortgage in any sense. It is simply a personal security within the meaning of the National Bank Act, and a national bank is not prohibited from taking it. Third Nat. Bank v. Blake, (1878) 73 N. Y. 260.

Discounting paper secured by mortgage. —The cases distinguish between a loaning of money on real estate and the discounting of a note which is secured by a deed of trust or mortgage. The loan in the latter case is not prohibited and the bank may take an assignment of such security. The right to enforce the security would in any event pass to the bank as an incident to the note without an assignment.


Conveyance of real estate by bank.— There is no restriction as to the power of a national bank to convey real estate, and it may sell its real estate and reserve a mortgage to secure the price, New Orleans Nat. Bank v. Raymond, (1877) 29 La. Ann. 305; Memphis First Nat. Bank v. Kidd, 20 Minn. 234; or it may take chattels in payment. Ottumwa First Nat. Bank v. Reno, (1887) 73 Ia. 145.

2. Effect of Ultra Viros Acts

In general.—"In the absence of a clear expression of legislative intention to the contrary, a conveyance of real estate to a corporation for a purpose not authorized by its charter is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers." Kerfoot v. Farmers', etc. Bank, (1910) 121 U. S. 281, 31 S. Ct. 14, 54 U. S. (L. ed.) 1042.


The validity of a mortgage upon realty executed to a national bank can be questioned only by the federal government. Taylor v. Davidson, (Tex. Civ. App. 1909) 129 S.W. 1018, a suit for partition, where the plaintiff claimed the land (which was occupied) in virture of a judgment obtained by a national bank in the foreclosure of a deed of trust on the land given to the bank by the owner. The court said: "The proposition of appellant [defendant] is that a national bank cannot accept a lien upon real estate for a loan then being made, and, when such lien is taken, the same is void as against the interest of third parties, and a foreclosure and sale of the property under such lien as against the interest of third parties would not pass title to the property covered by the lien. The authorities cited by appellant do not sustain the proposition. The authorities are overwhelmingly to the contrary."

In Union Nat. Bank v. Matthews, (1878) 95 U.S. 621, 25 U.S. (L. ed.) 188, reversing (1876) 62 Mo. 329, 21 Am. Rep. 425, the bank was the assignee of a note and a deed of trust on real estate in Missouri which had been given to secure the note, the assignment to the bank having been made to secure a loan to the assignor, who was the payee of the note. Upon failure to pay the note at maturity, the bank directed the trustee named in the deed of trust to sell, whereupon the maker of the note who executed the deed of trust filed a bill in the proper state court to enjoin the sale, contending that the loan by the bank, being made upon real-estate security, was forbidden by law, and that the deed of trust was therefore void. Holding that the state court erred in granting such injunction the Supreme Court (Mr. Justice Miller dissenting) said: "This case involves a question arising under the national banking law, which has not heretofore been passed upon by this court. We have considered it with the care due to its importance. Our attention has been called to but a single point which requires consideration, and that is whether the deed of trust can be enforced for the benefit of the bank... Sect. 5316 does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. Non constat, that the maker who executed the deed would not have been deemed abundantly sufficient without the further security. The deed, as a mortgage would have been, was an incident to the note and a right to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter. The object of the restrictions was obviously threesome. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real-estate speculations; and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain. The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garnishees are unappotted. Under these circumstances, the defense of ultra vires, if it can be made, does not address itself favorably to the mind of the chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error. In The Fort Dodge First Nat. Bank v. Haire, (1873) 38 Iowa 443, the bank refused to discount the note for a firm, but agreed that one of the partners might execute a note to the other, that the payee should indorse it, that the bank should discount it, and that
the maker should indemnify the indorser by a bond and mortgage upon sufficient real estate executed for that purpose, with a stipulation that, in default of due payment of the note, the bond and mortgage shall inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and indorser failed and became bankrupts. The bank filed a bill to foreclose. The same defense was set up as here. In disposing of this point, the Supreme Court of the State said: 'Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors; and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this. Silver Lake Bank v. North, [1820] 4 Johns. Ch. (N. Y.) 370.' But it is alleged by the learned counsel for the defendant in error that in the jurisprudence of Missouri a deed of trust is the same thing in effect as a direct mortgage,—with respect to a party entitled to the benefit of the security,—and authorities are cited in support of the proposition. The opinion of the Supreme Court of Missouri assumes that the loan was made upon real-estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question with the court in the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined. In Harris v. Runnels, [1851] 12 How. 79 [13 U. S. (L. ed.) 901], the court said that 'the statute must be examined as a whole, to find out whether or not the makers meant that a contract in contravention of it was to be void, so as not to be enforced in a court of justice.' In that case, a note given for the purchase-money of slaves, taken into Mississippi contrary to a statute of the state, was held to be valid. Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid; but the penalty attaches to the officer who did the prohibited act. Milford v. Worcester, [1810] 7 Mass. 48; Parton v. Her-vey, [1854] 1 Gray (Mass.), 119; King v. Birmingham, [1828] 8 Barn. & Cress. 29 [15 E. C. L. 151]. Where a bank is limited by its charter to a specified rate of interest, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void. Planters' Bank v. Sharp, [1844] 4 Smedes & M. (Miss.) 75 [43 Am. Dec. 470]; Grand Gulf Bank v. Archer, [1847] 8 Smedes & M. (Miss.) 151; Rock River Bank v. Sherwood, [1860] 10 Wis. 230, [78 Am. Dec. 669]. The charter of a savings institution required that its funds should be 'invested in, or loaned on, public stocks or private mortgages,' &c. A loan was made and a note taken, secured by a pledge of worthless bank-stock. The borrower sought to enjoin the collection of the note upon the ground that the transaction was forbidden by the charter, and therefore void. The court held the borrower bound, and upon a counter-claim adjudged that he should pay the amount of the loan with interest. Mott v. U. S. Trust Co., [1855] 19 Barb. (N. Y.) 508. Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. Leazure v. Hillegas, [1821] 7 Serg. & R. (Pa.) 313; Goundie v. Northampton Water Co., [1847] 7 Pa. St. 233; Runyan v. Coster, [1840] 14 Pet. 122 [10 U. S. (L. ed.) 392]; Banks v. Poitiaux, [1825] 3 Rand. (Va.) 136 [15 Am. Dec. 706]; McIndoe v. St. Louis, [1847] 10 Mo. 575, 577. See also Union Gold Min. Co. v. Rocky Mountain Nat. Bank, [1878] 90 U. S. 646, 124 U. S. (L. ed.) 53. The authority first cited is elaborate and exhaustive upon the subject. So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found. Fairfax v. Hunter, [1813] 7 Cranch 693, 694 [3 U. S. (L. ed.) 23]. Lamson v. North, [1892] 4 Johns. (N. Y.) Ch. 370, the bank was a Pennsylvania corporation, and had taken a mortgage upon real estate in New York. A bill of foreclosure was filed in the latter state. The answer set up as a defense 'that by the act of incorporation the plaintiffs were not authorized to take a mortgage except to secure a debt previously contracted in the course of its dealings; and here the money was lent after the bond and mortgage were executed.' The analogy of this defense to the one we are considering is too obvious to need remark. Both present exactly the same question. Chancellor Kent said: 'Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong;
to the government of Pennsylvania to
effect a forfeiture of their charter, than
for this court in this collateral way to
decide a question of misusery, by setting
aside an application to the loan.
'If the loan and mortgage were concur-
rent acts, and intended so to be, it was
not a case within the reason and spirit
of the restraining clause of the statute,
which only meant to prohibit the banking
company from vesting their capital in
real property, and engaging in land specu-
lations. A mortgage taken to secure a loan
advanced bona fide as a loan, in the course
and according to the usage of banking
operations, is not surely within the pro-
hibition.' It is not denied that the loan
here in question was within this category.
This authority, if recognized as sound, is
considerable. See also Baird v. Washington
Sedgwick (Stat. and Const. Constr. 79)
says: 'Where it is a simple question of
authority to contract, arising either on a
question of regular organization or of
power conferred by the charter, a party
who has had the benefit of the agreement
cannot be permitted in an action founded
upon it to question its validity. It would
be in the highest degree inequitable and
unjust to permit a defendant to repudiate
a contract, the benefit of which he re-
tains.' What is said in the text is fully
sustained by the authorities cited. We
cannot believe it was meant that stock-
holders, and perhaps depositors and other
creditors, should be punished and the bor-
rrower rewarded, by giving success to this
defense whenever the offensive fact shall
occur. The impending danger of a judg-
ment of ouster and dissolution was, we
think, the check, and none other contem-
plated by Congress. That has been al-
ways the punishment prescribed for the
wanton violation of a charter, and it may
be made to follow whenever the proper
public authority shall see fit to invoke
its application. A private person cannot,
directly or indirectly, usurp this function of
the government.'
A national bank may enforce a real es-
tate mortgage assigned to an employee for
its benefit, though it is subject to lia-
Bility to the federal government for exced-
ing its powers. Slade v. Squier, (1809)
A conveyance of real estate to a na-
tional bank in violation of the prohibition
contained in this section is not void, but
only voidable. Barron v. McKinnon, (C.
C. A. 1st Circ. 1912) 196 Fed. 933, 116
C. C. A. 453.
Conveyance to bank in trust.—The
United States alone can object to the
want of authority of a national bank,
under this section, to accept a conveyance
of real property to be held in trust. Ker-
foot v. Farmers', etc., Bank, (1910) 218
U. S. 281, 31 S. Ct. 30, 54 U. S. 1st Ed.
1942 (affirming (1898) 145 Mo. 418, 46
S. W. 1000, which affirmed a decree in
favor of defendants in a suit to set aside
a conveyance of real property to a na-
tional bank in trust), where the court
said: "This rule, while recognizing the
authority of the government to which the
Corporation is amenable, has the salutary
effect of assuring the security of titles
and of avoiding the injurious consequences
which would otherwise result. In the
present case a trust was declared, and
this trust should not be permitted to fail
and the property to be diverted from
those for whom it was intended, by treat-
ing the conveyance to the bank as a nul-
ility, in the absence of a clear statement
of legislative intent that it should be so
regarded."
II. FOR "IMMEDIATE ACCOMMODATION,"
Etc.
Real estate for banking house.—A na-
tional bank may rent banking rooms in
a building to be constructed under an
agreement to purchase of the building
Corporation some of its stock. And an
agreement with the promoter by which
he and his wife have an option to pur-
chase the stock is valid. Nashville Fourth
347, 173 S. W. 942, L. R. A. 1916 A. 568.
Under the first clause of this section a
national bank may enter into an agree-
ment to prevent the erection of a build-
ing on land adjacent to its bank build-
ing in order to secure the free entrance
of light into the windows of its banking
house. Newark First Presbyterian Church
v. National State Bank, (1894) 57 N. J.
L. 27, 29 Atl. 320, affirmed (1895) 58
N. J. L. 406, 36 Atl. 1129.
Lease for ninety-nine years.—Under
the power to purchase and hold such
real estate "as shall be necessary for its
immediate accommodation in the transac-
tion of its business," a national bank has
power to lease for a term of ninety-nine
years and agree with a lessor to construct
such a building as it desires, though only
a small portion of the building is to be
used for banking purposes, the balance
being rented to third persons. Brown v.
Schleier, (C. C. A. 8th Cir. 1902) 118
Fed. 981, 55 C. C. A. 475.
Lease extending beyond charter term
A lease may be taken by a national bank
for property for a bank building for a
term extending beyond the charter term,
though it be made nonassignable without
the consent of the lessor. Weeks v. Inter-
national Trust Co., (C. C. A. 1st Cir.
Improvement of real estate.—Where a
national bank in flourishing condition had
been for many years the rightful owner
of a lot improved by its bank building, it
had power to alter and enlarge the im-
provement thereon so as to furnish better
accommodation for the bank's business,
and at the same time provide offices which

III. MORTGAGE "SECURITY FOR DEBTS PREVIOUSLY CONTRACTED"

In general.—Where necessary to secure a debt, the bank may take real estate which is encumbered and assume the incumbrances. Mapes v. Scott, (1878) 88 Ill. 352; Mutual Life Ins. Co. v. Yates County Nat. Bank, (1898) 35 App. Div. 215, 54 N. Y. S. 743.


The defendant in order partially to secure an antecedent debt to a national bank gave a mortgage on property on which there was a prior mortgage which he agreed to pay. Part of this prior mortgage coming due, the bank, in order to save and protect its own lien, and at the request of the defendant, paid the amount maturing and then took a note and mortgage therefor on other property. It was held that the taking of the last-mentioned mortgage was not a violation of the National Bank Act. Oran v. Merchants' Nat. Bank, (1876) 16 Kan. 341.

Mortgage to secure coincidental debt, see supra, this note, 1, 2, Effect of ultra vires acts, p. 682.

IV. "PURCHASE AT SALES" OR "TO SECURE DEBTS"

Where necessary to secure a debt the bank may purchase real estate at a sale on a prior mortgage. Heath v. Lafayette Second Nat. Bank, (1880) 70 Ind. 106. Or it may purchase real estate of greater amount than such debt, paying the difference in cash. Libby v. Union Nat. Bank, (1881) 90 Ill. 622; Upton v. National Bank, (1876) 120 Mass. 153.

Where a national bank lawfully holds a second mortgage it may buy in a prior mortgage to protect its interest. Holmes v. Boyd, (1883) 90 Ind. 332; Richards v. Kountze, (1876) 4 Neb. 200.

Conceding that a national bank cannot buy or deal in real estate as a means of investing its funds, there is no question that it can take title to such property as a means of saving itself from apprehended loss caused by a mistaken or ill-advised loan. It is so expressly provided in the act under which it holds its charter. Moreover it may purchase a business for the same reason. Kennewick First Nat. Bank v. Conway, (1915) 87 Wash. 506, 151 Pac. 1129.
A national bank having purchased real estate which was mortgaged to it in good faith by way of security for debts previously contracted, the fact that in order to secure the same debt it purchases other real estate not mortgaged to it cannot affect the title to the land which it was authorized to purchase. Reynolds v. Crawfordsville First Nat. Bank, (1884) 112 U. S. 406, 5 S. Ct. 213, 28 U. S. (L. ed.) 733.

A conveyance prohibited by the state insolvency laws is not validated by the fact that it was made to a national bank, by way of security for debts previously contracted in the course of its dealings, or conveyed to it in satisfaction of such debt. McClellan v. Chipman, (1886) 164 U. S. 347, 17 S. Ct. 85, 41 U. S. (L. ed.) 461, affirming (1893) 159 Mass. 363, 34 N. E. 379.

VI. TIME LIMIT OF FIVE YEARS

Escheat.—The Kentucky statute, (Ky. Stat., § 567, Russell's Stat., § 2153) providing for escheat of real property held by banks, not necessary to their business, for more than five years, was held not to be in conflict with this section, so that realty held by a national bank not necessary for its business for more than five years was subject to escheat. Elizabethtown First Nat. Bank v. Com., (1911) 143 Ky. 816, 137 S. W. 518, Ann. Cas. 1912D. 378, 34 L. R. A. (N. S.) 54.

Sec. 5138. [Requisite amount of capital.] No association shall be organized with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants, and except that banks with a capital of not less than twenty-five thousand dollars may, with the sanction of the Secretary of the Treasury, be organized in any place the population of which does not exceed three thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars. [R. S.]

This section was amended to read as above by Act of March 14, 1900, ch. 41, § 10, 31 Stat. L. 48.

The section originally read as follows:

"Sec. 5138. No association shall be organized under this title with a less capital than one hundred thousand dollars, except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a capital of less than two hundred thousand dollars." Act of June 3, 1864, ch. 106, 13 Stat. L. 101.

Deposits not part of bank's capital.—In State v. Clement Nat. Bank, (1911) 84 Vt. 167, 78 Atl. 944, Ann. Cas. 1912D 22, which was an action by the state to recover taxes, the court, upholding the validity of the state statute relating to the taxation of national bank deposits, said: "Money deposited in a bank without special arrangements becomes the property of the bank, and properly available for the use in its business; and the depositor becomes a creditor of the bank to the amount of the deposit.

The defendant argues that by the terms of the statute the tax is upon the deposit, and that inasmuch as the deposits are the property of the bank, and properly used in its business, the tax is upon the property or business of the bank. But this was not the purport of the statute; it does not require this conclusion. The transaction which makes the money the property of the bank gives the depositor a credit of equal amount, and the term 'deposit' which may be used to indicate the money deposited or the credit which the depositor receives for it. The last must be taken to be the meaning here, for the statute lays the tax upon the depositor in so many words. The credit arising from the transaction is properly taxable to the depositor under our statute, unless the debtor's statute as a national bank secures its exemption. The deposits of a bank increase its capacity for doing business, but they are not capital stock in any view. Society for Sav. v. Coite, [1868] 6 Wall. 594, 18 U. S. (L. ed.) 897. The capital stock of national banks is taxed to the individual holders by permission of Congress, and could not be taxed without such permission. New York State v. Taylor, 93 U. S. 539, 25 U. S. (L. ed.) 705. But it does not follow that congressional authority is needed to enable the state to
tax national bank deposits to the de-positors. There is no similarity between capital stock and deposits. The 'capital stock' of a bank is the sum on which it is authorized to do business and the permanent basis of its credit. A 'general deposit' is a loan to the bank, and the right of the depositor a mere choice in action. Scammon v. Kimball, [1876] 92 U.S. 362, 23 U.S. (L. ed.) 483; Davis v. Elmira Sav. Bank, [1896] 161 U.S. 275, 16 S. Ct. 502, 40 U.S. (L. ed.) 700; National Bank of Republic v. Millard, [1870] 10 Wall. 152, 19 U.S. (L. ed.) 897. It is true that deposits become a part of the working capital of the bank, and that any taxation of the depositors may have a tendency to lessen this re-source; but it can hardly be supposed that the efficiency of national banks as instrumentalities of the federal government will be endangered by any taxation of depositors which is free from unjust discrimination. If the defendant's con-tention is correct, all the uninvested capital of the state can escape taxation by seeking a refuge in national banks. We find nothing in the utterances of the fed-eral Supreme Court to indicate that this curtailment of the taxing power of the state was intended by Congress."

Sec. 5139. [Shares of stock and transfers.] The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of associa-tion. Every person becoming a shareholder by such transfer shall, in proportion to his shares; succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of associa-tion by which the rights, remedies, or security of the existing creditors of the association shall be impaired. [R. S.]


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I. SCOPE OF NOTE

This section has been construed most often in connection with R. S. sec. 5151, infra, p. 705, superseded by Act of Dec. 23, 1913, ch. 6, § 23, infra, p. 722, in relation to the individual liability of shareholders for debts. For convenience of the reader the cases on the question of liability, so far as they turn upon the question of ownership or transfer of the shares are treated hereunder, but as to the individual liability of shareholders for debts see the notes to said § 23 of the Act of Dec. 23, 1913, infra, p. 723, which section also provides for the secondary individual liability in certain cases of shareholders who have transferred their stock.

Enforcement of liability of stockholders.—See R. S. sec. 5234, infra, p. 850, and notes thereto, and § 2 of the Act of June 30, 1878, ch. 156, infra, p. 918, and notes thereto.

II. STATUTE BASED ON PUBLIC POLICY

"The provision of the Act of 1864, making the stock of national banks transferable like other personal property, was a fundamental departure from the Act of 1863, and was based on a rule of public policy initiated by the Act of 1864, intended to afford facilities for the transfer of stock in national banks, and thereby to encourage investment in such stock." Buffalo Third Nat. Bank v. Buf-falo German Ins. Co., (1904) 193 U.S. 581, 24 S. Ct. 524, 48 U.S. (L. ed.) 801, stating that it was so pointed out in South Bend First Nat. Bank v. Laurier, (1871) 11 Wall. 369, 20 U.S. (L. ed.) 172.

III. EXECUTION AND ATTACHMENT

National bank shares are subject to seizure and sale on execution on a judg-ment against a stockholder, Braden's Estate, (1893) 166 Pa. St. 184, 30 Atl. 746, and such shares may be attached for the debt of a shareholder to the bank
without regard to the question of the solvency of the debtor or the necessity for such attachment. Hagar v. Union Nat. Bank, (1874) 63 Me. 508.

IV. TRANSFER OF SHARES; SUCCESSION TO RIGHTS AND LIABILITIES

See as to continued liability of transferee in certain cases, § 23 of the Act of Dec. 23, 1913, infra, p. 722.

1. Control by States


Transfer by executor.—The right of an executor to sell stock is governed by the laws of the state in which the estate of the decedent is located. Hobbs v. Western Nat. Bank, (1880) 8 W. N. C. (Pa.) 131, 12 Fed. Cas. No. 6,551a. A sale by an executor does not pass a good title where he was not authorized by the state law to make the sale. Weyer v. Franklin Second Nat. Bank, (1877) 57 Ind. 106.

In Hobbs v. Western Nat. Bank, (1880) 3 W. N. C. (Pa.) 131, 12 Fed. Cas. No. 6,551a, it was held that in Pennsylvania, where the by-laws or articles of association of a national bank do not otherwise prescribe, the bank is bound under Art. Pa. June 26, 1836, § 3, and Act of Pa. April 8, 1873, § 11, to recognize a transfer of its stock by a foreign executor duly appointed in another state.

2. Control by Banks

National bank stock is salable and transferable at the will of the owner, like other personal property, and neither the directors nor stockholders can control the right of a stockholder to make an absolute sale of his stock to any person capable of purchasing and holding it and assuming the liability of the transferrer in respect thereto. Johnson v. Latfin, (1873) 5 Ill. 65, 13 Fed. Cas. No. 7,393, affirmed (1880) 103 U. S. 800, 26 U. S. (L. ed.) 532.

A provision in the charter and by-laws of a national banking association carried into the certificates of stock as a condition, forbidding a transfer where the holder is indebted to the bank, is repugnant to the National Bank Act, and void and ineffectual for any purpose. Buffalo Third Nat. Bank v. Buffalo German Ins. Co., (1904) 193 U. S. 581, 24 S. Ct. 624, Vol. VI—23


The authority to prescribe the manner of the transfer permits only conditions which are essential to the protection of the association against transfers which are fraudulent or voidable may be designed to evade the just responsibility of the stockholder. Johnston v. Laflin, (1880) 103 U. S. 800, 26 U. S. (L. ed.) 532. It was enacted for the benefit of the corporation, its shareholders, and its creditors only. As to all other parties a transfer good at common law is good under the statute. Scott v. Pequonnock Nat. Bank, (S. D. N. Y. 1883) 15 Fed. 494; McNeel v. New York Tenth Nat. Bank, (1871) 46 N. Y. 325, 7 Am. Rep. 241; Doty v. Larimore First Nat. Bank, (1892) 3 N. D. 9, 53 N. W. 77, 17 L. R. A. 259; Gray v. Fankhauser, (1911) 58 Ore. 423, 115 Pac. 146.

As between the parties to a sale, it is enough that the certificate is delivered by the holder to the purchaser or pledgee with power to transfer the stock on the books of the bank, and either party may compel its registration and transfer. Scott v. Pequonnock Nat. Bank, (S. D. N. Y. 1883) 15 Fed. 494. And the same rule applies where the certificate of stock is delivered as collateral security for a loan. Dickinson v. Central Nat. Bank, (1880) 129 Mass. 279, 37 Am. Rep. 351.

This statute is sufficient to authorize a by-law that the stock shall be transferable only at the bank on the books. Lockwood v. Mechanics' Nat. Bank, (1869) 9 R. I. 308, 11 Am. Rep. 253.

3. When Transferability Ceases

The right to transfer shares so far as the creditors of the bank are concerned ceases entirely upon the insolvency and suspension of the bank. Irons v. Manufacturers' Nat. Bank, (N. D. Ill. 1893) 17 Fed. 308; Graham v. Platt, (1901) 28 Colo. 421, 65 Pac. 30.

The shares cease to be transferable as such after the bank has begun proceedings to wind up its affairs at the end of the original period for which it was organized. Richards v. Attleborough Nat. Bank, (1899) 145 Mass. 187, 19 N. E. 353. 1 L. R. A. 781.

4. Succession to Rights of Prior Holder

Rights of transferees in charged off assets.—Where assets of a national bank are charged off against withdrawn capital stock, and set apart in trust for the benefit of the then stockholders, a subsequent transferee and his assignee do not render the transferrer does not pass the right to the interest of the transferees in the trust fund, notwithstanding the provision of this section that transferees of national bank stock shall succeed to all the rights

Similarly, shareholders at the time of the creation of the trust fund may at any time thereafter transfer their rights in the trust fund with or without a transfer of their shares of stock. Cogswell v. Second Nat. Bank, (1905) 78 Conn. 75, 50 Atl. 1059, affirmed (1907) 204 U. S. 1, 27 S. Ct. 241, 51 U. S. (L. ed.) 343.

5. Necessity of Transfer on Books of Bank

a. In General


And this is so even where he has in good faith previously sold it and delivered to the buyer the certificate of stock with the power of attorney in such form as to enable the transfer to be made on the books of the bank (Richmond v. Irons, (1887) 121 U. S. 27, 7 S. Ct. 788, 30 U. S. (L. ed.) 864; Price v. Whitney, (C. C. Mass. 1886) 28 Fed. 297), relying upon the promise of the buyer to have the transfer made. Whitney v. Butler, (1886) 118 U. S. 653, 7 S. Ct. 61, 30 U. S. (L. ed.) 296. Or where the certificate and power of attorney are delivered to the bank without communicating to its officers the name of the buyer. Whitney v. Butler, (1886) 118 U. S. 653, 7 S. Ct. 61, 30 U. S. (L. ed.) 296. Man v. Chosenman, (1874) 16 Fed. Cas. No. 9,002a.

In Schofield v. Twining, (E. D. Pa. 1904) 127 Fed. 486, it appeared that the defendant, prior to the failure of a national bank in which his son was a director, owned certain shares of the bank's stock, which he sold to his son, receiving in payment a demand note, secured by certain collateral. At the time of the sale the son promised that he would see that the shares were properly transferred, but he failed to do so. Defendant made no attempt to see that the stock was transferred, and it stood in his name on the books of the bank at the time of its failure. It was held that the son was prima facie the father's agent to transfer the shares, and that in the absence of proof that the transfer was in good faith, and of a prompt attempt to have the stock transferred on the books of the bank, the father was liable to assessment thereon.

But the transferrer will not be held responsible for the neglect and carelessness of the owner of the bank who has done all that a prudent man should do. Whitney v. Butler, (1886) 118 U. S. 655, 7 S. Ct. 61, 30 U. S. (L. ed.) 296. And though no formal transfer is made on the books of the bank, he will be considered as having taken the precaution after the sale of his stock to surrender the certificates therefore to the bank either in person or accompanied by a power of attorney, which would enable the bank officers to make the transfer on the register. Earle v. Caron, (1903) 188 U. S. 42, 23 S. Ct. 254, 47 U. S. (L. ed.) 373, affirming (C. C. A. 3d Cir. 1901) 107 Fed. 639, 46 C. C. A. 498, 60 L. R. A. 266; Matteson v. Dent, (1900) 176 U. S. 521, 20 S. Ct. 462, 158 S. (L. ed.) 571; Briggs v. Spaulding, (N. D. N. Y. 1899) 39 Fed. 319; Hayes v. Twyger, (N. D. N. Y. 1899) 39 Fed. 918; Young v. McKay, (1892) 50 Fed. 394; Earle v. Coyle, (E. D. Pa. 1899) 95 Fed. 99; Cox v. Elmendorf, (1896) 97 Tenn. 518, 37 S. W. 387.

And this is so even though the officer to whom the certificate and power of attorney are delivered, and who has the authority to make the transfer is the purchaser of the stock. Briggs v. Spaulding, (1891) 141 U. S. 132, 11 S. Ct. 924, 35 U. S. (L. ed.) 602; Earle v. Coyle, (E. D. Va. 1899) 95 Fed. 99; Snyder v. Foster, (C. C. A. 9th Cir. 1896) 73 Fed. 126; Cox v. Elmendorf, (1896) 97 Tenn. 518. But where anything occurs that would justify the transferrer in believing or even suspecting that the transfer has not been promptly made on the books, he is perhaps wanting in due diligence where he discovers by inspection of the transfer books ascertain the facts. Whitney v. Butler, (1886) 118 U. S. 655, 7 S. Ct. 61, 30 U. S. (L. ed.) 296.

The delivery to the proper officer of the bank in the banking house, at the place where transfers are made, of the stock certificate, with an adequate power of attorney to make the transfer and a request that the stock be transferred, where the officer of the bank stated that the transfer would be made, is insufficient to relieve the transferrer from liability, though the transfer was not made as requested and the transferrer was ignorant of such fact. Earle v. Caron, (1903) 188 U. S. 42, 23 S. Ct. 254, 47 U. S. (L. ed.) 373, affirming (C. C. A. 3d Cir. 1901) 107 Fed. 639, 46 C. C. A. 498, 60 L. R. A. 266.

The cashtier is the proper officer to make the transfer, and a demand of him is sufficient to render the bank liable for a refusal to make the transfer. Case v.


b. As Between the Parties

Failure to transfer stock on the books of the bank, as required by this section, does not affect the validity of the transfer as between the parties, nor as to the person for whose benefit the stock was transferred. See Larimer v. Beardsley, (1906) 130 Ia. 706, 107 N. W. 395, where the court said: “There is no question as to the right of the owner of shares of stock in a national bank to transfer a legal or equitable right to such shares although they remain in his name on the books of the bank.”

In Johnston v. Laffin, (1891) 103 U. S. 800, 26 U. S. (L. ed.) 592, there was no by-law of the bank regulating transfers of its shares, but each certificate of stock contained this provision: “Transferable only on the books of the said bank, in person or by attorney, on the return of this certificate, and in conformity with the provisions of the laws of Congress and the by-laws which may be in force at the time of such transfer.” The court said: “Shares in the capital stock of associations, under the national banking law, are salable and transferable at the will of the owner. They are, in that respect, like other personal property. The statute recognizes this transferability, although it authorizes every association to prescribe the manner of their transfer. Its power in that respect, however, can only go to the extent of prescribing conditions essential to the protection of the association against fraudulent transfers or such as may be designed to evade the just responsibility of the stockholder. It is to be exercised reasonably. Under the pretense of prescribing the manner of the transfer, the association cannot clog the transfer with useless restrictions or make it dependent upon the consent of the directors or other stockholders. It is not necessary, however, to consider what restrictions would be within its power, for it had imposed none. As between Laffin and the broker, the transaction was consummated when the certificate was delivered to the latter, with the blank power of attorney endorsed, and the money was received from him. As between them, the title to the shares, when so passed, whether that be deemed a legal or equitable matter or not; the right to the shares then vested in the purchaser. The entry of the transfer on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller’s creditors. Purchasers and creditors, in the absence of other knowledge, are only bound to look to the books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or anyone he may name, to transfer it on the books of the company, and the price is paid. If a subsequent transfer of the certificate be refused by the bank it can be compelled, at the instance of either of them. . . . The transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies. The power of attorney endorsed on the certificate is usually written or printed, with a space in blank for the name of the attorney to be inserted, for the accommodation of the purchaser. The subsequent filling up of the blank by him with another name, instead of his own, as it may suit his convenience, does not so connect the vendor with the party named as to charge him with the latter’s knowledge, and thus affect the previous transaction. A different doctrine would put a speedy end to the forgery of powers of attorney in blank. And instruments of that kind are of great convenience in the sale of shares of incorporated companies, and are in constant use. The name with which the blank may be subsequently filled up by the purchaser is not, in practice, regarded as affecting the previous sale in any respect, but as a matter which concerns only the purchaser. It would be a source of disturbance in business if any other result were attached by the law to the proceeding.”

6. Surrender of Certificate on Transfer

A surrender of the certificate is essential to the issuance by the bank of another certificate upon a transfer made by the apparent owner either in person or by attorney. South Bend First Nat. Bank v. Lanier. (1871) 11 Wall. 361; 4 L. S. (L. ed.) 172; Johnston v. Laffin,
7. Real and Apparent Owner

a. In General

As a general rule, the question of liability for an assessment on the shares of an insolvent national bank depends upon who was the actual owner of the stock when the operations of the bank were suspended. Hullitt v. Ohio Valley Nat. Bank, (C. C. A. 6th Cir. 1905) 137 Fed. 401; 69 C. C. A. 606, affirmed (1907) 204 U. S. 162, 27 S. Ct. 179, 51 U. S. (L. ed.) 423.


On the other hand, it has been said that by the above section of the Revised Statutes those persons only have the rights and liabilities of stockholders who appear to be such as registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder subject to such liabilities and succeeding to such rights except by such transfer. Until such transfer, the prior holder is the stockholder for all the purposes of law. Richmond v. Irons, (1887) 121 U. S. 27, 8 S. Ct. 788, 30 U. S. (L. ed.) 864, followed in Robson v. Southern Nat. Bank. (C. C. A. 2d Cir. 1899) 94 Fed. 904, 36 C. C. A. 721.

In Johnston v. Lafin, (1881) 103 U. S. 800, 26 U. S. (L. ed.) 532, it was said by Field, J., that "the entry of the transaction on the books of the bank where stock is sold is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller's creditors."


A person to whom stock is transferred on the books of the bank without the knowledge or consent has a right to repudiate the transaction. Keyser v. Hitz, (1890) 133 U. S. 138, 10 S. Ct. 296, 33 U. S. (L. ed.) 531; Finn v. Brown, (1891) 142 U. S. 56, 12 S. Ct. 136, 35 U. S. (L. ed.) 936; yet he is presumed to be the owner of the stock, and the burden is upon him to show that he was not such owner. Finn v. Brown, (1891) 142 U. S. 56, 12 S. Ct. 136, 35 U. S. (L. ed.) 936, wherein it was held that a person to whom fifty shares of stock had been transferred on the books of the bank without his knowledge or consent, and who was subsequently elected a director of the bank and its vice-president, and acted as such at a time when he had no other stock, should be conclusively presumed to be the owner of such stock from the time of his appointment as director and vice-president.
So also the subsequent approval or ratification of such a transfer or an acceptance of any of the benefits arising from the ownership will make the person liable as a shareholder with such responsibility as the law imposes thereon and it is immaterial whether a new certificate of stock is issued or not. Keyser v. Hitz, (1890) 133 U. S. 138, 10 S. Ct. 290, 33 U. S. (L. ed.) 531, affirming (1883) 2 Mackey (D. C.) 496.

One who was notified that shares of stock in a national bank had been transferred to his name, although he had in fact no interest therein, and who indorsed the certificates in blank, but took no steps to have the stock transferred to the name of the true owner, cannot avoid liability for an assessment thereon made by the comptroller to meet the debts of the bank after its insolvency. Kenyon v. Fowler, (C. C. A. 2d Cir. 1907) 155 Fed. 107, 83 C. C. A. 567, affirmed (1910) 215 U. S. 583, 30 S. Ct. 409, 54 U. S. (L. ed.) 749. In the following cases in support of the foregoing ruling: Richmond v. Irons, (1887) 121 U. S. 27, 7 S. Ct. 758, 30 U. S. (L. ed.) 864; Keyser v. Hitz, (1890) 133 U. S. 138, 10 S. Ct. 290, 33 U. S. (L. ed.) 531, 143 Fed. 517. In both courts it was held that the bank was liable for the entire payment of the shares, though the bank was not a party to the action.

One who holds stock merely as a trustee for the bank cannot set up that fact to relieve himself of liability. Lewis v. Switz, (C. C. Neb. 1896) 74 Fed. 381.

An agreement by an officer of the bank that if the defendant would buy certain shares of the bank, and let them stand in his name, the bank would buy the shares from him at any time he may so wish, is void, since a national bank cannot purchase its own stock; and such agreement cannot be set up to relieve the apparent holder of such stock from liability. Bowden v. antos, (1877) 1 Hughes 159, 3 Fed. Cas. No. 1,716.

In Wheelock v. Kost, (1875) 77 Ill. 296, it appeared that a national bank transferred shares of its stock to the defendant as collateral security for loans by him to the bank, and as an indemnity against his liability on an accommodation note made by him for the bank. In an action against him for an assessment it was held that whatever might be his relation to the bank, so far as its creditors were concerned he was liable as a stockholder.

A certificate of stock may be shown to have been issued to the apparent owner as collateral security for a loan where it does not appear that there was any transfer on the stock register or that the apparent owner ever participated in any stockholders' meeting or received dividends. Williams v. American Nat. Bank, (C. C. A. 8th Cir. 1898) 85 Fed. 376, 56 U. S. App. 316, 29 C. C. A. 203.

A transfer of shares in trust to enable the transferee to become a director of the bank does not release the transferrer from liability as a shareholder. Witters v. Sowles, (C. C. Vt. 1887) 32 Fed. 130.

The purchasers of stock from a bank president who had certificates issued in their names and the transfers made on the books of the bank are held to have both the rights and liabilities of shareholders, though the president did not cancel the old certificates, but sold them, and thereby created an overissue. Davis v. Watkins, (1898) 56 Neb. 288, 76 N. W. 575.

"The word 'invested' [as used in section 5151, set out infra, p. 705] plainly has reference to those who originally or by subsequent purchase become the real owners of the stock, and cannot refer to those who never invested money in the shares, but only received the certificates of stock, or it may be the legal title thereto, as collateral security for debts or obligations already or to be contracted." A. R. Bradford v. J. W. A. State Loan, etc., Co., (1897) 165 U. S. 606, 17 S. Ct. 465, 41 U. S. (L. ed.) 844.

A person whose name appears on the bank books as a stockholder cannot be held liable as such where it also appears from the bank's books that he bought the stock at the time of the sale and since that time the seller's entire holdings were pledged to others. Burt v. Richmond, (D. C. Vt. 1901) 107 Fed. 387.

b. Transfer to National Bank

One national bank cannot lawfully acquire and hold the stock of another national bank as an investment, and in the case of an actual purchase as an investment the transferee is not estopped to deny its liability as an apparent stockholder for an assessment ordered by the comptroller, though it had the stock registered in its own name as owner and accepted dividends thereon. Concentrated Nat. Bank v. Hawkins, (1899) 174 U. S. 364, 19 S. Ct. 739, 43 U. S. (L. ed.) 1007, reversing (C. C. A. 1st Cir. 1897) 79 Fed. 51, 33 U. S. App. 747, 24 C. C. A. 444. See the opinion in this case quoted under the side-heading 'Stock of other national banks in notes to R. S. sec. 5136, at p. 654.'

But it has been held that where one national bank loans money on the pledge as collateral security of stock in another national bank, and has the shares transferred on the stock books to itself as owner, it is liable as the shareholder. Germania Nat. Bank v. Case, (1878) 90 U. S. 628, 25 U. S. (L. ed.) 448. In this case Strong, J., said: "There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. The latter is an ordinary mode of loaning and there is nothing in the letter or spirit of the National Banking Act that prohibits it. But
if there were, the lender could not set up its own violation of law to escape the responsibility resulting from its illegal action."

8. Transfer in Pledge

A bona fide pledgee of shares of the stock of a national banking association is not individually liable for its debts under this section. Williamson v. American Bank, (C. C. A. 4th Cir. 1911) 183 Fed. 66, 107 C. C. A. 286.

For the purposes of the National Banking Act, the pledgee of stock not transferred on the books is to be regarded as the owner until and unless something further transpires which operates to transfer the ownership to another. Hulitt v. Ohio Valley Nat. Bank, (C. C. A. 6th Cir. 1905) 137 Fed. 461, 69 C. C. A. 609, affirmed (1907) 294 U. S. 162, 27 S. Ct. 179, 51 U. S. (L. ed.) 423.

One who has taken stock in pledge as collateral security for a loan cannot be charged with liability as a shareholder unless it is made to appear that he has become the owner of the shares in fact or has held himself out to be the owner and thereby established himself to the bank to be the owner of the shares as owner. Rankin v. Fidelity Ins., etc., Co., (1903) 189 U. S. 242, 23 S. Ct. 533, 47 U. S. (L. ed.) 792, affirmed (C. C. A. 3d Cir. 1901) 108 Fed. 475, 46 C. C. A. 509.


The pledgee of national bank stock as collateral security for a note, with power of public or private sale for the liquidation of the pledge, becomes the beneficial owner of such stock, and, as such, subject to the liability of a stockholder under this section, where, after the death of the pledgee, it causes the stock to be registered in the name of an employee with no beneficial interest, and afterwards indorses upon the note the supposed value of the stock as of the date of the credit, and presents the note, as reduced by the amount of such valuation, to the pledgee's administrator, who allows the claim in this form. Ohio Valley Nat. Bank v. Hulitt, (1907) 204 U. S. 107, 27 S. Ct. 179, 51 U. S. (L. ed.) 423 affirming (C. C. A. 6th Cir. 1905) 137 Fed. 461, 69 C. C. A. 609.

One to whom stock has been transferred in pledge or as collateral security for money loaned is liable as a stockholder if by his direction, or with his knowledge, the shares are placed on the books of the bank in such a way as to imply that he is the real owner. Pullman v. Upton, (1877) 96 U. S. 328, 24 U. S. (L. ed.) 818; Germania Nat. Bank v. Case, (1878) 89 U. S. 628, 25 U. S. (L. ed.) 448; Rankin v. Fidelity Ins., etc., Co., (1903) 189 U. S. 242, 23 S. Ct. 533, 47 U. S. (L. ed.) 792; Bowden v. Farmers' etc., Bank, (1877) 1 Hughes 307, 3 Fed. Cas. No. 1,714; Moore v. Jones, (1877) 3 Woods 53, 17 Fed. Cas. No. 9,769; Wheelock v. Koat, (1875) 71 Ill. 296; Hale v. Walker, (1871) 31 Iowa 344, 7 Am. Rep. 137; Magruder v. Colston, (1875) 44 Md. 349, 22 Am. Rep. 47. And this is so though the loan had been paid at the time of the suspension of the bank, and though he had delivered to the borrower the certificate with power of attorney to retransfer the stock. Bowden v. Farmers' etc., Bank, (1877) 1 Hughes 307, 3 Fed. Cas. No. 1,714. This is upon the ground that by allowing his name to appear upon the stock list as owner he represents that he is such owner, and he will not be permitted after the bank fails, and when an assessment is made, to assume any other position as against creditors. Pauly v. State Loan, etc., Co., (1897) 165 U. S. 606, 17 S. Ct. 482, 41 U. S. (L. ed.) 844; Tourtelot v. Stolteben. (N. D. Ia. 1900) 101 Fed. 362. The courts have placed his liability upon three grounds: that he is estopped from denying his liability because he has voluntarily held himself out to the public as the owner of the stock; that by taking the legal title he has released the former owner from liability; and that after having taken the apparent ownership, and become entitled to the privileges of a stockholder, it would be impossible to release him from the responsibilities of a stockholder. Robinson v. Southern Nat. Bank, (C. C. A. 2d Cir. 1889) 94 Fed. 964, 36 C. C. A. 584.


Causing the stock to be transferred to an employee, and paying an assessment
levied upon the shareholder where the pledgor is still considered the owner of the stock, will not make the pledgee liable as a shareholder. Rankin v. Fidelity Ins., etc., Co., (1903) 169 U. S. 242, 23 S. Ct. 553, 47 U. S. (L. ed.) 792, affirming (C. C. A. 3d Cir. 1901) 168 Fed. 476, 46 C. C. A. 509.


9. Colorable Transfer

A transfer of shares of stock in a national bank, made for the benefit of the registered owner, cannot relieve the latter from his liability as a shareholder, for the debts of the bank. McDonald v. Dewey, (1906) 202 U. S. 510, 28 S. Ct. 751, 50 U. S. (L. ed.) 1128, reversing (C. C. A. 7th Cir. 1905) 134 Fed. 228, 67 C. C. A. 498. "The English cases, it is admitted, give effect to such transfer (to avoid liability) if they are made (as it is called) 'out and out'; that is, completely, so as to divest the transferrer of all interest in the stock. But even in them it is held that if the transfer is merely colorable, or as sometimes coarsely denominated, a sham; if, in fact, the transferee is a mere tool or nominee of the transferrer, so that, as between themselves, there has been no real transfer; but in the event of the company becoming prosperous the transferrer would become interested in the profits, the transfer will be held for naught, and the transferrer will be put upon the list of contributories.” Williams’ Case, [1869] L. R. 9 Eq. 225, note, where the transfer was, as in the present case, made to a clerk of the transferrer without consideration; Payne’s Case [1869] L. R. 9 Eq. 223; Es p. Kintria, [1869] L. R. 5 Ch. 95. * * * “The American doctrine is even more stringent.” Germania Nat. Bank v. Case, (1879) 99 U. S. 628, 25 U. S. (L. ed.) 448.

10. Fraudulent Transfer

In general—"It is not every transfer that releases a stockholder from his responsibility as such. While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable.” Germania Nat. Bank v. Case, (1879) 99 U. S. 628, 25 U. S. (L. ed.) 448. See also as to transfers "with knowledge of such impending failure," section 23 of the Act of Dec. 23, 1913, infra, p. 722.

A transfer with intent to escape individual liability, where the bank is in fact insolvent at the time, made with knowledge or reason to believe that the bank is insolvent, or about to fail, may be treated by the bank’sreceiver as inoperative between the transferee and himself, and the transferee may be held liable as a shareholder without reference to the financial condition of the transferee. Stuart v. Hayden, (1898) 169 U. S. 1, 18 S. Ct. 274, 42 U. S. (L. ed.) 639, affirming (C. C. A. 8th Cir. 1895) 72 Fed. 402, 90 U. S. App. 462, 18 C. C. A. 618; Cox v. Montague, (C. C. A. 6th Cir. 1897) 78 Fed. 845, 47 U. S. App. 364, 24 C. C. A. 364; as in such case both the transferrer and the transferees are liable for an assessment. Baker v. Reeves, (C. C. Wash. 188) 85 Fed. 837. Conversely a transfer made in good faith without knowledge or reason to believe the bank to be insolvent, where the shareholder has done everything reasonably possible to procure a transfer on the books of the bank to the purchaser, will relieve him from liability, though the bank at the time was insolvent and the purchaser was irresponsible. Earle v. Carson, (C. C. A. 3d Cir. 1901) 107 Fed. 639, 48 C. C. A. 498, 60 L. R. A. 236, judgment affirmed (1893) 158 U. S. 42, 23 S. Ct. 254, 47 U. S. (L. ed.) 377; Slayton v. Holloway, (C. C. Ky. 1897) 81 Fed. 432.

Where the real owner of shares transfers them to another person or causes them to be placed on the books of the association in the name of another person with the intent simply to evade the responsibility imposed by the statute, such owner may be treated as a shareholder. Pauly v. State Loan, etc., Co., (1897) 165 U. S. 606, 17 S. Ct. 465, 41 U. S. (L. ed.) 844; Matteson v. Dent, (1900) 176 U. S. 621, 20 S. Ct. 419, 44 U. S. (L. ed.) 371. A stockholder does not relieve himself from liability as such where, knowing or having good reason to know, the insolvency of the bank, he colludes with an irresponsible person with design to substitute the latter in his place, and thus to escape individual liability, and transfers.
his stock to such person; and "it is immaterial in such case that he may be able to show a full or partial consideration for the transfer as between himself and the transferee." —McDonald v. Dewey, (1906) 202 U. S. 510, 26 S. Ct. 731, 50 U. S. (L. ed.) 1128, 6 Ann. Cas. 419, reversing (C. C. A. 7th Cir. 1905) 134 Fed. 528, 67 C. C. A. 408, and citing Bowden v. Johnson, (1883) 107 U. S. 251, 2 S. Ct. 246, 27 U. S. (L. ed.) 386.

"When the transferee, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines as in this case with an irresponsible transferee with the design of substituting the latter in his place and thus leaving no one with any ability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decried to be a fraud on creditors and [he] will be held to the same liability to the creditors as before the transfer." Bowden v. Johnson, (1883) 107 U. S. 251, 2 S. Ct. 246, 27 U. S. (L. ed.) 386.

"The rule on this subject was clearly stated in the passage which has already been excerpted from Bowden v. Johnson, (1882) 107 U. S. 251, 2 S. Ct. 246, 27 U. S. (L. ed.) 386, where in declining to follow the English rule uphelding a real or out-and-out sale even if the purpose was to avoid impending liability, the court said that 'the transfer must not be to a person known to be irresponsible, and collusively made with the intent of escaping liability and defeating the rights given by statute to creditors,—a principle which has been since expressly reiterated in Matteson v. Dent. (1900) 176 U. S. 521, [26 S. (Ct. 419, 44 U. S. (L. ed.) 571]." Earle v. Carson, (1903) 188 U. S. 42, 28 S. Ct. 254, 47 U. S. (L. ed.) 373.

The transferee is not relieved from liability to a stockholder where with knowledge of the failing condition of the bank and for the purpose of escaping liability he causes the transfer to be made on the books of the bank to a person financially irresponsible with the understanding with him that the stock shall be retransferred on request. (Germania Nat. Bank v. Case, (1878) 99 U. S. 628, 25 U. S. (L. ed.) 448.

Nor is such transferee released from liability even where the transfer is not merely colorable but an out-and-out sale. Bowden v. Shulle, (1877) 1 Hughes 168, 3 Fed. Cas. No. 1,716.

And where a stockholder, though not supposing the bank to be actually insolvent, was advised of facts not generally known which indicated to him that there was uncertainty as to its ability to stand a "run" which had apparently begun, and thereafter made a transfer as a gift to his irresponsible children to avoid a loss in case the bank should meet with disaster, he was held to be liable. Foster r. Lincoln, (C. C. Nebr. 1896) 74 Fed. 385, affirming (C. C. A. 2d Cir. 1897) 79 Fed. 170, 45 U. S. App. 623, 24 C. C. A. 470; Baker r. Reeves, (C. C. Wash. 1896) 85 Fed. 186.

"Under the English law a shareholder may transfer his shares to an irresponsible party for a nominal consideration, though the sole purpose of the transfer be to escape liability, provided the transfer be out and out, and not merely colorable or collusive, with a secret trust attached. Under such circumstances the person making the transfer is released from liability, both as to corporate creditors and the other shareholders. * * * The law is quite different in this country." McDaid r. Dewey, (1906) 202 U. S. 510, 26 S. Ct. 731, 50 U. S. (L. ed.) 1128, 6 Ann. Cas. 419.

The sale of stock by a shareholder made with knowledge of the fact that at the time of such sale the stock had fallen below the legal requirement does not make the sale fraudulent as to creditors. Earle r. Carson, (1903) 188 U. S. 42, 28 S. Ct. 254, 47 U. S. (L. ed.) 373, affirming (C. C. A. 3d Cir. 1901) 107 Fed. 639, 46 C. C. A. 496, 60 L. R. A. 266. It was said by Harlan, J., in Stuart r. Hayden, (1898) 169 U. S. 1, 18 S. Ct. 274, 42 U. S. (L. ed.) 639, though not necessary to the decision of the case, that whether, the bank being in fact insolvent, the transferee is liable to be treated as a shareholder in respect of its existing contracts, debts, and engagements if he believed in good faith at the time of transfer that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible." But this latter remark has been treated as obiter in Earle r. Carson, (C. C. A. 3d Cir. 1901) 107 Fed. 639, 46 C. C. A. 496, 60 L. R. A. 266. And before the decision of the case by the Supreme Court, it was held in Sykes r. Holloway, (C. C. Ky. 1897) 81 Fed. 432, that a transfer of stock, though without consideration and to an irresponsible person, cannot be set aside by the receiver if made in good faith without knowledge of the failing condition of the bank. "The pecuniary condition of the transferee of stock in a national bank at the time of the transfer, while material upon the inquiry of whether or not the transfer is bona fide or colorable, cannot be a decisive element on the question of liability of the transferee, where the transfer has been made out and out without knowledge or notice of the failing condition of the bank." A similar holding was made in Earle r. Carson, (C. C. A. 2d Cir. 1901) 107 Fed. 639, 46 C. C. A. 496, 60 L. R. A. 266, judgment affirmed in (1903) 188 U. S. 42, 28 S. Ct. 254, 47 U. S. (L. ed.) 373.
The validity of a sale of stock is to be tested by the good faith of the seller and not upon the unknown financial condition of the buyer. The fact that the purchaser of stock was insolvent will not make the sale fraudulent as to the creditors of the bank where at the time the seller had no knowledge of that fact. Earle v. Carson, (1903) 188 U. S. 42, 23 S. Ct. 254, 47 U. S. (L. ed.) 373, affirming (C. C. A. 3d Cir. 1901) 107 Fed. 639, 46 C. C. A. 498, 60 L. R. A. 206.

The transferee of national bank stock cannot be made liable for an assessment upon the stock on the ground that the bank was insolvent at the time of the transfer, unless he knew of such insolvency, and intended to evade his liability. Vandegrift v. Rich Hill Bank, (C. C. A. 8th Cir. 1908) 162 Fed. 925, 90 C. C. A. 129.

A stockholder in a national bank devotes himself of the double liability imposed by the statute for the protection of creditors by a transfer of his stock when the bank is solvent, or even if insolvent by a bona fide transfer without knowledge of the insolvent; the only ground for holding him liable after a transfer being fraud. Fowler v. Crouse, (C. C. A. 2d Cir. 1910) 175 Fed. 646, 99 C. C. A. 200.

"Taking into view the whole Act, the provision conferring the power to transfer stock; the one already referred to, which avoids contracts made in contemplation of insolvency; the authority conferred upon the comptroller to constantly test the condition of a national bank; the right given him to suspend the business of such bank when the exigencies of its situation require it; and the double liability imposed on the registered stockholder,—we think it results that the power to transfer stock like other personal property is not limited by the mere fact that at the time of the transfer the bank, which was a going concern, was insolvent in the sense that its assets if liquidated would not discharge its liabilities, unless it be shown that the seller was aware of the fact, and had sold his stock to avoid the double liability which was impending." Earle v. Carson, (1903) 188 U. S. 42, 23 S. Ct. 254, 47 U. S. (L. ed.) 373.


**Knowledge of insolvency.**—The fact that a stockholder in a national bank having a capital of $300,000, at the time he sold and transferred his stock, was a director and was dissatisfied with the management, was held not sufficient to charge him with knowledge of its insolvency, so as to render him liable for a subsequent assessment on the stock, although it was in fact insolvent, where its assets on their face largely exceed its liabilities, and it appeared that the directors were deceived as to their value. Fowler v. Crouse, (C. C. A. 2d Cir. 1910) 175 Fed. 646, 99 C. C. A. 200.

11. Transfer to Infants or Married Women

See notes to Act of Dec. 23, 1913, ch. 6, § 23, infra, p. 723.

V. CHANGE IN ARTICLES OF ASSOCIATION

An amendment of the articles of association providing for an increase of the number of directors is not inconsistent with the provision that "no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired." National Banking Assn., (1882) 17 Op. Atty.-Gen. 288.

Sec. 5140. [How payment of the capital stock must be made and proved.] At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least ten per centum each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each installment shall be certified to the Comptroller, under oath, by the president or cashier of the association.

-[R. S.]-

Diversification of payment.—A subscriber to bank stock can maintain an action against the corporation for a diversion of funds delivered by him to the bank, to be paid on his subscription. Wilson v. Cheyenne First Nat. Bank, (1875) 1 Wyo. 108.

Notes given for stock.—While the capital stock must be paid in cash there is nothing to prevent a receiver of the bank from maintaining an action to collect from a stockholder a note given for capital stock. Hepburn v. Kinannon, (1897) 74 Miss. 601, 21 So. 569.

It is no defense to the maker of a note given for stock in a national bank, in a suit thereon by the receiver, that there was a failure of consideration because of the bank’s insolvency, where the maker has been fully indemnified against loss by the payee. Myers v. Hettinger, (C. C. A. 8th Cir. 1890) 94 Fed. 370, 37 C. C. A. 369.

Enforcing payment of fifty per centum.

"Most certainly the directors of the bank could compel the payment of said 50 per centum of the capital stock against the subscriber; and any subsequent purchaser of stock from the bank, on failure of the directors to take the necessary action to enforce the payment of said stock, could protect himself against the dereliction of duty. And still more certainly a creditor of the bank, dealing with it upon the assumption that the capital stock had been paid in, upon failure of the witness to enforce payment of the original subscription would have a remedy to enforce the payment of this sum as security for his debt." Wallace v. Hood, (C. C. Kan. 1898) 59 Fed. 11. But see in this paragraph in the note to R. S. sec. 5141, infra, p. 699.

Sec. 5141. [Proceedings if shareholder fails to pay installments] Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks’ previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association. [R. S.]

R. S. sec. 5234 mentioned in the text is given infra, p. 850.

Special trust fund for original stockholders.—Under an averment in a complaint by an original stockholder of a national bank, for the appointment of a receiver, that a certain fund was set apart for the benefit of the original stockholders when they consented to a reduction of capital and by direction of the Comptroller of the Currency, it was held that an objection that no special trust fund ever existed, because the directors had no authority to make it, was without merit, since no reduction in capital could have been made under this section without the approval of the Comptroller, and it was fairly within his authority to condition his approval on the adoption of such measures as he might think proper to do justice to the holders of the original shares. Cogswell v. Norwich Second Nat. Bank. (1903) 76 Conn. 252, 56 Atl. 574.

A state statute prescribing a mode of
procedure in favor of judgment creditors of a corporation against delinquent shareholders is not available to a judgment creditor of a national bank to enforce the payment by a stockholder therein of his unpaid subscription to the capital stock of such bank, for by this section the bank itself is given the right to sell stock of a delinquent shareholder for the satisfaction of the unpaid subscription and this remedy is apparently for the purpose of enabling the banking association to maintain its capital in accordance with its charter obligations, and for the benefit of all creditors and all its members. This purpose could be defeated and the capital diminished if a creditor were allowed to intercept unpaid subscriptions by subjecting the amounts due thereon to his individual debt against the bank in the manner attempted by the bill of complaint in this case. Mequitty v. King, (1915) 191 Ala. 205, 67 So. 1015. Compare the last paragraph in the note to R. S. sec. 5140, supra, p. 698.

Sec. 5142. [Increase of capital stock.] Any association formed under this Title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this Title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

[ R. S. ]


Further provisions relating to the increase of capital stock were made by the Act of May 1, 1886, ch. 73, § 1, infra, p. 720.

"The primary object of the provision that 'no increase of capital shall be valid until the whole amount of such increase is paid in' was to prevent the 'watering' of stock, that is, prevent banking business done upon the basis of an increased capital which did not in fact exist." Scott v. Dewees, (1901) 181 U. S. 292, 21 S. Ct. 583, 45 L. ed. 822.

Power to increase capital. — This section and the provision in Act of May 1, 1886, ch. 73, § 1, infra, p. 720, constitute the charter powers in respect to the increase of capital, and no increase can be made except in the manner provided therein. Winters v. Armstrong, (S. D. Ohio 1880) 37 Fed. 508.

It was held under this section, prior to the passage of the Act cited in the next preceding paragraph that, where articles of association provided for an increase of capital and the maximum of such increase was once fixed by the determination of the comptroller, both his power and that of the association over the subject were exhausted, and a further increase could only be effected by the amendment of the articles. National Banking Ass'n, (1882) 17 Op. Atty-Gen. 288.


In Charleston v. People's Nat. Bank, (1873) 5 S. C. 103, 22 Am. Rep. 1, it was held that though dividends had been paid on the new stock, it was not taxable as stock until the certificate of approval was issued.

It has been held that a subscription to the increase could not be enforced where the provisions of the law were not complied with; and that the subscribers were not estopped to allege a noncompliance
with the law by the fact that the bank, subsequent to their subscriptions and with their knowledge, represented to the public that the capital stock had been increased, or that they allowed their names to remain upon the list of those subscribing for and entitled to such increase, where they were free from actual fraud. Winters v. Armstrong, (S. D. Ohio 1889) 37 Fed. 508.

On the other hand it has been held that a stockholder who has accepted a certificate of stock and received dividends thereon in ignorance of the fact that the whole increase was not paid in, cannot set up in defense to a suit to enforce his personal liability for an assessment that the proposed increase was not fully paid in, where that fact has been duly certified by the comptroller as required by law. Scott v. Deweese, (1901) 181 U. S. 202, 21 S. Ct. 585, affirming Scott v. Latimer, (C. C. A. 8th Cir. 1898) 89 Fed. 433, 60 U. S. App. 720, 33 C. C. A. 1.

V. Liability of stockholders.—It is not material that the subscription and payment for the increased stock preceded the final vote of the stockholders to make the increase. Bailey v. Tillinghast, (C. C. A. 6th Cir. 1900) 90 Fed. 801, 40 C. C. A. 93, affirming (S. D. Ohio 1897) 86 Fed. 46.


An action by a subscriber to an increase of stock, against a receiver of a bank, after its insolvency, for the recovery of his subscription on the ground that the increase is illegal and the comptroller's certificate void, is a collateral attack. Brown v. Tillinghast, (C. C. A. 9th Cir. 1899) 93 Fed. 326, 35 C. C. A. 323; overruling (C. C. A. 9th Cir. 1897) 84 Fed. 71.

The fraudulent action of the officers of a bank in figuring out an apparent surplus, entitling them, as holders of original stock, to a dividend and appropriating such dividend to themselves, and refusing to pay it in paying up their quota of the increased stock, does not render the increase of stock invalid and void as to bona fide subscribers to such increase. Latimer v. Bard, (W. D. Mo. 1896) 76 Fed. 536. See also Scott r.

Directors who devise a scheme for increasing the capital stock by placing a fictitious valuation on the assets of the bank, and by taking notes given by them with the consent of the holders that they are not to be paid, are liable for all losses resulting to the creditors. Cockrell v. Abeles, (C. C. A. 8th Cir. 1898) 86 Fed. 505, 58 U. S. App. 483, 30 C. C. A. 223.

Where, on a subscription to a proposed increase of stock, old stock is issued to the subscriber without his knowledge or consent, nothing appearing on its face to show such fact, he cannot be held liable as a stockholder though he received and retained dividends on such stock. Stephens v. Follett, (C. C. Minn. 1890) 43 Fed. 842.

But where the certificate in such case shows on its face that it was for original stock, and the stockholder retains such stock for three years and until the bank becomes insolvent, he will not be held liable as a stockholder under the presumption that he knew of and assented to the change. Rand v. Columbia Nat. Bank, (C. C. A. 8th Cir. 1899) 94 Fed. 349, 36 C. C. A. 292; Bailey v. Tillinghast, (C. C. A. 8th Cir. 1900) 99 Fed. 350, 40 C. C. A. 93, affirming (S. D. Ohio 1897) 86 Fed. 46.

Payments before insolvency.—A subscriber who has made payments on his subscription to a proposed increase, believing that the statutory requirements would be complied with, is entitled to have the amount thereof allowed as a claim against the assets of the bank in the receiver’s hands where the bank fails before complying with the law authorizing the increase. Winters v. Armstrong, (S. D. Ohio 1889) 27 Fed. 508.

Abortive vote for increase — estoppel.—In Morrison v. Price, (C. C. Mass. 1888) 23 Fed. 217, (affirmed Delano c. Butler, (1866) 118 U. S. 634, 7 S. Ct. 39, 30 U. S. [1867] 520), upholding the individual liability of a stockholder under R. S. sec. 6515, infra, p. 705, it appeared that the stockholder who was the owner of shares originally issued, took new stock after the vote of the directors to increase the capital from $500,000, and his defense was that the increase from $500,000 to $961,300, was illegal and void. The court said: “Upon the facts here presented the most that can be claimed is that the proceedings in respect to the increase were not regular. The vote of the directors on December 13, 1881, was to increase the capital to $1,000,000, and this notice was sent to each stockholder, and the privilege given, as the charter provides, of subscribing for the new shares in proportion to the amount of stock owned by the stockholder. Subsequently it was found that $28,700 of the new stock had not been taken, and so the directors, on December 13, 1881, voted to make the increase $461,300, and to this increase the comptroller gave his consent. The point is taken that the vote of December 13th was a vote to reduce the capital stock from $1,000,000 to $961,300, and that to do this under the law required the consent of two-thirds of the stockholders, and the approval of the comptroller. Section 1652 Rev. St. If there ever had been a legal increase of the capital to $1,000,000, there would be some force in this argument; but the capital stock of the bank never was $1,000,000. The first step had been taken to make it that sum, but the amount had not been paid in, and the comptroller had not given his approval. In the absence of these necessary requirements the capital of the bank remained $500,000, until it was increased to $961,300. It cannot be said that the vote of December 13th was for a reduction, because you cannot reduce a capital which never existed. In our opinion, section 5143 has no application to the facts before us, since at no time was the capital of the bank $1,000,000. The vote of September 13th, taken in connection with that of December 13th, followed by the action of the comptroller, established the legal capital of the bank at $961,300. But it is urged with more force that the stockholders, after the action by the directors on September 13th, subscribed to an increase of $500,000, and that they paid for their new stock and received certificates on the basis of such an increase; in other words, that this was their contract with the corporation, and the only contract by which they are bound. But here, in view of what afterwards took place, comes in the principle of estoppel. It was clearly the duty of each stockholder, as soon as he discovered that the increase was greater than what he subscribed for, to repudiate his contract and decline to hold the new stock. But it surely would be contrary to every equitable principle to hold that a stockholder could retain his new stock without protest after notice, vote upon it at a stockholders’ meeting, pay assessments upon it that the bank might reopen, allow the bank in reopening to hold itself out to the world as possessing a capital of $961,300, such capital being a trust fund for the benefit of all creditors, and then, when the bank subsequently passed into the hands of a receiver, to seek for the first time to avoid his liability on the new stock, as against the general creditors of the corporation, on the ground that his contract with the corporation called for an increase of $500,000, while the actual increase was only $461,300. SUPposing this new stock had proved profitable, undoubtedly the complainant would have resorted to the benefit. Stockholders should not be permitted to deny the liability in case of loss, when they would have shared in the benefits in case of profit.”
Sec. 5143. [Reduction of capital stock.] Any association formed under this title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and such reduction has been approved by the said Comptroller of the Currency and by the Federal Reserve Board, or by the organization committee pending the organization of the Federal Reserve Board. [R. S.]

This section was amended and re-enacted to read as given in the text by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 28, 38 Stat. L. 274, other provisions of which Act constitute div. IV of this title, infra, p. 817, et seq. As originally enacted the text section was as follows:

"Sec. 5143. Any association formed under this Title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this Title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained."


"The only method by which a national bank can reduce its stock is that prescribed in section 5143." U. S. v. Morse, (S. D. N. Y. 1908) 161 Fed. 529 holding that a bank's unlawful ownership of its own stock did not constitute pro tanto reduction of the corporate stock.

Purpose of reduction. - The reduction of capital may be made for the purpose of producing a surplus for withdrawal and distribution, or may be required as an alternative to an assessment upon the stockholders to make good deficiencies occasioned by losses or otherwise. McCann r. Jeffersonville First Nat. Bank. (1897) 112 Ind. 395, 14 N. E. 251; McCann r. Jeffersonville First Nat. Bank. (1892) 131 Ind. 95, 30 N. E. 893.

Rights of stockholders. — It has been held that where the amount is voluntarily reduced the bank must return to the stockholders the whole capital set free by the reduction and cannot retain a portion for use as a surplus fund or for other purposes. Seeley r. New York Nat. Exch. Bank. (1878) 8 Daly (N. Y.) 400 affirmed (1879) 78 N. Y. 608.

But where the reduction is made to meet an impairment of the capital and to escape an assessment on the stockholders, there can be no withdrawal by the stockholders of the depreciated securities which caused the impairment. McCann r. Jeffersonville First Nat. Bank. (1887) 112 Ind. 524, 14 N. E. 251. So where the borrower of a large amount of money from a bank became insolvent, and certain collaterals held to secure the loan also became apparently worthless, and to avoid an assessment by the comptroller to make good an impairment of the capital stock thereby occasioned, the stockholders reduced the capital stock, it was not competent for them to take the depreciated assets which were the cause of the impairment and place them in the hands of trustees for the use and benefit of said stockholders. McCann r. Jeffersonville First Nat. Bank. (1892) 131 Ind. 95, 30 N. E. 893, where the court said: "It must be remembered that the reduction in the capital stock of the bank was, in a sense, involuntary, and was to meet an impairment of equal amount. It must be presumed that the comptroller of the currency, in estimating and determining the amount of the impairment, considered all of the assets of the bank, and that his estimate was based upon what then appeared to be their value, making proper allowance for assets depreciated in value and for those regarded as valueless. The assets of a bank are held by it in trust (1) for the payment of its indebtedness; and (2) for the distribution among its stockholders of the surplus only, if any remaining. Morse, Banks, § 706. Conceding, without deciding, that the stockholders of a national bank, the capital stock of which is intact, may voluntarily reduce its capital stock under the statute, for the purpose of withdrawing a portion of the investment, and may thereupon withdraw assets to an amount equaling the reduction, the question remains, can they take such action when the reduction is involuntary, and is only made to an amount equaling an impairment in its capital? The right to withdraw assets in the one case would not necessarily involve the right to do so in the other. In the one case the reduction in the amount of its stock is made for the purpose of releasing and withdrawing a portion of
the investment. In the other it is made because it is discovered that a corresponding amount of the investment has been lost, and thus already involuntarily withdrawn. There can be no voluntary withdrawal of any portion of the assets of a bank, when the effect of such withdrawal will be to impair the capital stock or endanger the security of its creditors. On the facts before us, it will be presumed that the reduced capital stock represented the actual value of the remaining assets. Prima facie, any further withdrawal of assets, whether of great or of little value, would result in still further impairment of the capital. In our opinion, the stockholders had no power to withdraw the assets in question, and no valid trust was created by the attempt to do so."

Sec. 5144. [Right of shareholders to vote.] In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Shareholders may vote by proxies duly authorized in writing; but no officer, clerk, teller, or book-keeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote. [B. S.]


Right to vote.—Only stockholders of record at the time a bank, at the expiration of its charter, proceeds to wind up its affairs, have a right to vote for directors for that purpose or are eligible for election as such. Richards v. Attleborough Nat. Bank. (1889) 148 Mass. 187 10 N. E. 333, 1 L. R. A. 781, holding that the shares cease to be transferable as such after the bank has begun proceedings to wind up its affairs at the end of the original period for which it was organized.

Voting trust.—In Bridgers v. Tarboro First Nat. Bank. (1910) 132 N. C. 295, 67 S. E. 776, 31 L. R. A. (N. S.) 1199, it appeared that a voting trust agreement between the majority stockholders of a national bank was intended to prevent the control of a majority of the stock passing by purchase into the hands of a stockholder seemingly persona non grata to many of them. It conferred on the trustees and their successors uncontrolled power to manage the bank for fifteen years. It gave the trustees unrestricted power to fill vacancies in their number and completely separated the legal and equitable ownership of the stock. The trustees were officers of the bank, forbidden by this section to act as proxies, but the agreement conferred an irrevocable representation by proxy for the term. It was not coupled with an interest, and by it the subscribers stripped themselves of their power to vote and to participate in the annual meetings at which are elected directors, each of whom is required by sections 5146 and 5147, infra, pp. 704, 705, to be the bona fide owner of at least ten shares of stock, and of their power to determine the bank's policy. The avowed purpose was to assure the subscribers of the undisturbed continuance of the existing conditions, except by an unanimous consent. The surrender of their duties was complete, and the power of the trustees to do as they saw fit was absolute. It was held that the agreement was against public policy and void.

Unpaid liability.—The last clause of the section refers only to the liability of the stockholder for unpaid subscriptions to or assessments upon stock, and not to his liability as a debtor to the bank in ordinary commercial transactions. U. S. v. Barry. (W. D. Mich. 1888) 36 Fed. 246.

Sec. 5145. [Election of directors.] The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking; and afterward at meetings to be held on such day in January of each year as is specified therefor in the articles of association. The directors

Charging off assets.—A national bank, in charging off assets against capital stock withdrawn by consent of the comptroller of the currency, may list in the schedule of charged-off assets claims which are also and primarily listed at a lesser valuation as part of the capital stock. Cogswell v. Second Nat. Bank. (1905) 78 Conn. 75, 60 Atl. 1059, affirmed (1907) 204 U. S. 1, 27 S. Ct. 241, 51 U. S. (L. ed.) 343 in which latter case, however, the court said: "As a general rule, it may be admitted that where capital stock is impaired and a reduction is made merely to meet that impairment, there can be no distribution."

The comptroller's certificate of approval suffices to itself to prove the reduction. Brown v. Ellis. (D. C. Vi. 1900) 103 Fed. 834.
shall hold office for one year, and until their successors are elected and have qualified. [R. S.]


The only powers conferred upon the directors are vested in them as a board and when acting as a unit, and therefore the assent of a majority of the individual members of the board acting separately and singly is not the assent of the bank, and is not binding upon it. Ft. Scott First Nat. Bank v. Drake, (1886) 35 Kan. 564, 11 Pac. 445, 57 Am. Rep. 193.

Charging off bad and doubtful assets.— Under this section providing that the affairs of a national bank shall be managed by the directors, the directors may, on a reduction of the capital stock of the bank by a vote of the shareholders, approved by the Comptroller of the Currency on the assurance of the president and directors that bad and doubtful assets will be charged off and set aside for the benefit of the then shareholders, charge off the bad and doubtful assets as, in effect, a dividend from assets in excess of capital stock, and on so doing, the right to receive the proceeds of the assets thus set apart, is irrevocably vested in those who are shareholders on the date of the approval of the reduction of stock by the Comptroller of the Currency. Cogwell v. Second Nat. Bank, (1905) 78 Conn. 75, 60 Atl. 1039, affirmed (1907) 204 U. S. 1, 27 S. Ct. 241, 51 U. S. (L. ed.) 343.

Resignations.— The provision fixing the term of office of directors for one year, or until their successors have been elected and have qualified, does not prohibit resignations during the year, and the Act being silent as to the time when and the method by which the office of director may be resigned, the rule at common law obtains, and a verbal resignation offered to the president on the day on which the director sold all of his stock has been held to be sufficient. Briggs v. Spaulding, (1881) 141 U. S. 132, 11 S. Ct. 924, 35 U. S. (L. ed.) 662, affirming Movius v. Lee, (N. D. N. Y. 1887) 30 Fed. 298.

An information in the nature of a quo warranto will not lie in a state court to try the right to the office of director in a national bank. State v. Curtis, (1868) 35 Conn. 374, 95 Am. Dec. 263.

Sec. 5146. [Requisite qualifications of directors.] Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or District in which the association is located for at least one year immediately preceding their election and must be residents therein during their continuance in office. Every director must own in his own right at least ten shares of the capital stock of the association of which he is a director, unless the capital of the bank shall not exceed twenty-five thousand dollars, in which case he must own in his own right at least five shares of such capital stock. Any director who ceases to be the owner of the required number of shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place. [R. S.]

This section was amended to read as given in the text by an Act of Feb. 28, 1905, ch. 1103, 33 Stat. L. 818, entitled: "An Act To amend section fifty-one hundred and forty-six of the Revised Statutes of the United States in relation to the qualifications of directors of national banking associations."

As originally enacted it was as follows:

"Sec. 5146. Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory, or district in which the association is located, for at least one year immediately preceding their election, and must be residents therein during their continuance in office. Every director must own, in his own right, at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place."


Qualifications of the directors of Federal Reserve banks were prescribed by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 4, infra, p. 820.

For provisions relating to interlocking directors see Trade Combinations and Tauslers.

Residence of directors.— One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may for that reason be supposed to know the trustworthiness of those who
are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money."

Sec. 5147. [Oath required from directors.] Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this Title, subscribed by him, or standing in his name on the books of the association; and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his Office. [R. S.]


Reorganized state bank.—In the case of a reorganized state bank the oath is not required of the old directors. Lockwood v. Mechanics' Nat. Bank, (1869) 9 R. I. 308.

Sec. 5148. [Filling vacancies.] Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election. [R. S.]


Sec. 5149. [Proceedings where no election is held on the proper day.] If, from any cause, an election of directors is not made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town, or county in which the association is located; and if no newspaper is published in such city, town, or county, such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if no election is held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise; or if the directors fail to fix the day, shareholders representing two-thirds of the shares may do so. [R. S.]


Sec. 5150. [Election of president of the board.] One of the directors to be chosen by the board, shall be the president of the board. [R. S.]


The appointment of the President may be before the adoption of by-laws. Taylor 195.

R. S. sec. 5151. This section was as follows:
"Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts,
debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this Title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of Chapter four of this Title."


It was superseded by the provisions of the Federal Revenue Act of Dec. 23, 1913, ch. 6, § 23, infra, p. 722. See notes to said section.

Sec. 5152. [Executors, trustees, etc., not personally liable.] Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-funds would be, if living and competent to act and hold the stock in his own name.

[R. S.]


Relation between R. S. secs. 5151 and 5152.—For R. S. sec. 5151, see supra, p. 705. "Both sections deal with the subject of the double liability of stockholders of national banks, and each of them has for its purpose the enforcement of such liability. The variances between them are due to the essential difference in the circumstances under which they respectively are intended to operate. Considering them in their relation to a living stockholder, on the one hand, and, on the other, to the estate of a deceased stockholder, it is clear upon their face that Congress in their enactment had in view a practical, reasonable and consistent plan for the collection of assessments of the double liability. In the case of a living stockholder, the amount of the assessment against him was intended to be paid by him and suit could be maintained against him as a stockholder for its recovery whenever it matured. In the case of a deceased stockholder, who for the purpose of the payment of his share of the assessment was represented by his estate, it was intended that the statutory liability should attach to it in the hands of his executors or administrators as a charge or lien. And it fairly is to be assumed that as Congress intended individual responsibility of the stockholders to serve as security for the payment, in the case of a living stockholder, of his share of an assessment, so it equally intended such charge or lien to serve, in the absence of countervailing equities, as such security in the case of a deceased stockholder. Section 5152 expressly provides that 'the estates and funds' in the hands of 'persons holding stock as executors' shall be 'liable in like manner and to the same extent as the testator would be, if living and competent to act and hold the stock in his own name.' This provision shows a legislative intent that the charge or lien upon the estate of a deceased stockholder in favor of the creditors of a national bank, shall, in the absence of superior countervailing rights of equities, be regarded and enforced equally as the individual responsibility of living stockholders. Further, section 5151 in providing for double liability declares that the stockholders shall be 'held individually responsible, equally and ratably, and not one for another,' for the debts of a national bank; and that section when read in connection with section 5152 which, as before stated, also deals with the subject of the enforcement of the double liability, affords additional reason to support the conclusion that Congress intended the enforcement of the charge or lien upon the estate of a deceased stockholder equally with the enforcement of the individual responsibility of living stockholders to serve as means for the accomplishment of the purpose of the statute." Rankin v. Miller. (D. C. Del. 1913) 207 Fed. 602.

"The only purpose of this section is to protect persons who hold stock in a representative capacity from any personal liability, and only makes the funds in the hands of such representatives liable. The object of this section undoubtedly was to encourage the investment of trust funds in this class of corporations by relieving the trustees from personal liability, and American Bankers' Nat. Bank, (N. D. Ill. 1884) 21 Fed. 197.

Liability of an estate under this section attaches from the date when the bank
suspended and was declared insolvent. Rankin v. Miller, (D. C. Del. 1913) 207 Fed. 602.

Liability of estate in the hands of executors is not limited to such demands as were existing claims at the time of the death of the decedent but if the liability was created after his death, and while the shares of stock formed part of his estate, then under the provisions of section 5132, the estate becomes responsible for such liabilities.” Wickham v. Hull, (N. Y. 1894) 80 Fed. 209.


A transfer on the books of the bank is essential to save the estate from liability. Notwithstanding the stockholder died and his estate was distributed and settled prior to the insolvency of the bank, the estate is still liable in the absence of such transfer of the stock. Matteson v. Dent. (1900) 176 U. S. 521, 20 S. Ct. 419, 44 U. S. (L. ed.) 571, affirming (1897) 70 Minn. 519, 73 N. W. 416; Davis v. Weed (1877) 44 Conn. 509, 7 Fed. cas. No. 3,658; and such liability may be enforced as to the assets in the hands of personal representatives at the time of the insolvency of the bank. Witters v. Sowles, (C. C. Vt. 1887) 32 Fed. 130; Baker v. Beach. (C. C. Wash.) 1898 85 Fed. 836; and the estate may be followed in the hands of distributees and legatees. Matteson v. Dent. (1900) 176 U. S. 521, 20 S. Ct. 419, 44 U. S. (L. ed) 571, affirming (1898) 73 Minn. 170, 73 N. W. 1041; Witters v. Sowles, (C. C. Vt. 1887) 32 Fed. 130; and the whole amount of the assessment enforced to the extent of the distributive share received. Matteson v. Dent. (1900) 176 U. S. 521, 20 S. Ct. 419, 44 U. S. (L. ed) 571, affirming (1898) 73 Minn. 170, 73 N. W. 1041.

It does not seem to be material when the liabilities for which the assessment is made arose, so long as there is no transfer on the books of the bank. Matteson v. Dent. (1900) 176 U. S. 521, 20 S. Ct. 419, 44 U. S. (L. ed) 571. Contra, Witters v. Sowles, (C. C. Vt. 1887) 92 Fed. 130. See also Zimmerman v. Carpenter, (C. C. S. D. 1898) 84 Fed. 747.

The receiver of an insolvent national bank has a valid claim for an assessment against the estate generally of a deceased stockholder, who died prior to the insolvency of the bank, but whose stock has not been transferred, at the rate of the Comptroller's order. Davis v. U. S. (C. C. S. D. 1898) 569, 7 Fed. Cas. No. 3,658, where Shipman, J., said: “I do not think that section 5132 was intended to affect the liability of assessments of estates in process of settlement. The principal object of the section was to prevent personal transfer from running against executors, administrators, trustees, or guardians who had purchased as trustees or to whom had been transferred in their names, as trustees of national bank stocks for the benefit of the trust estates. Having by such purchase voluntarily entered into a contingent liability for assessments, it might be claimed that a judgment or bonus propris could be rendered against them. The main object of the section was to prevent personal judgments being rendered against such persons in whom the stock stood on the books of the bank, as trustees.”

Where executors sold their testator's stock and surrendered the certificate therefor to the president of the bank accompanied by a power of attorney, which would enable its officers to make the transfer on the register, and the president received the certificate and power of attorney with knowledge that the purpose was to have it applied to personal transfer on the books of the bank that the executors were no longer shareholders, the exemption of the estate from further responsibility was thereby secured, though the transfer on the books was not in fact made; the executors believing in good faith, and having no reason to doubt that the purchaser of the stock had caused the transfer to be made. Whitney v. Butler, (1886) 118 U. S. 655, 7 S. Ct. 61, 30 U. S. (L. ed.) 266.

In Witters v. Sowles, (C. C. Vt. 1886) 28 Fed. 121 where complainant, as receiver of a national bank, exhibited his bill against the executor of a deceased shareholder, to reach assets, if any, in the hands of said executor, also against the executor's wife, to reach her interest as residuary legatee, failing assets in the hands of her husband, the court said: “If there are assets in his hands to be charged with that liability, and they are taken for that purpose, the prospective share of his wife, the residuary legatee, will be lessened to some amount thereby. If the assessment is charged upon the assets in her hands on account of a deficiency of those in his hands, her estate in possession will be diminished by so much. If the assets in the hands of other legatees are reached, and taken for that purpose, she will be liable to take good the amount to the extent to which she has received assets as residuary legatee.”

An action by the receiver of a national
bank to enforce liability of a testator's estate is not to be regarded as an action upon a testamentary bond against either principal or surety. Rankin v. Miller, (D. C. Del. 1913) 207 Fed. 602.

The receiver of a national bank is under no obligation before suing in the federal court to establish the liability of a deceased shareholder's estate to present his claim before the register of wills having jurisdiction over the settlement of the decedent's estate, nor is it necessary for him to make a demand or to present to the executors an affidavit as required by the state law, before instituting suit. Rankin v. Miller, (D. C. Del. 1913) 207 Fed. 602.

Transfer before insolvency.—When the beneficial ownership of the stock has passed from the estate before the insolvency of the bank, and has been transferred on the books of the bank, the estate of the deceased stockholder is not liable. Blackmore v. Woodward, (C. C. A. 6th Cir. 1895) 71 Fed. 321, 37 U. S. App. 531, 18 C. C. A. 57.

Where the stock has been transferred on the books of the bank to a residuary legatee before the insolvency of the bank, the estate of the deceased stockholder is not liable. Witter v. Sowles, (C. C. Vt. 1887) 32 Fed. 130.

Receipt of stock.—The executor is liable as such though the stock in question was received after the death of the stockholder on the reduction of the capital stock of the bank. Brown v. Ellis, (D. C. Vt. 1900) 103 Fed. 534; or was transferred to him as trustee, the legal title never having been divested. Earle v. Rogers, (E. D. Pa. 1900) 105 Fed. 208.

Determination of liability of trust estate.—Where the question of the liability of a trust estate for an assessment on shares of an insolvent national bank held by the trustee depends upon the power of the trustee, under the terms of the trust, to purchase such shares for the estate, such question cannot be determined in an action at law by the bank receiver against the stockholder, though it is alleged that he holds the stock as trustee. Hampton v. Foster, (C. C. Mass. 1904) 127 Fed. 468.

An assignee for the benefit of creditors is liable as such for an assessment on the stock of his assignor levied after the assignment. Graham v. Platt, (1801) 28 C. R. 421, 65 Pa. 30.

Personal exemption of executors, administrators, guardians, or trustees.—The personal exemption of persons holding stock as trustees refers not only to trustees appointed by will or by order of a court or judge, but to any trust relationship however created. Lucas v. Coe, (N. D. N. Y. 1898) 86 Fed. 972. But such exemption is limited to express and active trusts where there is a probability of some estate to respond to the liability. Hougherton v. E. Houghton, (C. C. Mass. 1898) 86 Fed. 547; and it does not apply where the bank's records show an unencumbered title in the alleged trustee. Hubbell v. Hougherton, (C. C. Mass. 1898) 86 Fed. 547, 552; Davis v. Essex First Baptist Soc., (1877) 44 Conn. 582, 7 Fed. Cas. No. 3,633; Kerr v. Urie, (1897) 86 Md. 72, 37 Atl. 759, 63 A. S. R. 493, 38 L. R. A. 119.

The court does not exist within the meaning of the section when the alleged trustee has a right to hold and dispose of the stock as his own without liability to account therefor to any person. Horton v. Mercer, (C. C. A. 8th Cir. 1931) 71 Fed. 153, 36 U. S. App. 284, 18 C. C. A. 18.

This section is not confined to express trusts, but applies to every one holding stock as trustee, and a father who invested funds belonging to his children in such stock, taking in his own name simply as "trustee," cannot be held personally liable for an assessment thereon, although the fund so invested arose from an investment of his own money previously made by him in their names and behalf. Fowler v. Clarington, (C. C. 3d Cir. 1900) 16 Fed. 891, 91 C. C. A. 569, affirming (N. D. N. Y. 1907) 152 Fed. 801.

In Lucas v. Coe, (N. D. N. Y. 1898) 86 Fed. 972, a father, as trustee of a fund for investment for his infant son, subscribed for stock in a national bank, stating for whom the subscription was made, but the stock was listed in his name. It was held that the father was not liable as a shareholder.

In Yardley v. Wilgus, (E. D. Pa. 1893) 56 Fed. 985, the bank had recovered a judgment for an assessment against the real owner of the stock standing in the name of another, who was an undisclosed trustee, and it was held that the record owner could not thereafter be made liable as a shareholder, though the real owner was removed.

In Kerr v. Urie, (1897) 86 Md. 72, 37 Atl. 789, 63 A. S. R. 493, 38 L. R. A. 119, the court declined to accept the defense of a married woman who had purchased stock in her own name, that she held it as a self-appointed attorney or trustee for an infant of tender years.

Where a trustee makes an improper investment in bank stock, the beneficiary has the right on learning of the nature of the investment to accept or reject it, and if rejected then it would seem that the trustee holds the stock in his individual right and would himself be liable as such upon the stock. Williams v. Cobb, (C. C. A. 2d Cir. 1914) 219 Fed. 663, 134 C. C. A. 217.

One to whom certificates of stock are issued in his own name, and who does not cause the books to show that he held the stock, not in his own right, but only as a trustee, cannot be permitted to show, as against creditors, that he held the
stock as trustee for the bank. Lewis r. Switz, (C. C. Neb. 1896) 74 Fed. 381.

There, in an action by the receiver of a national bank, it appeared that the stock stood, and had always stood, since its purchase by the defendants, upon the stock ledger and the stock books of the bank in the name of the defendants, without indication or notice that they were trustees, and it appeared that the bank was ever notified that the defendants claimed to be trustees, they were held personally liable to assessment for debts of the insolvent bank. Davis r. Essex First Baptist Soc., (1877) 44 Conn. 382, 7 Fed. Cas. No. 3,833.

One who was administrator of the estate of a deceased stockholder and was also his heir and next of kin, did not become personally liable on an assessment by the fact that he took the stock into his possession, voted it with other stock, and received such dividends as it produced. In re Biingham, (1891) 127 N. Y. 296, 27 N. E. 1055, (affirming (1890) 57 Hun 586, 10 N. Y. S. 325), where the court said: "The residuary interest in the stock after payment of the debts of his intestate belonged to him; but while he held the relationship of administrator, which he would terminate only through a final judicial settlement of his accounts, it is not seen how he could be treated as having the legal title to the stock other than in his representative capacity. But if, in this instance, he had procured a transfer upon the bank-books of the stock to himself individually, a different question may have been presented."

"It will be observed that in fixing the liability of stockholders in national banks, so far as the persons beneficially owning stock may be under the legal disability of infancy are concerned, as well as instances where the stock is held by executors, administrators, or other trustees, it is the estate of the testator or other person who made liable for assessment. It will be noticed that neither the executor, guardian, nor trustee is personally liable, although the legal title to the stock may be held by them." Clark r. Ogilvie, (1901) 111 Ky. 181, 63 S. W. 429, holding that neither the guardian nor his ward was subject to personal liability on account of stock held by the former in his capacity of guardian.

Trustee personally exempt, though holding naked title.—In Welles r. Larrabee, (N. D. fa. 1888) 36 Fed. 866, 2 L. R. A. 471, the court proposed to itself the following question, which it answered in the negative: "Can a person who is not the owner of the stock, and has no beneficial interest therein, be held liable for the assessments thereon by reason of the fact that the shares have been assigned to him to hold in trust, it appearing upon the proper books of the bank that he holds the same as trustee?" The court said:

"All that is necessary to be done to bring one within the terms of the statute [R. S. sec. 5152] is to show that the party holds the stock as trustee and has, in the possession or under his control to which he might look for reimbursement, should be held personally liable for the assessments upon the stock thus held by him, where a trustee who has an estate or funds in his possession or under his control is expressly exempt from personal liability? If any distinction is to be made, it would be more in consonance with just principles to hold the trustee, having an estate or funds in possession, to which he might look for reimbursement, liable instead of the executor, rather than one who holds merely a naked title."

Law of devestavit applicable to executors.—In Rankin r. Miller, (D. C. Del. 1913) 207 Fed. 602, holding the executors, Miller and Bailey, personally liable, the court said: "The executors are trustees charged with the duty of disposing of the estate according to law and are guilty of a breach of trust in knowingly or negligently disregarding and defeating the right of creditors to the security conferred upon them by law with respect to the double liability. It is no answer to say that the statutory liability was the subject only of a charge or lien upon the decedent's estate, which was spent or dissipated or became 'extinguished.' One cannot take advantage of his own wrong, and such an objection does not lie in the mouth of the wrongdoer. Executors are under an obligation to see to it that the funds in their hands shall not be squandered, wasted or otherwise improperly disposed of with the intent of making the estate liable for the assessment. If this be not the law one cannot readily perceive why an executor could not with perfect immunity from suit cast the most valuable part of an estate represented by him into the ocean knowing that it was subject to the statutory liability, and then claim immunity on the ground that it was not in his hands at the time an assessment became payable or when suit was instituted. The law will not countenance such a partial act upon his part. . . . The executors prior to the distribution of the estate had actual knowledge of the fact that these shares of stock belonged to that estate; for they charged themselves with them in the inventory and appraisal, verified April 20, 1892. They knew they were shares of a national bank. Knowing they were such shares and belonged to the decedent's estate they were bound to know the law and were chargeable with knowledge that the estate
was subject to double or statutory liabil-
ity or a charge or lien for the benefit of the
creditors of the Alma bank. That the
executors had cause to suspect the em-

barrassment or insolvency of the bank
fairly may be inferred from the fact that
the value assigned to the shares in the

innocent's appraisement was only one-
tenth of their par value. Although the
executor, Miller, was examined as a wit-

ness, it does not appear from his testi-
mony, or that of any other witness, that
either he, or his co-executor, Baily, not-
withstanding the above circumstance, at
any time prior to the distribution of the
estate made any inquiry as to the finan-
cial condition of the bank. They dis-

 tributed in October, 1892, five months
after charging themselves with the stock
in question, the net balance of the estate,
amounting to $18,991.75, according to
the terms of the decedent's will, without
requiring either refunding bond or other
security from those to whom such bal-
ance was distributed; the defendant
Charles R. Miller receiving from and re-

 ceipting to the estate for the sum of
$4,747.44 on his own individual account
October 6, 1892; the total amount of the
second assessment against the estate in-

 volved in this suit being only $2,190, with
interest from December 22, 1900. It
may be noted in passing that while Miller tes-

 tified that he had spent the share thus
received by him he did not state when
his share was so spent. But however
this may be, the executors recklessly and
at their own peril, without regard to the
rights of the creditors of the Alma bank,
and although possessing knowledge that
the decedent's estate was chargeable with
its share of the amount of any assessment
which should be made by direction of the
comptroller of the currency, disposed of
that share in the same manner as if
they had never known that the decedent
had been the owner of the 150 shares of
stock, or that the same had passed to and
were held by them as part of the estate,
or that the Alma bank was embarrassed
or insolvent. As between the innocent
creditors of the Alma bank, on the one
hand, and, on the other, Miller and Baily,
who made such improper use of their
office as executors without requiring secu-
rity the equities of the case are wholly
on the side of the former. Nothing that
is here said is intended to convey the idea
that either Miller or Baily intended in
fact to defraud or wrong the creditors of
the Alma bank. This court does not im-
pute to them, or either of them, such a
dishonorable or unworthy motive. But
the course of conduct pursued by them,
without actual wrongful intent, neverthe-
less constituted them wrongdoers and torti-
feasors and as such jointly and severally
liable, under the prayer for other and
further relief, to the receiver for the
benefit of the creditors of the Alma bank
for the amount of $2,190 with interest
as claimed. I can perceive no reason why
the law of devolution is not as applicable
to executors, holding them personally lia-
able to those entitled to the benefit of the
double liability on account of misapplication
of the estate of a decedent, as it
would be to executors for squandering or
misappropriating the estate in cases not
involving the enforcement of double
liability. To draw a distinction between
the two would establish a mischievous and
hurtful precedent."

Liability of estate in hands of legatees
or distributees.—In Rankin v. Miller, (D. C. Del. 1913) 207 Fed. 602, holding the
executors, Miller and Rankin, per-

sonally liable, as stated in the last preceding
paragraph, the court said: "Counsel for
the receiver have contended that under the
second assessment the legatees and ben-

eficiaries under the will of the decedent are,
within the limits of the value of the
portions of the estate respectively re-
ceived by them, liable to pay to the
receiver the several sums chargeable un-
der that assessment against those several
portions of the estate. But in view of
the conclusion heretofore reached it is un-
necessary now to enter into this inquiry.
There is no evidence that any of the prop-
erty of the decedent can now be traced
to the possession of any of the beneficiaries
under his will. Whether there may be a
claim on the part of the executors for
contribution from such legatees or bene-

ficiaries is unnecessary now to consider.
Their equities probably are wholly differ-
ent from those of Miller and Baily. That
under certain circumstances creditors of
a decedent may, after final settlement of
his estate, proceed with all proper expedi-
tion for satisfaction of their claims out
of portions of his estate in the hands of
legatees or devises in an old and well
settled doctrine of the common law. The
question to be decided is whether they are
careful not with a claim originating at
common law or under general principles
of equity, but solely with the enforcement
of the purely statutory right of double
liability, and it may be material to ob-
serve in passing that a claim of this sort
is founded on a liability of the executors
or devises of the decedent, excepting the
executors. Miller and Baily, appear to
have held any part of the 150 shares of
stock of the Alma bank, and further that
section 5152 refers to estates and funds
in the hands of "executors, administrators,
guardians, or trustees" but does not men-
tion legatees or devises. Under the fore-
going circumstances this court would not
feel justified in decreeing against the lega-
tees or devises as such, but only against
Miller and Baily jointly and severally as
tort-feasors. Should they conceive they
have a right to compel contribution, the
decree to be entered in this case may be
so framed as not to prejudice such right,
if any they have." See Witters v. Sowles,
(C. C. Vt. 1895) 22 Fed. 168.

Where, in the settlement of the estate
of a deceased shareholder, stock and other
assets are transferred on the books of the bank to a residuary legatee before the insolvency of the bank, such legatee cannot be held liable as a distributee to the extent of assets received, but is liable only as a stockholder. Witters v. Sowles, (C. C. Vt. 1887) 32 Fed. 130.

Sec. 5153. [Duties and liabilities when designated as depositaries of public moneys.] All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: Provided, That the Secretary shall, on or before the first of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: Provided. That the Secretary of the Treasury shall distribute the deposits herein provided for, as far as practicable, equitably between the different States and sections. [R. S.]

As originally enacted this section was as follows:

"Sec. 5153. All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary, and such depositaries may also be employed as financial agents of the Government; and they shall perform all such reasonable duties as depositaries of public money and financial agents of the Government as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue or for loans or stocks."


It was first amended by an Act of March 3, 1901, ch. 871, 31 Stat. L. 1448. The amendment consisted in the insertion, after the word "Secretary" in the first sentence, the words: "but receipts derived from duties on imports in Alaska, the Hawaiian Islands, and other islands under the jurisdiction of the United States may be deposited in such depositaries subject to such regulations;" it was again amended by an Act of March 4, 1907, ch. 2913, § 3, 34 Stat. L. 1290 to read as given in the text.

The Federal Reserve Act of Dec. 23, 1913, ch. 6, § 27 given as amended by the Act of Aug. 4, 1914, ch. 225, infra, p. 843, provided as follows: "Sections fifty-one hundred and fifty-three, fifty-one hundred and seventy-two, fifty-one hundred and ninety-one, and fifty-two hundred and fourteen of the Revised Statutes of the United States, which were amended by the Act of May thirteenth, nineteen hundred and eight, are hereby rescinded and are hereby read as such sections read prior to May thirtieth, nineteen hundred and eight, subject to such amendments or modifications as are prescribed in this Act." Said R. S. sec. 5153 was not, however, specifically amended by the Aldrich-Vreeland Act of May 30, 1908, ch. 229, 35 Stat. L. 546 to which the quotation obviously refers. That Act did contain, in section 15 thereof, provisions relating to interest which possibly affected this section while they were in force, but the entire Act expired on June 30, 1915 by virtue of the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 27 previously mentioned.

Practical construction.—In Branch v. U. S., (1878) 12 Ct. Cl. 251, judgment affirmed (1880) 100 U. S. 673, 25 L. S. (L. ed.) 759, the court said: "Designating a national bank as a depositary of public money under this provision does
not change the character of its organization, or convert its managers into public officers, or give to the government any additional control over the institution, or render the United States liable for any of the acts, contracts, or obligations of the bank. Nor does it constitute the bank a general financial agent of the government, but when after such designation it is required by law or by direction of the secretary of the treasury to perform any financial duties for the United States, it then becomes a special agent for the particular purpose required, with no power to bind the government beyond the special authority conferred upon it. In short, constituting a national bank a depository of public money is an employment of the institution for business purposes, as it is employed by individual depositors, and not an assumption of its powers and liabilities by the national government, nor the making of it, as an institution, a part of the United States Treasury. . . . When public money is deposited with a designated depository national bank, it is not there retained in kind as the special property of the United States, of which the bank is made the custodian, but it becomes at once the property of the bank, is mingled with its other funds, is loaned or otherwise employed in the ordinary business of the corporation, and the bank, instead of being a custodian of public money, becomes a debtor to the United States precisely as it does to other depositors on receipt of individual deposits. Such was the practical construction adopted immediately on the designation of national banks as depositories of public money after the passage of the national banking law, and ever since uniformly followed without question. The government has the same rights and remedies against the bank as other creditors have. If the bank fails, the United States resort to the collateral security, if any, given to secure the deposits of public money to the extent of the proceeds thereof, and if after that is exhausted a balance due for deposits remains unpaid, the government takes its dividend thereon with other creditors, and is entitled to no priority or preference, if the construction given in opinions of the attorneys-general who have advised the executors on that subject be correct, which has not been judicially determined. ([1869] 12 Op. Att'y-Gen. 549; [1871] 13 Op. Att'y-Gen. 528.)

Money paid into court not public money.—In Branch v. U. S. (1850) 100 U. S. 475, 25 L. S. (L. ed.) 759. certain cotton was seized upon information filed under the Confiscation Act, and the proceeds of a sale thereof were paid over, under the direction of the District Court, to the clerk, who deposited the same to his own credit as clerk in a national bank which had been designated as a depository of public money. The condemnation suit was dismissed, but in the meanwhile the bank had failed. Holding that the claimant could not recover of the United States the loss incurred by the bank's failure, the court said: "The designated depositories are intended as places for the deposit of the public moneys of the United States. What is to say, moneys belonging to the United States. No officer of the United States can charge the Government with liability for moneys in his hands not public moneys by depositing them to his own credit in a bank designated as a depository. In this case, the money deposited belonged for the time being to the court, and was held as a trust fund pending the litigation. The United States claimed it, but their claim was contested. So long as this contest remained undecided, the officers of the Treasury could not control the fund. Although deposited with a bank that was a designated depository, it was not paid into the Treasury. No one could withdraw it except the court or the clerk, and it was held for the benefit of whoever in the end it should be found to belong. The whole subject is elaborately considered in the opinion of the Court of Claims, and we deem it unnecessary to attempt to add to what has there been said." Followed in a similar case in Condert v. U. S. (1899) 175 U. S. 173, 20 S. Ct. 56, 44 U. S. (1. ed.) 129, where the court said: "It was only public money of the United States which national banks could be made depositories, and it was therefore only public money which an officer could deposit in them, whether he received it originally or received it to disburse . . . . It is not without significance that when Congress authorized 'moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such courts, to be deposited with a designated depository, it required it to be done 'in the name and to the credit of such court,' and not to the credit of the United States. Act of March 24, 1871, ch. 2, 17 Stat. L. 1," — for which Act see R. S. sec. 995 in title Money Paid into Court.


"The power and authority given in this section will permit the Secretary of the Treasury to receive as collateral security from such national banking associations money securities of the United States of the same general character as its bonds, and will permit the Secretary therefore to receive treasury notes of the United States as collateral security for the performance of the obligations of such association." (1875) 16 Op. Att'y-Gen. 98.

C. C. A. 219, affirming judgment for the plaintiff in an action by the United States against a national bank depository to recover payments by the bank on checks drawn by an examiner of surveys and special disbursing agent for the Interior Department and payable to fictitious payees with forged indorsements of said examiner and agent, the court said: "The very simple and obviously reasonable and common-sense view of the situation is that the bank was the depository of public moneys, to be drawn upon by the government or its authorized agent for public use, and it can make no sort of difference whether the bank is regarded as a debtor to the government to the amount of such moneys so deposited, or as holding the same in specie subject to the government's check or demand. The funds are nevertheless the funds of the government. Nor can it make any difference whether they are drawn out by the fraudulent practices of the government's agent, or paid out without lawful warrant by the bank; the liability of either to reimburse the government is just the same. While the bank may not be, and is not, liable criminally, it is liable civilly."

Sec. 5154. [Organization of state banks as national banking associations.] Any bank incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a national banking association under the provisions of the existing laws may, by the vote of the shareholders owning not less than fifty-one per centum of the capital stock of such bank or banking association, with the approval of the Comptroller of the Currency be converted into a national banking association, with any name approved by the Comptroller of the Currency:

Provided, however, That said conversion shall not be in contravention of the State law. In such case the articles of association and organization certificate may be executed by a majority of the directors of the bank or banking institution, and the certificate shall declare that the owners of fifty-one per centum of the capital stock have authorized the directors to make such certificate and to change or convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and the organization certificate, shall have power to execute all other papers and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be directors of the association until others are elected or appointed in accordance with the provisions of the statutes of the United States. When the Comptroller has given to such bank or banking association a certificate that the provisions of this Act have been complied with, such bank or banking association, and all its stockholders, officers, and employees, shall have the same powers and privileges, and shall be subject to the same duties, liabilities, and regulations, in all respects; as shall have been prescribed by the Federal Reserve Act and by the national banking Act for associations originally organized as national banking associations. [R. S.]

This section was amended to read as given in the text by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 8, 38 Stat. L. 258. As originally enacted it was as follows:

"Sec. 5154. Any bank incorporated by special law, or any banking institution organized under a general law of any State, may become a national association under this Title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and
to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be the directors of the association until others are elected or appointed in accordance with the provisions of this chapter; and any State bank which is a stockholder in any other bank, by authority of State laws, may continue until the close of the next annual meeting or both, may be organized under and have accepted the provisions of this Title. When the Comptroller of the Currency has given to such association a certificate, under his hand and official seal, that the provisions of this Title have been complied with, and that it is authorized to commence the business of banking, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules prescribed for other associations originally organized as national banking associations, and shall be held and regarded as such an association. But no such association shall have a less capital than the amount prescribed for associations organized under this Title."


**Intent of Act.**—The National Bank Act was intended to provide not only for the organization of new banks, but to absorb the old state banks and establish a general exclusive banking system for the whole country. See r. Phenix Bank, (1867) 34 Conn. 205.

**State authority is not necessary to enable a state bank to change its organization to a national bank.** Casey r. Galli, (1877) 94 U. S. 673, 24 U. S. (L. ed.) 168; State r. National Bank, (1870) 23 Md. 75; National Banking Ass'n, (1882) 17 Op. Atty.-Gen. 288.

**Right to reorganize.**—A national bank which has become a state bank, after the liquidation of its affairs, upon the expiration of its charter, may be converted back into a national banking association, and adopt the name of the expired corporation with the approval of the comptroller. National Banking Ass'n, (1882) 17 Op. Atty.-Gen. 288.

**Savings bank in District of Columbia.**—After the enactment of the Act of June 30, 1876, ch. 156, § 6, infra, p. 813, savings banks organized in the District of Columbia under an Act of Congress, and having a capital stock paid up in whole or part, were entitled to become national banking associations in the mode, and subject to the conditions, prescribed by the text R. S. sec. 5154. Keyser r. Hitz, (1890) 133 U. S. 138. 10 S. Ct. 280, 33 U. S. (L. ed.) 531.


**Vote to reorganize.**—Two-thirds of the absolute or voting stockholders of the state bank consenting thereto is sufficient to reorganize the corporation as a national bank and transfer to the reorganized corporation the entire stock and assets of the old bank. Keyser r. Hitz, (1883) 2 Mackey (D. C.) 473; State r. Phenix Bank, (1867) 34 Conn. 205; State r. Hartford Nat. Bank, (1867) 34 Conn. 240.

The comptroller's certificate is conclusive as to the regularity of the proceedings by which the bank was converted into a national bank. Heineman r. Galli, (1883) 2 Mackey (D. C.) 473; Casey r. Galli, (1877) 94 U. S. 673, 24 U. S. (L. ed.) 168.

**Conversion of banks organized under territorial laws.**—The conversion of a bank organized under the territorial laws, into a national bank transfers the assets of the former to the latter, which succeeds thereto by operation of law, and not as a purchaser. People's Nat. Bank r. Kingfisher County, (Okla. 1908) 103 Pac. 682.


And this is so although in form it was organized as a new bank and the assets were transferred to it as if by sale and purchase. Western Reserve Bank v. McIntire, (1884) 40 Ohio St. 528.

The national bank into which a state
bank has been converted may enforce a liability to the state bank existing at the time the conversion was effected. City Nat. Bank v. Phelps, (1881) 86 N. Y. 494, affirming (1878) 16 Hun 158.

A state bank may change to a national bank and put itself beyond the control of the state, but it cannot, by such legal metamorphosis, escape liabilities it incurred during its existence as a state institution. State v. Farmers' Nat. Bank, (Okla. 1915) 150 Pac. 212.

Privilege tax.—On its reorganization as a national bank the bank ceases to exist as a state bank, and is not liable to a privilege tax under its state charter. State v. National Bank, (1870) 33 Md. 75.

The conversion into a national bank did not work an annihilation or dissolution so as to adeem a residuary legacy in certain shares limited upon a life estate in such shares which was to become an absolute one in case the bank should pay off or refund its stock, by reason of the expiration of its charter or from any other cause. Maynard v. Mechanics' Nat. Bank, (1867) 1 Brewst. (Pa.) 483.

Deposit.—A national or state bank which succeeds a national bank whose charter has expired or which went into voluntary liquidation, receiving all its funds and property, is liable for deposits in the liquidated bank. Monmouth First Nat. Bank v. Strang, (1891) 138 Ill. 347, 27 N. E. 903; Evans v. National Exch. Bank, (1883) 79 Mo. 182.

Where the successor bank has paid instalments of interest due on government bonds which had been deposited with the old bank, it is entitled to deny that such bonds came into its possession on the reorganization. Monmouth First Nat. Bank v. Strang, (1891) 138 Ill. 347, 27 N. E. 903.

Outstanding circulation.—It is liable to holders of its outstanding circulation issued in accordance with the state laws as if it were a continuing corporation. Metropolitan Nat. Bank v. Claggett, (1891) 141 U. S. 520, 12 S. Ct. 60, 35 U. S. (L. ed.) 841, affirming (1891) 125 N. Y. 729, 26 N. E. 757, affirming (1890) 56 Hun 575, 10 N. Y. S. 165.

Unlawful assets.—Assets belonging to a state bank which a national bank is prohibited by the National Bank Act from holding nevertheless pass to the national bank on such reorganization. Scofield v. State Nat. Bank, (1879) 9 Neb. 316, 2 N. W. 888, 31 Am. Rep. 412.

Officers.—The officers of the old bank become officers of the new one until their successors are elected, without regard to their qualifications. Lockwood v. Mechanics' Nat. Bank, (1869) 9 R. I. 308, 11 Am. Rep. 253.

Rights of shareholders.—By its conversion into a national bank every holder of shares of the capital stock of the state bank becomes a shareholder of the capital stock of the new bank to the amount of his shares, and as such is subject to the liabilities imposed by the National Bank Act on such shareholders. Casey v. Galli, (1877) 94 U. S. 673, 24 U. S. (L. ed.) 168; State v. Phoenix Bank, (1887) 34 Conn. 205; State v. Hartford Nat. Bank, (1867) 34 Conn. 240.

Nor is it material that new certificates of stock were not issued to the shareholders. Keyser v. Hitz, (1883) 2 Mackey (D. C.) 473.

Where a national bank has gone into voluntary liquidation prior to the expiration of its charter, a single shareholder who receives without objection dividends amounting to nearly his whole proportionate share of the stock of the old bank, cannot claim by virtue of his interest in the old bank to be a stockholder in the reorganized bank or entitled to a share of its earnings. Centralia First Nat. Bank v. Marshall, (1887) 26 Ill. App. 440.

Where a stockholder in a state bank, after its reorganization as a national bank, accepted dividends on his individual shares, and in view of the tender age of certain children, to whom he had transferred part of his stock, it might be presumed that he also received dividend checks made payable by the bank to the order of such children, he was estopped to deny his liability for assessments levied on such stock by the Comptroller on the insolvency of the bank on the ground that he did not expressly assent to the reorganization of the bank. Aldrich v. Bingham, (W. D. N. Y. 1904) 131 Fed. 363.

Withdrawing shareholders.—The stockholders who do not enter into the new organization are entitled to a full share of the assets of the old bank or of the avails of the sale thereof, and their rights will be enforced by a court of equity upon their application by decree and execution. State v. Hartford Nat. Bank, (1897) 34 Conn. 240.

Sec. 5155. [State banks having branches.] It shall be lawful for any bank or banking association organized under State laws, and having branches, the capital being joint and assigned to and used by the mother-bank and branches in definite proportions, to become a national banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to
retain; the amount of the circulation redeemable at the mother-bank, and each branch, to be regulated by the amount of capital assigned to and used by each. [R. S.]


Branch banks in general.—The power of a state bank on becoming a national banking association to retain and keep in operation its branches does not imply that a national bank as such has the power to establish a branch bank. If the power existed for national banks to have branches, there was no necessity for this express provision allowing States banks, when converted, to retain their branches; and, moreover, the limitation of this power to such banks as had their capital assigned to the mother and branch banks in definite proportions, clearly shows that it was not supposed that such a power was possessed by banks in general. (1911) 29 Op. Atty.-Gen. 81.

Sec. 5156. [Reservation of rights of associations organized under Act of 1863.] Nothing in this Title shall affect any appointments made, acts done, or proceedings had or commenced prior to the third day of June, eighteen hundred and sixty-four, in or toward the organization of any national banking association under the act of February twenty-five, eighteen hundred and sixty-three; but all associations which, on the third day of June, eighteen hundred and sixty-four, were organized or commenced to be organized under that act, shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities, and restrictions imposed by this Title, notwithstanding all the steps prescribed by this Title for the organization of associations were not pursued, if such associations were duly organized under that act. [R. S.]


The Act of Feb. 25, 1863, ch. 58, 12 Stat. L. 665, was the original National Bank Act, repealed by the Act of June 3, 1864, ch. 106, which was incorporated in the Revised Statutes as title 62. See the notes to R. S. sec. 5133, supra, p. 651.

An act to enable national-banking associations to extend their corporate existence, and for other purposes.


[Sec. 1.] [Extension of charter for twenty years.] That any national banking association organized under the acts of February twenty-fifth, eighteen hundred and sixty-three, June third, eighteen hundred and sixty-four, and February fourteenth, eighteen hundred and eighty, or under sections fifty-one hundred and thirty-three, fifty-one hundred and thirty-four, fifty-one hundred and thirty-five, fifty-one hundred and thirty-six, and fifty-one hundred fifty-four of the Revised Statutes of the United States, may, at any time within the two years next previous to the date of the expiration of its corporate existence under present law, and with the approval of the Comptroller of the Currency, to be granted, as hereinafter provided, extend its period of succession by amending its articles of association for a term of not more than twenty years from the expiration of the period of succession named in said articles of association, and shall have succession for such extended period, unless sooner dissolved by the act of
shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law, or unless hereafter modified or repealed. [22 Stat. L. 162.]

This was the first section of the "National Bank Extension Act."

Sections 2-7 and 14 are set out in the following paragraphs of the text.

Section 8 of this Act, relating to the deposit of bonds to secure circulating notes is given infra, p. 737.

Section 9 of the Act relating to the withdrawal of circulating notes and bonds deposited is given infra, p. 738. See the notes to said section.

Section 10 of the Act relating to the issue of circulating notes repealed R. S. sec. 5171 noted infra, p. 730; and 5176 noted infra, p. 732, and was superseded by the provisions of the Act of March 14, 1890, ch. 41, § 12, infra, p. 730.

Section 11 of the Act authorized the exchange of outstanding three and one half per cent bonds of the United States for three per cent bonds, and may be regarded as temporary. For a consideration of this and other provisions relating to a similar subject see Public Debt.

Section 12 of the Act relating to the exchange of gold certificates for gold coin is given infra, p. 814.

Section 13 of the Act relating to false certification of checks is given infra, p. 814.

A further extension of twenty years was authorized by the Act of April 12, 1902, ch. 503, infra, p. 722.

The Act of Feb. 25, 1883, ch. 58, 12 Stat. L. 665 mentioned in the text was the original National Bank Act. It was repealed by the National Bank Act of June 3, 1864, ch. 106, 13 Stat. L. 90, likewise mentioned in the text, and incorporated into the Revised Statutes as title 62 thereof. See the note to R. S. section 5133, supra, p. 651.

The Act of Feb. 14, 1890, ch. 23, mentioned in the text is given infra, p. 737.

Presumption of acceptance of extended charter.—Where a national bank continues its existence, and performs the functions of such an association after the expiration of its original corporate existence for a long period of time, it will be presumed to have accepted the benefit of a certificate executed by the Comptroller of the Currency extending its corporate existence. Clement v. U. S., (C. C. A. 8th Cir. 1906) 149 Fed. 305, 79 C. C. A. 243, certiorari denied, (1907) 206 U. S. 562, 27 S. Ct. 795, 51 U. S. (L. ed.) 1180.

SEC. 2. [Consent in writing of two-thirds of shareholders.] That such amendment of said articles of association shall be authorized by the consent in writing of shareholders owning not less than two-thirds of the capital stock of the association; and the board of directors shall cause such consent to be certified under the seal of the association, by the president or cashier, to the Comptroller of the Currency, accompanied by an application made by the president or cashier for the approval of the amended articles of association by the Comptroller; and such amended articles of association shall not be valid until the Comptroller shall give to such association a certificate under his hand and seal that the association has complied with all the provisions required to be complied with, and is authorized to have success[ion] for the extended period named in the amended articles of association. [22 Stat. L. 163.]

See the notes to the preceding section 1 of this Act.

SEC. 3. [Comptroller to make examination and issue certificate.] That upon the receipt of the application and certificate of the association provided for in the preceding section, the Comptroller of the Currency shall cause a special examination to be made, at the expense of the association, to determine its condition; and if after such examination or otherwise, it appears to him that said association is in a satisfactory condition, he shall grant his certificate of approval provided for in the preceding section, or
if it appears that the condition of said association is not satisfactory, he shall withhold such certificate of approval. [22 Stat. L. 163.]

See the notes to section 1 of this Act, supra, p. 717.

Certificate as evidence.—Where a certificate of the Comptroller of the Currency recited that a certain bank had complied with all the provisions of this Act authorizing an extension of the corporate existence of such banks, and declared that the bank was authorized to have succession until Nov. 21, 1908, such certificate was conclusive evidence, in a prosecution of the president of the bank for violating the National Bank Act, of a compliance by the bank with all necessary conditions precedent to the extension of its charter. Clement v. U. S., 16 C. C. A. 8th Cir. 1906; 149 Fed. 305, 79 C. C. A. 243. Certiorari denied, (1907) 206 U. S. 582, 27 S. Ct. 793, 51 U. S. (L. ed.) 1189.

SEC. 4. [Rights, privileges, etc., of banks preserved.] That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: Provided, however, • • • [22 Stat. L. 163.]

The proviso omitted above relates to venue of suits by and against national banks, and is set forth infra, p. 928, and is there annotated.

Effect of extension.—On the extension of the charter under the provisions of this section the identity of the original corporation is in no wise affected. Newark First Presbyterian Church v. National State Bank, (1894) 57 N. J. L. 27, 29 Atl. 320, affirmed (1895) 58 N. J. L. 406, 36 Atl. 1129.

SEC. 5. [Withdrawal of nonconsenting shareholders—preference of old shareholders.] That when any national-banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within thirty days after the final appraisal provided in this section: Provided, That in the organization of any banking association intended to replace any existing banking association, and retaining the name thereof, the holders of stock in the expiring association shall be entitled to preference in the allotment of the shares of the new
association in proportion to the number of shares held by them respectively in the expiring association. [22 Stat. L. 163.]

See the notes to section 1 of this Act, supra, p. 717.

Liability of withdrawing shareholders.— Shareholders in a national bank which has extended its corporate existence, conformably to this Act, cease to be such upon the expiration of the original term of the bank's corporate life, and therefore cannot thereafter be chargeable with the personal liability for its debts, where they took the steps required of nonassenting stockholders in section 5 by giving notice of a desire to withdraw, and by appointing an appraiser to obtain a valuation of their shares, although, without the shareholders' fault, further proceedings toward an appraisal were not taken. Apsey v. Kimball, (1911) 221 U. S. 514, 31 S. Ct. 695, 55 U. S. (L. ed.) 534, affording (C. C. A. 1st Cir. 1908) 164 Fed. 530, 90 C. C. A. 634, and (1908) 190 Mass. 65, 85 N. E. 91.

The committee of appraisal of the shares of those shareholders who do not assent to amendments to the articles of association does not possess any judicial function and may correct any clerical error in its report and appraisal at any time before the expiration of the time to appeal, though its award has been accepted. Clarion First Nat. Bank v. Brennan, (1888) 114 Pa. St. 315, 7 Atl. 910.

Waiver of withdrawal.— Where a shareholder gave notice, within the thirty days specified in the statute, of his desire to withdraw from the association, but in the meanwhile the bank declared a dividend from its profits, the greater part of which was earned prior to the expiration of its original charter, and subsequently to giving said notice the shareholder demanded and received said dividend, the previous withdrawal was thereby waived, and he ceased to have a right to the appraisal of his shares so that they should become a debt of the bank to him. Smith v. Phillips Nat. Bank, (1915) 114 Me. 297, 96 Atl. 217.

SEC. 6. [Redemption of outstanding circulation — new notes — cost of new plates.] That the circulating notes of any association so extending the period of its succession which shall have been issued to it prior to such extension shall be redeemed at the Treasury of the United States, as provided in section three of the act of June twentieth, eighteen hundred and seventy-four, entitled "An act fixing the amount of United States notes, providing for redistribution of national-bank currency, and for other purposes," and such notes when redeemed shall be forwarded to the Comptroller of the Currency, and destroyed as now provided by law; and at the end of three years from the date of the extension of the corporate existence of each bank the association so extended shall deposit lawful money with the Treasurer of the United States sufficient to redeem the remainder of the circulation which was outstanding at the date of its extension, as provided in sections fifty-two hundred and twenty-two, fifty-two hundred and twenty-four, and fifty-two hundred and twenty-five of the Revised Statutes; and any gain that may arise from the failure to present such circulating notes for redemption shall inure to the benefit of the United States; and from time to time, as such notes are redeemed or lawful money deposited therefor as provided herein, new circulating notes shall be issued as provided by this act, bearing such devices, to be approved by the Secretary of the Treasury, as shall make them readily distinguishable from the circulating notes heretofore issued: Provided, however, That each banking association which shall obtain the benefit of this act shall reimburse to the Treasury the cost of preparing the plate or plates for such new circulating notes as shall be issued to it. [22 Stat. L. 163.]

See the notes to section 1 of this Act, supra, p. 717.

The Act of June 20, 1874, ch. 343, § 3, mentioned in the text is given infra, p. 811. R. S. secs. 5222, 5224, 5225, mentioned in the text are given infra, pp. 547, 548.

By a provision of the Act of June 3, 1874, ch. 455, § 1, given in Currency, vol. 2 p. 707, bank notes were to be destroyed by maceration instead of being burned, repealing to that extent R. S. secs. 5184 and 5225, infra, pp. 734, 848, respectively.
SEC. 7. [Liquidation of banks not accepting provisions of act.] That national-banking associations whose corporate existence has expired or shall hereafter expire, and which do not avail themselves of the provisions of this act, shall be required to comply with the provisions of sections fifty-two hundred and twenty-one and fifty-two hundred and twenty-two of the Revised Statutes in the same manner as if the shareholders had voted to go into liquidation as provided in section fifty-two hundred and twenty of the Revised Statutes; and the provisions of section fifty-two hundred and twenty-four and fifty-two hundred and twenty-five of the Revised Statutes shall also be applicable to such associations, except as modified by this act; and the franchise of such association is hereby extended for the sole purpose of liquidating their affairs until such affairs are finally closed [22 Stat. L. 164.]

See the notes to section 1 of this Act, supra, p. 717.
R. S. sec. 5220, 5221, 5222, 5224 and 5225, mentioned in this section, are given infra, pp. 843, 847, 848.


A banking association whose franchise is extended for the purpose of liquidating its affairs, as provided in this section, "may exercise all the powers originally conferred upon it which are appropriate for that purpose, among which is the election of directors." Richards v. Attleborough Nat. Bank, (1889) 148 Mass. 187, 10 N. E. 353, 1 L. R. A. 781.

An objection that a national bank whose charter had expired had no corporate existence for the purpose of being sued by a stockholder and ceasing to exist a special trust fund for the appointment of a receiver is without merit, under this section, extending their franchises, in such case "for the sole purpose of liquidating their affairs, until such affairs are finally closed." Cogswell v. Norwich Second Nat. Bank, (1903) 76 Conn. 292, 56 Atl. 574.

In Louisville v. U. S. Bank, (1842) 3 B. Mon. (Ky.) 138, it was held that the expiration of the charter of the Bank of the United States did not abate a suit in equity then pending in the name of the bank.

SEC. 14. [Act may be repealed, altered, etc.] That Congress may at any time amend, alter, or repeal this act and the acts of which this is amendatory. [22 Stat. L. 166.]

See the notes to section 1 of this Act, supra, p. 717.

An act to enable national banking associations to increase their capital stock and to change their names or locations.

[Act of May 1, 1886, ch. 73, 24 Stat. L. 18.]

[SEC. 1.] [Increase of capital stock.] That any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said Comptroller, notwithstanding the limit fixed in its original articles of association and determined by said Comptroller; and no increase of the capital stock of any national banking association either
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within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided. [24 Stat. L. 18.]

Earlier provisions relating to an increase of capital stock were made by R. S. sec. 5142, supra, p. 699.

SEC. 2. [Change of name and location.] That any national banking association may change its name or the place where its operations of discount and deposit are to be carried on, to any other place within the same State, not more than thirty miles distant with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association. A duly authenticated notice of the vote and of the new name or location selected shall be sent to the office of the Comptroller of the Currency; but no change of name or location shall be valid until the Comptroller shall have issued his certificate of approval of the same. [24 Stat. L. 18.]

Unauthorised change of "place."—In Capital Hill First Nat. Bank v. Murray, (C. C. A. 5th 1914) 212 Fed. 140, 128 C. C. A. 652, affording a judgment forfeiting the bank's charter, at the suit of the Comptroller of the Currency, because its directors knowingly violated the national banking laws, the court said: "The bank was chartered in 1906 with a capital of $25,000 to do business in the village of Capital Hill, Okl., a suburb outside the corporate limit of Oklahoma City. Less than a month afterwards, by proceedings under the local laws, the limits of the city were enlarged to include the village. Capital Hill had not exceeding 3,000 inhabitants; Oklahoma City a population of over 50,000. Thereupon the bank, desiring to remove its banking house to the business section of Oklahoma City within its original limits, applied to the Comptroller for permission to do so. The Comptroller refused to permit the change unless the bank increased its capital stock to at least $200,000, changed its name to Capital Hill National Bank of Oklahoma City, and agreed to comply with the provisions of the law relating to reserves to be held by banks in reserve cities, Oklahoma City being of that character. The bank having declined to comply with these conditions and having removed its place of business to the location desired, the Comptroller brought action with the result above indicated. The statutes relating to the situation provide as follows: The organization certificate of a national banking association must state the name adopted which is subject to the approval of the Comptroller. It must also state the place where its operations of discount and deposit are to be carried on, and its usual business shall be transacted at an office or banking house in the place so specified. The reserve required to be maintained by a national bank in a non-reserve locality is 15 per cent. of its deposits, while in a reserve city it is 25 per cent. Generally a national bank cannot be organized with a capital less than $100,000, nor, in a city of more than 50,000 inhabitants, with a capital less than $200,000; but, with the approval of the Secretary of the Treasury, it may, in a place of 3,000 inhabitants or less, have a capital of at least $25,000, and in a place of not exceeding 6,000 inhabitants a capital not less than $50,000. A national bank may change its name or the 'place' where its operations of discount and deposit are carried on to any other 'place' in the same state not more than 30 miles distant with the approval of the Comptroller, but no such change shall be valid until the Comptroller has issued his certificate of approval. . . . There is no right to organize and carry on the business of a national bank except upon the conditions and in the way prescribed by the acts of Congress, of which all must take notice. McCormick v. Market Nat. Bank, [1897] 165 U. S. 538, 17 S. Ct. 433, 41 U. S. (L. ed.) 817. Extensive powers of control and visitation have been conferred by the Comptroller of the Currency, and his acts within the law are not subject to review by the courts. The above provisions of the acts of Congress were intended to secure uniformity, efficiency, and safety in the conduct of the business authorized, and they should be construed in the light of that purpose. It is important that there should be a due proportion between capitalization and the amount of deposits which may reasonably be expected in a village, town or city in which a bank is located. The value of a bank as an aid to business is affected by the amount it is authorized to lend its customers, and a national bank is prohibited from lending a single borrower more than a prescribed per cent. of its paid capital. The larger or more populous the locality, the greater, ordinarily, may be the needs of customers. Again, the
maximum limit of the required surplus which makes for financial soundness of such institutions is also proportioned to the amount of capital. The reserve required by the law was 15 per cent. in Capitol Hill; it is 25 per cent. in Oklahoma City. We do not think the Capitol Hill Bank acquired, through the action of the local authorities, immunity from those requirements of the comptroller which could have been imposed had it first sought a certificate of authority to do business in Oklahoma City. It insists upon carrying its meager equipment just acquired into the larger and more important field of action solely because of a local occurrence foreign to the spirit and intent of the federal statutes and in which no one charged with the administration of those statutes participated. If it should prevail in this, a way is pointed out by which interested persons advised of impending changes of municipal limits may evade the commands and prohibitions of Congress on a subject peculiarly within its exclusive jurisdiction. Had the bank sought authority at first to do business in the city on village conditions, it would certainly have been refused a contrary to law; it should not be indirectly secured in the way shown. Though the separate identity of the village has been by the action of the local authorities and for local governmental purposes merged in that of the city, the city is not in the circumstances of this case the same 'place' as the village within the meaning of the federal statutes and the action of the comptroller sought and obtained by the organizers of the bank."

SEC. 3. [Debts, etc., not affected by change.] That all debts, liabilities, rights, provisions, and powers of the association under its old name shall devolve upon and inure to the association under its new name. [24 Stat. L. 19.]

SEC. 4. [Liabilities to continue.] That nothing in this act contained shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability, or affect any action or proceeding in law in which said association may be or become a party or interested. [24 Stat. L. 19.]

An Act To provide for the extension of the charters of national banks.
[Act of April 12, 1902, ch. 503, 32 Stat. L. 101.]

[Extension of charter for twenty years.] That the Comptroller of the Currency is hereby authorized, in the manner provided by, and under the conditions and limitations of, the Act of July twelfth, eighteen hundred and eighty-two, to extend for a further period of twenty years the charter of any national banking association extended under said Act which shall desire to continue its existence after the expiration of its charter. [32 Stat. L. 101.]

The Act of July 12, 1882, ch. 290, is given in part, supra, p. 716. See the notes to section 1 thereof, supra, p. 717.

SEC. 23. [Individual liability of stockholders.] The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such
association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. [38 Stat. L. 273.]

This was a part of the Federal Reserve Act of Dec. 23, 1913, ch. 6. See the notes to section 1 of said Act. infra, p. 817.

The provisions of the text superseded those of R. S. sec. 5151 set forth supra, p. 705.

Provisions relating to the enforcement of the liability prescribed by said R. S. sec. 5151 were made by the Act of June 30, 1876, ch. 156, § 2, infra, p. 915.

The Federal Reserve Act of Dec. 23, 1913, ch. 6, § 2, infra, p. 817, prescribed the individual liability of shareholders of Federal Reserve banks.

I. WHO ARE LIABLE AS STOCKHOLDERS

1. In General

Liability as affected by transfer or character of transfer of cases, see notes to R. S. sec. 5139 supra, p. 688.

One who subscribed to new stock of a national bank that had voted to increase its capital stock by paying for it and receiving a receipt for the same "on account of subscription to new stock," became a stockholder and liable as such, where he was entered as such on the stock book of the company, and his certificate of stock was made out ready for him when he should call for it, though he did not thereafter call for and take his certificate. Thayer v. Butler, (1891) 141 U. S. 234, 11 S. Ct. 987, 35 U. S. (L. ed.) 711.

"Without express regulation to the contrary, a person becomes a stockholder by subscribing for stock, paying the amount to the company or its proper officer and being entered on the stock book as a stockholder. He may take out a certificate or not, as he sees fit. Millions of dollars of capital stock are held without any certificate; or if certificates are made out, without their ever being delivered. A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself. And an actual subscription is not necessary. There may be a virtual subscription, deductible from the acts and conduct of the party." Pacific Nat. Bank v. Eaton, (1891) 141 U. S. 227, 11 S. Ct. 984, 35 U. S. (L. ed.) 702.

Immediately upon the failure of a national bank the rights of the creditors intervene and attach under this section, and a shareholder who was such when the failure occurred cannot escape the individual liability prescribed by rescinding his purchase of stock, or claim to be relieved upon the ground that the bank had issued to him a certificate of stock before, strictly speaking, it had authority to do so, or upon the ground of misrepresentation and deceit by any person who was an officer of the bank at the time of the purchase of his shares. Salter v. Williams, (D. C. N. J. 1914) 219 Fed. 1017, following the general rule laid down in Scott v. Deweese, (1901) 181 U. S. 202, 21 S. Ct. 585, 45 U. S. (L. ed.) 822.

Release from liability.—The bank cannot by contract with subscribers to its capital stock relieve them from the statutory liability created in favor of creditors. Scott v. Latimer, (C. C. A. 8th Cir. 1898) 89 Fed. 843, 60 U. S. App. 720, 33 C. C. A. 1.

2. Married Women


The coverture of the legatee of shares of stock in a national bank when her name was placed upon the bank's books as a stockholder and when she received the certificate of stock does not protect her against a personal judgment at law for the amount due as a shareholder under an assessment made by the Comptroller of the Currency to pay the debts of the bank, although a married woman may be incapable, under the local law, of making

A married woman has been held liable as a stockholder, though she obtained the stock by transfer from her husband, made without her knowledge or consent and without consideration, where she received the dividend. Keyser v. Hitz, (1896) 153 U. S. 128, 10 S. Ct. 290, 33 U. S. (L. ed.) 531, affirming (1883) 2 Mackey (D. C.) 473.

3. Infants

It has been held that a minor does not have the necessary legal capacity to become a stockholder in a national bank, and is not personally liable for assessments on stock standing in his name or in the name of a guardian. Foster v. Chase, (C. C. Vt. 1896) 75 Fed. 797; Clark v. Ogilvie, (1901) 111 Ky. 181; 63 S. W. 429; Kerr v. Urie, (1897) 56 Md. 73; 37 Atl. 780; 63 A. S. R. 423, 38 L. R. A. 119; Lucas v. Vue, (N. D. N. Y. 1898) 86 Fed. 972. Though it seems that where the stock is left by will, or descends to the minor, the estate in the hands of the guardian is liable for the assessment. Clark v. Ogilvie, (1901) 111 Ky. 181, 63 S. W. 429.

But a father buying stock in the names of his minor children becomes himself liable to assessment as a shareholder; and the assent of a minor after becoming of age, after the assessment but before suit is brought, does not relieve the father from liability. Foster v. Wilson, (C. C. Vt. 1896) 75 Fed. 797.

In Aldrich v. Bingham, (W. D. N. Y. 1904) 131 Fed. 363, it was held that a transfer of stock in a national bank, while it was a going concern, to the stockholder's infant children under five years of age, not legally liable to assume all the obligations of stockholders, did not relieve the father from his liability for assessments levied on the stock so transferred after the bank's insolvency.

II. "Contracts, Debts and Engagements"


There would be no individual liability in respect of a note by the bank for borrowed money, if, in the particular case, the bank had no power to borrow the money. See Wyman v. Wallace, (1906) 201 U. S. 230, 26 S. Ct. 496, 50 U. S. (L. ed.) 738, affirming (C. C. A. 8th Cir. 1914) 625 Fed. 296, 65 C. C. A. 46.

Where a national bank assumed the debts of an insolvent bank contemplating liquidation, in consideration of a transfer of certain of the bank's available assets, and certain notes for the balance, such notes represented the "contracts, debts, and engagements" of the insolvent bank in equity, for which its stockholders were liable, as provided by this section. George v. Wallace, (C. C. A. 8th Cir. 1904) 135 Fed. 286, 65 C. C. A. 40, affirmed (1906) 201 U. S. 245, 26 S. Ct. 498, 50 U. S. (L. ed.) 743.

Warranty as "contract" or "engagement."—Shareholders are responsible on the warranty of a bank contained in a deed executed by it, such warranty being a "contract" and an "engagement" within the meaning of this section. McLean v. Moore, (Tex. Civ. App. 1912) 145 S. W. 1074.

Contracts made after suspension.—Such liability does not extend to contracts made by the officers after the bank has gone into liquidation, unless made in compliance with the duty of such officers to wind up the bank's affairs. Schrader v. Manufacturers' Nat. Bank, (1890) 133 U. S. 67, 10 S. Ct. 238, 33 U. S. (L. ed.) 864.

Thus contracts of indorsement or guaranty made by the president in the name of the bank after its suspension on bills receivable which were taken by creditors in settlement of their claims are not binding on the stockholders. Richmond v. Irons, (1887) 121 U. S. 27, 7 S. Ct. 788, 30 U. S. (L. ed.) 864, affirming (N. D. Ill. 1884) 21 Fed. 197.

Interest on debts.—The individual liability extends to interest on debts where the bank would have been liable therefor. Richmond v. Irons, (1887) 121 U. S. 27, 7 S. Ct. 788, 30 U. S. (L. ed.) 864, affirming (N. D. Ill. 1884) 21 Fed. 197.

The expenses of a receivership appointed in a creditor's suit contesting voluntary liquidation cannot be charged upon the stockholders as a part of their statutory liability, but are to be paid by the creditors, at whose instance the receiver was appointed. Richmond v. Irons, (1887) 121 U. S. 27, 7 S. Ct. 788, 30 U. S. (L. ed.) 864, affirming (N. D. Ill. 1884) 21 Fed. 197.

III. Extent of Liability

The liability is several and not affected by the failure of any other shareholder to pay the amount assessed against him;
II. OBTAINING AND ISSUING CIRCULATING NOTES

Sec. 5157. [What associations are governed by chapters 2, 3, and 4.] The provisions of chapters two, three, and four of this Title, which are expressed without restrictive words, as applying to "national banking associations," or to "associations," apply to all associations organized to carry on the business of banking under any act of Congress. [R. S.]

Chapters two, three, and four of title 62 of the Revised Statutes are the same as divisions II, III, and V of this title. Sections 5157-5159 constitute chapter 2 of title 62 of the Revised Statutes, entitled "Obtaining and Issuing Circulating Notes."

Sec. 5158. [Registered bonds intended by the term "United States bonds"] The term "United States bonds," as used throughout this chapter, shall be construed to mean registered bonds of the United States. [R. S.]


R. S. sec. 5159. This section was as follows:

"Sec. 5159. Every association, after having complied with the provisions of this Title, preliminary to the commence ment of the banking business, and before it shall be authorized to commence banking business under this Title, shall transfer and deliver to the Treasurer of the United States any United States registered bonds, bearing interest, to an amount not less than thirty thousand dollars and not less than one-third of the capital stock paid in. Such bonds shall be received by the Treasurer upon deposit, and shall be by him safely kept in his office, until they shall be otherwise disposed of, in pursuance of the provisions of this Title."


The Federal Reserve Act of Dec. 23, 1913, ch. 6, § 17, infra, p. 536, provided as follows: "So much of the provisions of section fifty-one hundred and fifty-nine of the Revised Statutes of the United States, and section four of the Act of June twentieth, eighteen hundred and seventy-four, and section eight of the Act of July twelfth, eighteen hundred and eighty-two, and of any other provisions of existing statutes as require that before any national banking associations [sic] shall be authorized to commence banking business it shall transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds is hereby repealed."

The provisons of said R. S. sec. 5159 not included in the repeal became inoperative on the repeal of the provisions on which they depended.

See the Act of June 20, 1874, ch. 343, § 4, infra, p. 735; and the Act of July 12, 1892, ch. 290, § 8, infra, p. 737, and the notes to said sections. The bonds issued to defray expenditures on account of the Panama canal under authority of the Tariff Act of Aug. 6, 1909, ch. 6, § 39, 36 Stat. L. 117, were not to be receivable by the Treasurer of the United States as security for the issue of circulating notes to National banks by virtue of a provision of the Act of March 2, 1911, ch. 195, 36 Stat. L. 1013.

CASES UNDER R. S. SEC. 5159.

Repeal.—The provision of Act of June 20, 1874, ch. 343, § 4, infra, p. 735, "that the amount of the bonds on deposit for circulation shall not be reduced below $50,000," was held to be repugnant
to the provisions of R. S. secs. 5159, 5160, requiring national banks to have and maintain with the treasurer of the United States a bond deposit to the amount of one-third of their capital stock, and so far in effect repeals such provisions. Bond Deposit of Nat. Banks, (1880) 16 Op. Atty-Gen. 663.
Withdrawal of bonds.—A bank whose charter was about to expire, which had taken no steps for going into liquidation under R. S. sec. 5220 et seq., could not withdraw all of the bonds to secure its circulation, upon depositing lawful money equal to the amount of its outstanding circulation. notwithstanding the provisions of R. S. secs. 5159, 5160, and Act of June 20, 1874, ch. 343, § 4. National Banking Ass'n, (1882) 17 Op. Atty-Gen. 465.

Bonds called in.—Where bonds had been called in for redemption, and so cease to bear interest, it was held that the bank must substitute other and interest-bearing bonds. National Banking Ass'n, (1886) 18 Op. Atty-Gen. 493.

Sec. 5160. [Increase or reduction of deposit to correspond with capital.] The deposit of bonds made by each association shall be increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the Treasurer registered United States bonds to the amount of at least one-third of its capital stock actually paid in. And any association that may desire to reduce its capital or to close up its business and dissolve its organization, may take up its bonds upon returning to the Comptroller its circulating notes in the proportion hereinafter required, or may take up any excess of bonds beyond one-third of its capital stock, and upon which no circulating notes have been delivered. [R. S.]

The Federal Reserve Act of Dec. 23, 1913, ch. 6, § 17, infra, p. 836, repealed all provisions of existing statutes as required, that before any National banking association should be authorized to commence banking business it should transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds. By said Act R. S. sec. 5130 was expressly repealed as noted, supra, p. 725. Since the section given in the text prescribes the procedure for the requirements of R. S. sec. 5159, it would appear to be superseded by the repeal of said R. S. sec. 5159.

Sec. 5161. [Exchange of coupon for registered bonds.] To facilitate a compliance with the two preceding sections, the Secretary of the Treasury is authorized to receive from any association, and cancel, any United States coupon bonds, and to issue in lieu thereof registered bonds of like amount, bearing a like rate of interest, and having the same time to run. [R. S.]

See the note to the preceding R. S. sec. 5160.
The “two preceding sections” mentioned in the text are R. S. sec. 5159 and R. S. sec. 5160. R. S. sec. 5159 was expressly repealed as noted, supra, p. 725, and it would seem that the preceding R. S. sec. 5160 and the section given in the text were superseded thereby.

Sec. 5162. [Manner of making transfers of bonds.] All transfers of United States bonds, made by any association under the provisions of this Title, shall be made to the Treasurer of the United States in trust for the association, with a memorandum written or printed on each bond, and signed by the cashier, or some other officer of the association making the deposit. A receipt shall be given to the association, by the Comptroller of the Currency, or by a clerk appointed by him for that purpose, stating that the bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assign-
ment or transfer of any such bond by the Treasurer shall be deemed valid
unless countersigned by the Comptroller of the Currency. [R. S.]

See the note to R. S. sec. 5160, supra, p. 726.

Sec. 5163. [Registry of transfers.] The Comptroller of the Currency
shall keep in his Office a book in which he shall cause to be entered, imme-
diately upon countersigning it, every transfer or assignment by the Treas-
urer, of any bonds belonging to a national banking association, presented
for his signature. He shall state in such entry the name of the association
from whose accounts the transfer is made, the name of the party to whom
it is made, and the par value of the bonds transferred. [R. S.]

See the note to R. S. sec. 5160, supra, p. 726.

Sec. 5164. [Notice of transfer to be given to association interested.] The
Comptroller of the Currency shall, immediately upon countersigning and
entering any transfer or assignment by the Treasurer, of any bonds
belonging to a national banking association, advise by mail the association
from whose accounts the transfer is made, of the kind and numerical desig-
nation of the bonds, and the amount thereof so transferred. [R. S.]

See the note to R. S. sec. 5160, supra, p. 726.

Sec. 5165. [Examination of registry and bonds.] The Comptroller of
the Currency shall have at all times, during office-hours, access to the books
of the Treasurer of the United States for the purpose of ascertaining the
correctness of any transfer or assignment of the bonds deposited by an
association, presented to the Comptroller to countersign; and the Treasurer
shall have the like access to the book mentioned in section fifty-one hundred
and sixty-three, during office-hours, to ascertain the correctness of the
entries in the same; and the Comptroller shall also at all times have access
to the bonds on deposit with the Treasurer, to ascertain their amount and
condition. [R. S.]

See the note to R. S. sec. 5160, supra, p. 726.

Sec. 5166. [Annual examination of bonds by associations.] Every asso-
ciation having bonds deposited in the office of the Treasurer of the United
States shall, once or oftener in each fiscal year, examine and compare the
bonds pledged by the association with the books of the Comptroller of the
Currency and with the accounts of the association, and, if they are found
correct, to [sic] execute to the Treasurer a certificate setting forth the
different kinds and the amounts thereof, and that the same are in the pos-
session and custody of the Treasurer at the date of the certificate. Such
examination shall be made at such time or times, during the ordinary busi-
dness hours, as the Treasurer and the Comptroller, respectively, may select,
and may be made by an officer or agent of such association, duly appointed
in writing for that purpose; and his certificate before mentioned shall be
of like force and validity as if executed by the president or cashier. A
duplicate of such certificate, signed by the Treasurer, shall be retained by
the association. [R. S.]

See the note to R. S. sec. 5160, supra, p. 726.

Sec. 5167. [Custody of bonds, collection of interest, etc.] The bonds
transferred to and deposited with the Treasurer of the United States, by
any association, for the security of its circulating notes, shall be held exclu-
sively for that purpose, until such notes are redeemed, except as provided
in this Title. The Comptroller of the Currency shall give to any such asso-
ciation powers of attorney to receive and appropriate to its own use the
interest on the bonds which it has so transferred to the Treasurer; but such
powers shall become inoperative whenever such association fails to redeem
its circulating notes. Whenever the market or cash value of any bonds thus
deposited with the Treasurer is reduced below the amount of the circula-
tion issued for the same, the Comptroller may demand and receive the
amount of such depreciation in other United States bonds at cash value,
or in money, from the association, to be deposited with the Treasurer as
long as such depreciation continues. And the Comptroller, upon the
terms prescribed by the Secretary of the Treasury, may permit an ex-
change to be made of any of the bonds deposited with the Treasurer by
any association, for other bonds of the United States authorized to be
received as security for circulating notes, if he is of opinion that such an
exchange can be made without prejudice to the United States; and he
may direct the return of any bonds to the association which transferred
the same, in sums of not less than one thousand dollars, upon the surren-
der to him and the cancellation of a proportionate amount of such circu-
lating notes: Provided, That the remaining bonds which shall have been
transferred by the association offering to surrender circulating notes are
equal to the amount required for the circulating notes not surrendered by
such association, and that the amount of bonds in the hands of the Treas-
urer is not diminished below the amount required to be kept on deposit
with him, and that there has been no failure by the association to redeem
its circulating notes, nor any other violation by it of the provisions of this
Title, and that the market or cash value of the remaining bonds is not
below the amount required for the circulation issued for the same. [R. S.]

See the note to R. S. sec. 5160, supra, p. 726.
Provisions authorizing the withdrawal of bonds were made by the Act of June 20,
1874, ch. 343, § 4, infra, p. 735.

Trust fund.—Bonds deposited under this section are held in trust for the
purposes therein named, and the United States cannot set off against the fund
arising from a sale thereof its individual demand against the bank. Cook County
The Treasurer of the United States cannot retain, as security for a claim due
the United States, the bonds deposited with him by a national bank. (1869) 12

Sec. 5168. [Comptroller to determine if associations can commence business.] Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this Title, and the association transmitting the
same notifies the Comptroller that at least fifty per centum of its capital
stock has been duly paid in, and that such association has complied with
all the provisions of this Title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this Title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence the business of banking. [R. S.]


Sec. 5169. [Certificate of authority to commence banking to be issued.] If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business: But the Comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this Title. [R. S.]


A certificate signed by the deputy comptroller as "acting comptroller of the currency" is a sufficient compliance with the section. Keyser v. Hitz, (1890) 133 U. S. 135, 10 S. Ct. 290, 33 U. S. (L. ed.) 531.


For example, an objection that the organization certificate was acknowledged before a notary, who was shown therein to be a stockholder in a bank, is without force after the issuance of the comptroller's certificate. Thatcher v. West River Nat. Bank, (1869) 19 Mich. 196.

Sufficiency of certificate.—A certificate reciting that satisfactory evidence has been presented to the comptroller that the bank has complied with all the provisions of the Revised Statutes required to be complied with before the association shall be authorized to commence business, and certifying that such bank is authorized to commence business as provided in the Revised Statutes, is sufficient. Citizens' Nat. Bank v. Great Western Elevator Co., (1900) 13 S. D. 1, 82 N. W. 180.

Sec. 5170. [Publication of certificate.] The association shall cause the certificate issued under the preceding section to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is published in such city or county, then in the newspaper published nearest thereto. [R. S.]


R. S. sec. 5171. This section was as follows:

"Sec. 5171. Upon a deposit of bonds as prescribed by sections fifty-one hundred and fifty-nine and fifty-one hundred and sixty, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as hereinafter provided, equal in amount to ninety per centum of the current market-value of the United States bonds so transferred and delivered, but not exceeding ninety per centum of the amount of the bonds at the par value thereof, if bearing interest at a rate not less than five per centum per annum: Provided, That the amount of circulating notes to be furnished to each association shall be in proportion to its paid-up capital, as follows, and no more:

"First. To each association whose capital does not exceed five hundred thousand dollars, ninety per centum of such capital.

"Second. To each association whose capital exceeds five hundred thousand dollars, but does not exceed one million of dollars, eighty per centum of such capital.

"Third. To each association whose capital exceeds one million of dollars, but does not exceed three million of dollars, seventy-five per centum of such capital.

"Fourth. To each association whose capital exceeds three millions of dollars, sixty per centum of such capital."


It was directly repealed by Act of July 12, 1882, ch. 290. § 10, 22 Stat. L. 165, which was as follows:

"Sec. 10. That upon a deposit of bonds as described by sections fifty-one hundred and fifty-nine and fifty-one hundred and sixty, except as modified by section four of an Act entitled 'An Act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes,' approved June twenty-eighth, eighteen hundred and seventy-four, and as modified by section eight of this Act, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as provided by law, equal in amount to ninety per centum of the current market value, not exceeding par, of the United States bonds so transferred and delivered, and at no time shall the total amount of such notes issued to any such association exceed the amount of the capital stock; and the provisions of sections fifty-one hundred and seventy-one and fifty-one hundred and seventy-six of the Revised Statutes are hereby repealed."

Said repealing section 10 was superseded by the provisions of the Act of March 14, 1960, ch. 41, § 12, infra, p. 739.
Sec. 5172. [Printing, denominations, and form of the circulating notes.] In order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the denominations of one dollar, two dollars, three dollars, five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, and one thousand dollars, as may be required to supply the associations entitled to receive the same. Such notes shall express upon their face that they are secured by United States bonds, deposited with the Treasurer of the United States, by the written or engraved signatures of the Treasurer and Register, and by the imprint of the seal of the Treasury; and shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signatures of the president or vice-president and cashier; and shall bear such devices and such other statements; and shall be in such form, as the Secretary of the Treasury shall, by regulation, direct. [B. S.]


This section was amended by the Aldrich-Vreeland, as National Currency Association Act of May 30, 1908, ch. 229, § 11. 35 Stat. L. 651, to read as follows:

"Sec. 5172. In order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the denominations of five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, one thousand dollars, and ten thousand dollars, as may be required to supply the associations entitled to receive the same. Such notes shall state upon their face that they are secured by United States bonds or other securities, certified by the written or engraved signatures of the Treasurer and Register and by the imprint of the seal of the Treasury. They shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signature of the president or vice-president and cashier. The Comptroller of the Currency, acting under the direction of the Secretary of the Treasury, shall as soon as practicable cause to be prepared circulating notes in blank, registered and countersigned, as provided by law, to an amount equal to fifty per centum of the capital stock of each national banking association; such notes to be deposited in the Treasury or in the sub-treasury of the United States nearest the place of business of each association, and to be held for such association, subject to the order of the Comptroller of the Currency, for their delivery as provided by law: Provided, That the Comptroller of the Currency may issue national bank notes of the present form until plates can be prepared and circulating notes issued as above provided: Provided, however, That in no event shall bank notes of the present form be issued to any bank as additional circulation provided for by this Act."

However by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 27, given as amended infra, p. 843, it was provided that said R. S. sec. 5172, which was amended by said Act of May 30, 1908, ch. 299, § 11, should be re-enacted to read as it read "prior to May thirteenth, nineteen hundred and eight, subject to such amendments or modifications as are prescribed by this Act," thereby restoring said section to its original form as given in the text.

See the Act of June 20, 1874, ch. 343. § 5, infra, p. 736, requiring the charter number of the association to be placed on notes issued, and the Act of March 3, 1875, ch. 130. § 1, requiring distinctive paper to be used for printing notes.

Note for fractional sum.—This section provides how the notes contemplated by the National Bank Act shall be printed and what they shall contain. No provision is made for a note for less than one dollar. In re Aldrich, (N. D. N. Y. 1883) 16 Fed. 369.

Power of corporation to issue promissory notes in form of bank notes.—In U. S. v. Ray, (1817) 2 Cranch C. C. 141. 27 Fed. Cas. No. 16,124, it was held that The Independent Manufacturing Company of Baltimore might authorize their president and treasurer to issue promissory notes, having the form of bank notes, in bona fide payment for materials furnished, and services rendered for the use of the company, if done without fraudulent in-
Sec. 5173. [Plates and dies to be under control of Comptroller.] The plates and special dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the laws respecting the procuring of such notes, and all other expenses of the Bureau of the Currency, shall be paid out of the proceeds of the taxes or duties assessed and collected on the circulation of national banking associations under this Title. [R. S.]


Provisions requiring the banks to pay the cost of their plates were made by the Act of June 20, 1874, ch. 343, § 3, infra, p. 811, and the Act of July 12, 1882, ch. 290, § 6, supra, p. 719.

Sec. 5174. [Annual examination of plates, dies, etc.] The Comptroller of the Currency shall cause to be examined, each year, the plates, dies, bed-pieces, and other material from which the national-bank circulation is printed, in whole or in part, and file in his Office annually a correct list of the same. Such material as shall have been used in the printing of the notes of associations which are in liquidation, or have closed business, shall be destroyed under such regulations as shall be prescribed by the Comptroller of the Currency and approved by the Secretary of the Treasury. The expenses of any such examination or destruction shall be paid out of any appropriation made by Congress for the special examination of national banks and bank-note plates. [R. S.]


This section was amended by Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 252, by inserting the word "bed-pieces" in place of the words "but piece" appearing in the section as originally enacted.

The provisions of this section were extended to include the plates, etc., for Federal reserve notes by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 16, infra, p. 833.

Sec. 5175. [Limit to issue of notes under five dollars.] Not more than one-sixth part of the notes furnished to any association shall be of a less denomination than five dollars. After specie payments are resumed no association shall be furnished with notes of a less denomination than five dollars. [R. S.]


Notes of the denomination of five dollars were further limited in number by the Act of March 14, 1900, ch. 41, § 12, infra, p. 739.

R. S. sec. 5176. This section was as follows:

"Sec. 5176. No banking association organized subsequent to the twelfth day of July, eighteen hundred and seventy, shall have a circulation in excess of five hundred thousand dollars." Act of July 12, 1870, ch. 252, 16 Stat. L. 251.

It was repealed by an Act of July 12, 1882, ch. 290, § 10, 22 Stat. L. 165, noted supra, p. 717, which was in turn superseded by the provisions of the Act of March 14, 1900, ch. 41, § 12, infra, p. 739.
RET. sec. 5177. This section was as follows:

"Sec. 5177. The aggregate amount of circulating notes issued under the Act of February twenty-five, eighteen hundred and sixty-three, and under the Act of June three, eighteen hundred and seventy, and under section one of the Act of July twelve, eighteen hundred and seventy, and under this Title, shall not exceed three hundred and fifty-four millions of dollars."


It was repealed by a provision of the Specie Payment Resumption Act of Jan. 14, 1875, ch. 15, § 3, in/nr, p. 736.

R. S. secs. 5178-5181. These sections were as follows:

"Sec. 5178. One hundred and fifty millions of dollars of the entire amount of circulating notes shall be apportioned to associations in the States, in the Territories, and in the District of Columbia, according to representative population.

One hundred and fifty millions shall be apportioned by the Secretary of the Treasury among associations formed in the several States, in the Territories, and in the District of Columbia, having due regard to the existing banking capital, resources, and business of such States, Territories, and District. The remaining fifty-four millions shall be apportioned among associations in States and Territories having, under the apportionments above prescribed, less than their full proportion of the aggregate amount of notes authorized, which made due application for circulating notes prior to the twelfth day of July, eighteen hundred and seventy-one. Any remainder of such fifty-four millions shall be issued to banking associations applying for circulating notes in other States or Territories having less than their proportion." Act of March 3, 1865, ch. 82, 13 Stat. L. 498; Act of July 12, 1870, ch. 292, 16 Stat. L. 251.

"Sec. 5179. In order to secure a more equitable distribution of the national banking currency, there may be issued circulating notes to banking associations organized in States and Territories having less than their proportion, and the amount of circulation herein authorized shall, under the direction of the Secretary of the Treasury, as it may be required for this purpose, be withdrawn, as herein provided, from banking associations organized in States having more than their proportion, but the amount so withdrawn shall not exceed twenty-five million dollars: Provided, That no circulation shall be withdrawn under the provisions of this section until after the fifty-four millions granted in the first section of the Act of July twelfth, eighteen hundred and seventy, shall have been taken up." Act of July 12, 1870, ch. 292, 16 Stat. L. 252.

"Sec. 5180. Currency shall, under the direction of the Secretary of the Treasury, make a statement showing the amount of circulation in each State and Territory, and the amount necessary to be withdrawn from each association, and shall forthwith make a requisition for such amount upon such associations, commencing with those having a circulation exceeding one million of dollars, in States having an excess of circulation, and withdrawing their circulation in excess of one million of dollars, and then proceeding sporadically with other associations having a circulation exceeding three hundred thousand dollars, in States having the largest excess of circulation, and reducing the circulation of such associations in States having the greatest proportion in excess, leaving undisturbed the associations in States having a smaller proportion, until those in greater excess have been reduced to the same grade, and continuing thus to make such reductions until the full amount of twenty-five millions has been withdrawn; and the circulation so withdrawn shall be distributed among the States and Territories having less than their proportion, so as to equalize the same. Upon failure of any association to return the amount of circulating notes so required, within one year, the Comptroller shall sell at public auction, having given twenty days’ notice thereof in one daily newspaper printed in Washington and one in New York City, an amount of the bonds deposited by that association as security for its circulation, equal to the circulation required to be withdrawn from the association and not returned in compliance with such requisition; and he shall, with the proceeds, redeem so many of the notes of such association, as they come into the Treasury, as will equal the amount required and not returned; and shall pay the balance, if any, to the association." Act of July 12, 1870, ch. 292, 16 Stat. L. 253.

"Sec. 5181. Any association located in any State having more than its proportion of circulation may be removed to any State having less than its proportion of circulation, under such rules and regulations as the Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall prescribe: Provided, That the amount of the issue of said banks shall not be deducted from the issue of fifty-four millions mentioned in section five thousand one hundred and seventy-eight." Act of July 12, 1870, ch. 292, 16 Stat. L. 254.

These sections were repealed by the Specie Payment Resumption Act of Jan. 14, 1875, ch. 15, § 3, in/nr, p. 736, which repealed the "provisions of law for the withdrawal and redistribution of national bank currency among the several States and Territories."

Sec. 5182. [For what demands national-bank notes may be received.]

After any association receiving circulating notes under this Title has caused
its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its place of business, such association may issue and circulate the same as money. And the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the national currency. [R. S.]


Sec. 5183. [Issue of other notes prohibited.] No national banking association shall issue post notes or any other notes to circulate as money than such as are authorized by the provisions of this Title. [R. S.]

This section was amended by Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 320, by inserting the words "post notes" as above given.

Certificate of deposit as "post note."—A certificate of deposit in the usual form issued in the ordinary course of business, and not designed or adapted to circulate as money, is not a post note within the meaning of the section. Riddle v. Butler First Nat. Bank, (W. D. Pa. 1886) 27 Fed. 503; Hunt, Appellant, (1886) 141 Mass. 515, 6 N. E. 554; Lorrain Nat. Bank v. Williamson, (1887) 1 Ohio Cir. Dec. 395.

Sec. 5184. [Destroying and replacing worn-out and mutilated notes.] It shall be the duty of the Comptroller of the Currency to receive worn-out or mutilated circulating notes issued by any banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to the association other blank circulating notes to an equal amount. Such worn-out or mutilated notes, after a memorandum has been entered in the proper books, in accordance with such regulations as may be established by the Comptroller, as well as all circulating notes which shall have been paid or surrendered to be canceled, shall be burned to ashes in presence of four persons, one to be appointed by the Secretary of the Treasury, one by the Comptroller of the Currency, one by the Treasurer of the United States, and one by the association, under such regulations as the Secretary of the Treasury may prescribe. A certificate of such burning, signed by the parties so appointed, shall be made in the books of the Comptroller, and a duplicate thereof forwarded to the association whose notes are thus canceled. [R. S.]

Provisions allowing national bank notes to be destroyed by maceration instead of burning, and repealing to that extent the provisions of the above section, are contained in Act of June 23, 1874, ch. 453. See CURRENCY, vol. 2, p. 707.

Sec. 5185. [Organization of associations to issue gold-notes authorized.] Associations may be organized in the manner prescribed by this Title for the purpose of issuing notes payable in gold; and upon the deposit of any United States bonds bearing interest payable in gold with the Treasurer of the United States, in the manner prescribed for other associations, it shall be lawful for the Comptroller of the Currency to issue to the association making the deposit, circulating notes of different denominations.
but none of them of less than five dollars, and not exceeding in amount
eighty per centum of the par value of the bonds deposited, which shall
express the promise of the association to pay them, upon presentation at
the office at which they are issued, in gold coin of the United States, and
shall be so redeemable. But no such association shall have a circulation of
more than one million dollars. [R. S.]


This section was in part repealed by the Act of Jan. 19, 1875, ch. 19, infra, p. 737.

Sec. 5186. [Their lawful money reserve, and duty of receiving notes
of other associations.] Every association organized under the preceding
section shall at all times keep on hand not less than twenty-five per centum
of its outstanding circulation, in gold or silver coin of the United States;
and shall receive at par in the payment of debts the gold-notes of every
other such association which at the time of such payment is redeeming its
circulating notes in gold coin of the United States, and shall be subject
to all the provisions of this Title: Provided, That, in applying the same
to associations organized for issuing gold-notes, the terms "lawful money"
and "lawful money of the United States" shall be construed to mean gold
or silver coin of the United States; and the circulation of such associations
shall not be within the limitation of circulation mentioned in this Title.

[R. S.]


Sec. 5187. [Penalty for issuing circulating notes to unauthorized as-
associations.] No officer acting under the provisions of this Title shall coun-
tersign or deliver to any association, or to any other company or person,
any circulating notes contemplated by this Title, except in accordance with
the true intent and meaning of its provisions. Every officer who violates
this section shall be deemed guilty of a high misdemeanor, and shall be
fined not more than double the amount so countersigned and delivered,
and imprisoned not less than one year and not more than fifteen years.

[R. S.]

R. S. secs. 5188-5189. The former section rendered the imitation of national bank
notes by advertisements, etc., or the printing or writing thereon of advertisements, etc.,
unlawful. The latter section provided a penalty for defacing, etc., national bank notes.
both sections were incorporated in the Penal Laws of March 4, 1909, § 175, 176, respec-
tively and repealed by section 341 thereof. See Penal Laws.

Sec. 4. [Withdrawal of circulating notes and taking up bonds depos-
ited.] That any association organized under this act, or any of the acts of
which this is an amendment, desiring to withdraw its circulating notes, in
whole or in part, may, upon the deposit of lawful money with the Treasurer
of the United States in sums of not less than nine thousand dollars, take
up the bonds which said association has on deposit with the Treasurer for
the security of such circulating notes; which bonds shall be assigned to the
bank in the manner specified in the nineteenth section of the national-
bank act; and the outstanding notes of said association, to an amount equal
to the legal-tender notes deposited, shall be redeemed at the Treasury of
the United States, and destroyed as now provided by law: Provided, That the amount of the bonds on deposit for circulation shall not be reduced below fifty thousand dollars. [18 Stat. L. 124.]

The provisions of the text and of the following section 5 were from the Act of June 20, 1874, ch. 343. For reference to the entire Act see the notes to section 1 thereof, supra, p. 650.

Section 19 of the National Bank Act mentioned in the text was incorporated in R. S. sec. 5162-5164, supra, pp. 726-727.

See further the Act of July 12, 1882, ch. 290, § 9, infra, p. 738.

The Federal Reserve Act of Dec. 23, 1913, ch. 6, § 17, infra, p. 836, provided as follows: "So much of the provisions of * * * section four of the Act of June twentieth, eighteen hundred and seventy-four, * * * and of any other provisions of existing statutes as require that before any national banking associations [sic] shall be authorized to commence banking business it shall transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds is hereby repealed."

"Lawful money."—Under this section a national banking association desiring to withdraw its circulating notes and take up the bonds deposited with the United States treasurer as security therefor may do so by depositing with the treasurer the required amount in lawful money, whether this consists of coin or of legal tender notes. Withdrawal of Nat. Bank Notes, (1881) 17 Op. Att'y-Gen. 121; (1881) 17 Op. Att'y-Gen. 144.

-Silver certificates are not lawful money. (1894) 20 Op. Att'y-Gen. 725.

Substituting interest-bearing bonds for called bonds.—Where certain 3 per cent. bonds of the United States, held by the United States Treasurer as security for the circulating notes of a national bank, were called in for redemption and ceased to be interest bearing, it was advised that unless the bank substituted interest-bearing bonds for the called bonds, the proceeds of the latter must be applied to retiring the circulation secured thereby. (1886) 18 Op. Att'y-Gen. 403.

Withdrawal of all bonds.—A national bank whose charter is about to expire, but which has taken no step toward going into liquidation under R. S. secs. 5229 to 5224 (see infra, pp. 843-847), cannot withdraw all of the bonds deposited to secure its circulation, upon depositing lawful money equal to the amount of its outstanding circulation. (1882) 17 Op. Att'y-Gen. 409.

Proviso construed.—See (1874) 14 Op. Att'y-Gen. 414; (1889) 18 Att'y-Gen. 663.

SEC. 5. [Charter numbers to be on notes.] That the Comptroller of the Currency shall, under such rules and regulations as the Secretary of the Treasury may prescribe, cause the charter-numbers of the association to be printed upon all national-bank notes which may be hereafter issued by him. [18 Stat. L. 124.]

See the note to the preceding section 4 of this Act.

SEC. 3. [Aggregate amount of circulating notes not limited.] That section five thousand one hundred and seventy-seven of the Revised Statutes of the United States, limiting the aggregate amount of circulating-notes of national banking-associations, be, and is hereby, repealed; and each existing banking-association may increase its circulating-notes in accordance with existing law without respect to said aggregate limit; and new banking associations may be organized in accordance with existing law without respect to said aggregate limit; and the provisions of law for the withdrawal and redistribution of national-bank currency among the several States and Territories are hereby repealed. * * * [18 Stat. L. 296.]

This was from the Specie Payment Resumption Act of Jan. 14, 1875, ch. 15. For the part of this section omitted see CURRENCY, vol. 2, p. 707.

R. S. sec. 5177 repealed by the text is noted supra, p. 733.

The "provisions of law" repealed by this section were contained in R. S. secs. 5178-5181 noted supra, p. 733, and secs. 7, 8 and 9 of the Act of June 20, 1874, ch. 345, noted under section 1 of said Act, supra, p. 650.
An act to remove the limitation restricting the circulation of banking associations issuing notes payable in gold.


[Removal of limit of circulation of gold note banks.] That so much of section five thousand one hundred and eighty-five of the Revised Statutes of the United States as limits the circulation of banking associations, organized for the purpose of issuing notes payable in gold, severally to one million dollars, be, and the same is hereby, repealed; and each of such existing banking-associations may increase its circulating notes, and new banking-associations may be organized, in accordance with existing law, without respect to such limitation. [18 Stat. L. 302.]

R. S. sec. 5185 in part repealed by the text is given supra, p. 734.

[Sec. 1.] [Bank notes to be printed on distinctive paper.] That the national-bank notes shall be printed under the direction of the Secretary of the Treasury, and upon the distinctive or special paper which has been, or may hereafter be, adopted by him for printing United States notes. [18 Stat. L. 372.]

This is from the Sundry Civil Appropriation Act of March 3, 1875, ch. 130.

An act authorizing the conversion of national gold banks.


[Conversion of national gold banks into currency banks.] That any national gold bank organized under the provisions of the laws of the United States, may, in the manner and subject to the provisions prescribed by section fifty-one hundred and fifty-four of the Revised Statutes of the United States, for the conversion of banks incorporated under the laws of any State, cease to be a gold bank, and become such an association as is authorized by section fifty-one hundred and thirty-three, for carrying on the business of banking, and shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are by law prescribed for such associations: Provided, That all certificates of organization which shall be issued under this act shall bear the date of the original organization of each bank respectively as a gold bank. [21 Stat. L. 65.]

R. S. secs. 5133 and 5154 mentioned in the text are given supra, pp. 651, 653.

SEC. 8. [Amount of bonds to secure circulating notes — cost of transportation for reducing or retiring circulation.] That national banks now organized or hereafter organized, having a capital of one hundred and fifty thousand dollars, or less, shall not be required to keep on deposit or deposit with the Treasurer of the United States United States bonds in
excess of one-fourth of their capital stock as security for their circulating notes; but such banks shall keep on deposit or deposit with the Treasurer of the United States the amount of bonds as herein required. And such of those banks having on deposit bonds in excess of that amount are authorized to reduce their circulation by the deposit of lawful money as provided by law: Provided, That the amount of such circulating notes shall not in any case exceed ninety per centum of the par value of the bonds deposited as herein provided: Provided further, That the national banks which shall hereafter make deposits of lawful money for the retirement in full of their circulation shall at the time of their deposit be assessed for the cost of transporting and redeeming their notes then outstanding, a sum equal to the average cost of the redemption of national-bank notes during the preceding year, and shall thereupon pay such assessment. And all national banks which have heretofore made or shall hereafter make deposits of lawful money for the reduction of their circulation shall be assessed and shall pay an assessment in the manner specified in section three of the act approved June twentieth, eighteen hundred and seventy-four, for the cost of transporting and redeeming their notes redeemed from such deposits subsequently to June thirtieth, eighteen hundred and eighty-one. [22 Stat. L. 164.]

The provisions of the foregoing section 8, and the following section 9 of the text were from the Act of July 12, 1862, ch. 290. For reference to the entire Act see the notes to section 1 thereof, supra, p. 717.

The Act of June 20, 1874, ch. 343, § 3, mentioned in the text is given infra, p. 811. So much of this section as limited the circulation to ninety per cent. of the bonds deposited was superseded by the Act of March 14, 1890, ch. 41, § 12, infra, p. 739.

The Federal Reserve Act of Dec. 23, 1913, ch. 6, § 17, infra, p. 836, provided as follows: "So much of the provisions of ** section eight of the Act of July twelfth, eighteen hundred and eighty-two, and of any other provisions of existing statutes as require that before any national banking associations [sic] shall be authorized to commence banking business it shall transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds is hereby repealed."

SEC. 9. [Withdrawal of circulating notes and bonds deposited.] That any national banking association desiring to withdraw its circulating notes, secured by deposit of United States bonds in the manner provided in section four of the Act approved June twentieth, eighteen hundred and seventy-four, is hereby authorized for that purpose to deposit lawful money with the Treasurer of the United States and, with the consent of the Comptroller of the Currency and the approval of the Secretary of the Treasury, to withdraw a proportionate amount of bonds held as security for its circulating notes in the order of such deposits: Provided, That not more than nine millions of dollars of lawful money shall be so deposited during any calendar month for this purpose.

Any national banking association desiring to withdraw any of its circulating notes, secured by the deposit of securities other than bonds of the United States, may make such withdrawals at any time in like manner and effect by the deposit of lawful money or national bank notes with the Treasurer of the United States, and upon such deposit a proportionate share of the securities so deposited may be withdrawn: Provided, That the deposits under this section to retire notes secured by the deposit of securities other than bonds of the United States shall not be covered into the Treasury, as required by section six of an act entitled "An Act directing the purchase of silver bullion and the issue of Treasury notes thereon,
and for other purposes," approved July fourteenth, eighteen hundred and ninety, but shall be retained in the Treasury for the purpose of redeeming the notes of the bank making such deposit. [22 Stat. L. 1290, as amended by 34 Stat. L. 1290, 35 Stat. L. 551.]

See the notes to the preceding section 8 of this Act. As originally enacted this section was as follows:

"Sec. 9. That any national banking association now organized, or hereafter organized, desiring to withdraw its circulating notes, upon a deposit of lawful money with the Treasurer of the United States, as provided in section four of the Act of June twentieth, eighteen hundred and seventy-four, entitled 'An act fixing the amount of United States notes, providing for a redistribution of national-bank currency, and for other purposes,' or as provided in this act, is authorized to deposit lawful money and withdraw a proportionate amount of the bonds held as security for its circulating notes in the order of such deposits; and no national bank which makes any deposit of lawful money in order to withdraw its circulating notes shall be entitled to receive any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid: Provided, That not more than three millions of dollars of lawful money shall be deposited during any calendar month for this purpose: And provided further, That the provisions of this section shall not apply to bonds called for redemption by the Secretary of the Treasury, nor to the withdrawal of circulating notes in consequence thereof." [22 Stat. L. 164.]

It was first amended by an Act of March 4, 1907, ch. 2913, § 4, to read as follows:

"Sec. 9. That any national banking association now organized, or hereafter organized, desiring to withdraw its circulating notes, upon a deposit of lawful money with the Treasurer of the United States, as provided in section four of the Act of June twentieth, eighteen hundred and seventy-four, or as provided in this Act, is authorized to deposit lawful money and, with the consent of the Comptroller of the Currency and the approval of the Secretary of the Treasury, withdraw a proportionate amount of the bonds held as security for its circulating notes in the order of such deposits: Provided, That not more than nine millions of dollars of lawful money shall be deposited during any calendar month for this purpose: And provided further, That the provisions of this section shall not apply to bonds called for redemption by the Secretary of the Treasury, nor to withdrawal of circulating notes in consequence thereof." [24 Stat. L. 1290.]

It was again amended by the Aldrich-Vreeland Act of May 30, 1908, ch. 229, § 10, to read as given in the text. The Federal Reserve Act of Dec. 23, 1913, ch. 6, § 27, given as amended by the Act of Aug. 4, 1914, ch. 225, infra, p. 843, provided that various sections of the Revised Statutes, which had been amended by the Act of May 30, 1908, ch. 229, were "re-enacted to read as such sections read prior to May thirtieth, nineteen hundred and eight, subject to such amendments or modifications as are prescribed in this Act." No mention was made, however, of the Act of July 12, 1882, ch. 290, § 9, which had been amended by said Act of May 30, 1908, ch. 229, § 10, and this section is given in the text as so amended.

The Act of June 20, 1874, ch. 343, § 4, mentioned in the text is given supra, p. 735. The Act of July 14, 1890, ch. 708, § 6, mentioned in the text is given infra, p. 516.

Sec. 12. [Issue of circulating notes to banks; substitution of bonds.] That upon the deposit with the Treasurer of the United States, by any national banking association, of any bonds of the United States in the manner provided by existing law, such association shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited; and any national banking association now having bonds on deposit for the security of circulating notes, and upon which an amount of circulating notes has been issued less than the par value of the bonds, shall be entitled, upon due application to the Comptroller of the Currency, to receive additional circulating notes in blank to an amount which will increase the circulating notes held by such association to the par value of the bonds deposited, such additional notes
to be held and treated in the same way as circulating notes of national banking associations heretofore issued, and subject to all the provisions of law affecting such notes: Provided, That nothing herein contained shall be construed to modify or repeal the provisions of section fifty-one hundred and sixty-seven of the Revised Statutes of the United States, authorizing the Comptroller of the Currency to require additional deposits of bonds or of lawful money in case the market value of the bonds held to secure the circulating notes shall fall below the par value of the circulating notes outstanding for which such bonds may be deposited as security: And provided further, That the circulating notes furnished to national banking associations under the provisions of this Act shall be of the denominations prescribed by law, except that no national banking association shall, after the passage of this act, be entitled to receive from the Comptroller of the Currency, or to issue or reissue or place in circulation, more than one-third in amount of its circulating notes of the denomination of five dollars: And provided further, That the total amount of such notes issued to any such association may equal at any time but shall not exceed the amount at such time of its capital stock actually paid in: And provided further, That under regulations to be prescribed by the Secretary of the Treasury any national banking association may substitute the two per centum bonds issued under the provisions of this Act for any of the bonds deposited with the Treasurer to secure circulation or to secure deposits of public money; and so much of an Act entitled "An Act to enable national banking associations to extend their corporate existence, and for other purposes," approved July twelfth, eighteen hundred and eighty-two, as prohibits any national bank which makes any deposit of lawful money in order to withdraw its circulating notes from receiving any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid, is hereby repealed, and all other Acts or parts of Acts inconsistent with the provisions of this section are hereby repealed. [31 Stat. L. 49.]

This was from the Parity Act of March 14, 1900, ch. 41. For reference to the entire Act see COINAGE, MINTS, AND ASSET OFFICES, vol. 2, p. 348. The provisions of the text superseded those of the Act of July 12, 1882, ch. 250, § 10, 22 Stat. L. 165, which repealed R. S. sec. 5171 and contained provisions designed to be a substitute therefor as noted supra, p. 730. The provisions of the Act of July 12, 1882, ch. 290, § 9, repealed by the text were contained in said section as originally enacted, given in the notes to said section, which, as amended is set out in the preceding paragraph of the text.

It is questionable whether this section is now effective since the repeal of R. S. sec. 5159 as noted supra, p. 725. See the notes to R. S. sec. 5169, supra, p. 725.

III. REGULATION OF THE BANKING BUSINESS

Sec. 5190. [Place of business.] The usual business of each national banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate. [R. S.]
NATIONAL BANKS

Provisions authorizing national banks to establish branches in foreign countries as dependencies of the United States were made by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 25, supra, p. 842.

Provisions authorizing a change in the place of business of national banks were made by the Act of May 1, 1886, ch. 73, § 2, supra, p. 721.

In general.—The provision of section 5190, that "the usual business of each national banking association shall be transacted at an office or banking house located in the place specified in its organization certificate," refers to its "usual business," after obtaining the certificate from the Comptroller; and to "the place," that is, the city or town, in which, after it has been authorized by the Comptroller's certificate to commence its business of banking, its "office or banking house" is located. McCormick v. Market Nat. Bank, (1896) 165 U. S. 538, 17 S. Ct. 433, 1 L. Ed. (2d ed.) 817.


Cashing checks at another place.—A bank cannot make a valid contract providing for the cashing of checks upon it at any other place than its office or banking house; and a bank which cashes checks for another national bank under such a contract cannot recover the amount thereof where they are not presented to the drawee bank until after the latter has suspended. Armstrong v. Springfield Second Nat. Bank, (S. D. Ohio 1889) 38 Fed. 883.

Money received for deposit outside bank.—Where an employee of a bank receives money for deposit outside the bank and it does not reach the bank, he is the agent of the person delivering him the money, and not the bank.

Branch banks.—Although this section does not expressly prohibit the establish-

Sec. 5191. ["Lawsful-money reserve" prescribed.] Every national banking association in either of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Saint Louis, San Francisco, and Washington, shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its notes in circulation and its deposits; and every other association shall at all times have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation, and of its deposits. Whenever the lawful money of any association in any of the cities named shall be below the amount of twenty-five per centum of its circulation and deposits, and whenever the lawful money of any other association shall be below fifteen per centum of its circulation and deposits, such association shall not increase its liabilities by making any new loans or discounts otherwise than
by discounting or purchasing bills of exchange payable at sight, nor make any dividend of its profits until the required proportion, between the aggregate amount of its outstanding notes of circulation and deposits and its lawful money of the United States, has been restored. And the Comptroller of the Currency may notify any association, whose lawful-money reserve shall be below the amount above required to be kept on hand, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money, the Comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of the association, as provided in section fifty-two hundred and thirty-four. [R. S.]


The Act of June 20, 1874, ch. 343, § 2, infra, p. 810, amended this and the following section by providing that the association herein named should not be required to keep on hand any amount of money whatever by reason of the amount of their respective circulations, but that the money required to be kept on hand should be determined, in all respects by the amount of deposits as provided for in the text.

Additional reserve cities were authorized to be designated by the Act of March 3, 1887, ch. 378, §§ 1 and 2, infra, p. 815.

The Federal Reserve Act of Dec. 23, 1913, ch. 6, § 11, par. (e), infra, p. 828, authorized the Federal Reserve Board "To add to the number of cities classified as reserve and the number of reserve cities * * * as to reclassify existing reserve and central reserve cities as to terminate their designation as such."

Provisions relating to Federal reserve districts and Federal reserve cities and affecting national banks were made by said Federal Reserve Act of Dec. 23, 1913, ch. 6, §§ 2 and 4, infra, pp. 817, 820.

The Federal Reserve Act of Dec. 23, 1913, ch. 6, § 27, given as amended by the Act of Aug. 4, 1914, ch. 225, infra, p. 843, provided that R. S. sec. 5191, together with various other sections of the Revised Statutes "which were amended by the Act of May thirtieth, nineteen hundred and eight, are hereby re-enacted to read as such sections read prior to May thirtieth, nineteen hundred and eight, subject to such amendments or modifications as are prescribed in this Act."

Said R. S. sec. 5191 was not, however, specifically amended by the Aldrich-Vreeland Act of May 30, 1908, ch. 229, 35 Stat. L. 646, to which the sentence quoted referred and the section remains, subject only to "such amendments and modifications" as are to be found in said Federal Reserve Act.

"The object of Rev. St. § 5191 is to insure the constant presence of a cash reserve. If this were not so, the banks might suffer loss for want of cash on hand, and for such a loss, if one occurred, the defendants might be liable, although the loans made while the reserve was below the limit were paid at maturity. This provision of the statute was not intended to protect the bank against bad loans, and a loss arising from their nonpayment cannot fairly be said to be caused by the directors' violation of law." Allen v. Luke, (C. C. Mass. 1908) 163 Fed. 1018.

"The cash items including cash handled daily by a bank, constitute a particular fund, aside from its general assets and property. It is recognized as a separate fund by section 5191 R. S." Centralia v. U. S. Na. Bank, (W. D. Wash. 1915) 221 Fed. 755.

Presumption of inability to continue business as consequence of reduction of reserve. This section creates no presumption of inability to continue business as a consequence of the reduction of the reserve below the legal requirement. On the contrary, the statute expressly contemplates the continuance of business by a bank, although its reserve may have fallen below the standard, since it merely forbids the making by a bank of certain enumerated transactions during the period when the reserve is impaired. True, the law confers authority on the Comptroller in his discretion to require a bank, whose reserve has fallen below the legal limit, to restore the reserve within thirty days, and moreover gives power to the Comptroller, with the approval of the Secretary of the Treasury, to appoint a receiver when a bank fails to comply after the thirty days with the demand made. These provisions, however, but add cogency to the view that it cannot be implied that the mere reduction of the reserve below the legal limit, as a matter of law, suspends the business of the bank, or, what would be tantamount thereto, affects, with a legal presumption of bad faith, all transactions made with or concerning the bank during the period whilst the reserve is impaired. Earle v. Carson, (1902) 188 U. S. 42, 23 S. Ct. 584, 47 U. S. (L. ed.) 373.
A savings bank in the city of Washington, D. C., incorporated under an Act of Congress and having a capital of over one hundred thousand dollars and less than two hundred thousand dollars, was required under this section to keep on hand a reserve of twenty-five per cent. of its deposits. German-American Sav. Bank, (1877) 15 Op. Atty.-Gen. 605.

Sec. 5192. [What may be counted toward the "lawful-money reserve."] Three-fifths of the reserve of fifteen per centum required by the preceding section to be kept, may consist of balances due to an association, available for the redemption of its circulating notes, from associations approved by the Comptroller of the Currency, organized under the act of June three, eighteen hundred and sixty-four, or under this Title, and doing business in the cities of Albany, Baltimore, Boston, Charleston, Chicago, Cincinnati, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Richmond, Saint Louis, San Francisco, and Washington. Clearing-house certificates, representing specie or lawful money specially deposited for the purpose, of any clearing-house association, shall also be deemed to be lawful money in the possession of any association belonging to such clearing-house, holding and owning such certificate, within the preceding section. [R. S.]


This section has been in part repealed. See the note to the preceding R. S. sec. 5192. See the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 19, infra, p. 838.

R. S. sec. 5193. This section was as follows:

"Sec. 5193. The Secretary of the Treasury may receive United States notes on deposit, without interest, from any national banking associations, in sums of not less than ten thousand dollars, and issue certificates therefor in such form as he may prescribe, in denominations of not less than five thousand dollars, and payable on demand in United States notes at the place where the deposits were made. The notes so deposited shall not be counted as part of the lawful-money reserve of the association; but the certificates issued therefor may be counted as part of its lawful-money reserve, and may be accepted in the settlement of clearing-house balances at the places where the deposits therefor were made." Act of June 8, 1872, ch. 346, 17 Stat. L. 336.

It was repealed by an Act of March 14, 1900, ch. 41, § 6, 31 Stat. L. 47. See COINAGE, MINTS, AND ASSAY OFFICES, vol. 2, p. 349.

R. S. sec. 5194. This section was as follows:

"Sec. 5194. The power conferred on the Secretary of the Treasury, by the preceding section, shall not be exercised so as to create any expansion or contraction of the currency. And United States notes for which certificates are issued under that section, or other United States notes of like amount, shall be held as special deposits in the Treasury, and used only for the redemption of such certificates."


By the repeal of the "preceding section" 5193 as stated in the preceding note this section became inoperative.

Sec. 5195. [Place for redemption of circulating notes to be designated.] Each association organized in any of the cities named in section fifty-one hundred and ninety-one shall select, subject to the approval of the Comptroller of the Currency, an association in the city of New York, at which it will redeem its circulating notes at par; and may keep one-half of its lawful-money reserve in cash deposits in the city of New York. But the foregoing provision shall not apply to associations organized and located in the city of San Francisco for the purpose of issuing notes payable in gold. Each association not organized within the cities named, shall select, subject to the approval of the Comptroller, an association in either of the cities named, at which it will redeem its circulating notes at par. The Comptroller shall give public notice of the names of the associations selected, at which redemptions are to be made by the respective associations,
and of any change that may be made of the association at which the notes of any association are redeemed. Whenever any association fails either to make the selection or to redeem its notes as aforesaid, the Comptroller of the Currency may, upon receiving satisfactory evidence thereof, appoint a receiver, in the manner provided for in section fifty-two hundred and thirty-four, to wind up its affairs. But this section shall not relieve any association from its liability to redeem its circulating notes at its own counter, at par, in lawful money on demand. [R. S.]

See the notes to R. S. sec. 5191, supra, p. 741.
So much of this section as required or permitted the redemption of a bank's circulating notes at its counter was repealed by the Act of June 20, 1874, ch. 343, § 3, supra, p. 810.

Sec. 5196. [National banks to receive notes of other national banks.] Every national banking association formed or existing under this Title, shall take and receive at par, for any debt or liability to it, any and all notes or bills issued by any lawfully organized national banking association. But this provision shall not apply to any association organized for the purpose of issuing notes payable in gold. [R. S.]


Sec. 5197. [Limitation upon rate of interest which may be taken.] Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this Title. When no rate is fixed by the laws of the State, or Territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona-fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. [R. S.]


I. In general, 744.
II. Constitutionality, 745.
III. Exclusiveness of federal legislation, 745.
IV. Interest at rate allowed by state law, 745.
V. Agreement as to rate, 746.
VI. Equality of national banks with natural persons, 747.
VII. Current rate of exchange, 747.
VIII. Payment in advance, 747.

I. IN GENERAL

This section is liberally construed in view of the intention of Congress to place national banks in a favorable position to compete with all other banks for the banking business of the country. It is designed primarily as an enabling act, not as a restraining act. There are three provisions in the section, each of them enabling. "If no rate of interest is defined by state laws, seven per cent. is allowed to be charged. If there is a rate of interest fixed by the state laws for lenders generally, national banks are allowed to charge that rate but no more, except that if state banks of issue are allowed to reserve more the same privilege is allowed to national banking associations." Tiffany

II. CONSTITUTIONALITY


III. EXCLUSIVENESS OF FEDERAL LEGISLATION


And in an early case it was held immaterial whether such rate was allowed to natural persons or to state banks of issue or otherwise. Tiffany v. National Bank, (1874) 18 Wall. 409 U. S. (L. ed.) 862, overruling Shunk v. Galion First Nat. Bank, (1872) 22 Ohio St. 508, 10 Am. Rep. 762, and holding that under a state law allowing ten per cent. as interest but limiting banks of issue organized in the state to eight per cent. a national bank might charge a greater rate.


The court is not bound to take judicial notice that other banks in the state are authorized by special charter to take a greater rate of interest than the legal rate, but such charters must be produced and proven. Clarion First Nat. Bank v.

By compounding interest oftener than is permitted by a state law, a national bank charges interest at a higher rate than that allowed by the laws of the state, within the meaning of the section, although the compounded interest is less than the state's interest paid by being charged directly without compounding. Citizens' Nat. Bank v. Donnell, (1904) 195 U. S. 369, 25 S. Ct. 49, 49 U. S. (L. ed.) 238, affirming (1903) 172 Mo. 384, 72 S. W. 925.

Absence of penalty.—A national bank is limited to the rate fixed by the state laws as the legal rate though no penalty is provided by such law for exceeding it. Bramhall v. Atlantic Nat. Bank, (1873) 36 N. J. L. 243; Lebanon Nat. Bank v. Karmy, (1881) 98 Pa. St. 65.

Statute forbidding defense of usury.—Where a national bank, located in the city of New York, made a loan there to a corporation, which, if it had been made to an individual, would have been usurious, under the law of New York, as a loan at a rate exceeding the rate of 7 per centum per annum, so that the securities taken for the loan would have been void, and a statute of New York forbade a corporation to interpose the defense of usury, the effect of such statute, as construed by the highest court of the state, being that the rate of interest which a corporation might pay was not fixed or limited, it was held that the interest on the loan in question was forfeited notwithstanding such statute. In re Wild, (1873) 11 Blatchf. 243, 29 Fed. Cas. No. 17,845.

However, it was held that an Illinois statute which restricts the rate of interest to six per cent., unless the contract was in writing, when eight per cent. might be agreed upon and no more, but which prohibits a corporation from interposing the defense of usury, would prevent a national bank from enforcing a contract with a corporation for more than eight per cent. Union Nat. Bank v. Louisville, etc., R. Co., (1893) 145 Ill. 208, 34 N. E. 135. To the same effect see Bramwell v. Atlantic Nat. Bank, (1873) 36 N. J. L. 243. The Supreme Court of the United States construed the Illinois case above cited to hold that under and by virtue of the state statutes the plaintiff, whoever he or it might be, could not enforce a contract forbidden by the terms of those statutes, and this irrespective of any other rights that the defendant might have in respect thereto, and as thus construed the decision did not discriminate against national banks. Union Nat. Bank v. Louisville, etc., R. Co., (1896) 163 U. S. 325, 16 S. Ct. 1039, 41 U. S. (L. ed.) 177.

The true construction of the state legislation is a matter of state jurisprudence, and while the right of the national bank springs from the Act of Congress, yet it is equally chargeable with the administration of the rule established by the state law. It does not involve a reservation to the national courts of the authority to determine adversely to the state courts what is the rule as to interest prescribed by the state law; only the right to see that such rule is equally enforced in favor of national banks is intended. Union Nat. Bank v. Louisville, etc., R. Co., (1896) 163 U. S. 325, 16 S. Ct. 1039, 4 U. S. (L. ed.) 177.


V. AGREEMENT AS TO RATE


A statutory requirement that no greater rate than that fixed by the law as the legal rate shall be collected unless it be upon a contract evidenced by a memorandum in writing signed by the party to be charged, is complied with in the case of a note discounted by a national bank without other memorandum. Newell v. National Bank, (1876) 12 Bush (Ky.) 57.

Where a state law fixing a legal rate provides that the parties by prior agreement may fix any rate but restricts the recovery of interest beyond a certain rate, the latter rate is the maximum which a national bank may charge. Crocker v. Chetopah First Nat. Bank, (1876) 4 Dill. 356 & Fed. Cas. No. 3,397. The words "fixed by law" as used in the provision providing for interest at seven per cent. where no rate is fixed, are construed to mean "allowed by the law." Daggs v. Phoenix Nat. Bank, (1900) 177 U. S. 549, 20 S. Ct. 732, 44 U. S. (L. ed.) 852, affirming (1898) 5 Ariz. 409, 53 C. C. A. 201.
VI. EQUALITY OF BANKS WITH NATURAL PERSONS


In case of a discount at a usurious rate, of paper transferred by an indorsement, imposing the ordinary liability upon the indorser, the bank is subject to the penalty provided by the National Bank Act, though a similar transaction between natural persons would not be usurious under the state laws. National Bank v. Johnson, (1881) 104 U. S. 271, 26 U. S. (L. ed.) 742, affirming (1878) 74 N. Y. 329, 30 Am. Rep. 302.

VII. CURRENT RATE OF EXCHANGE

The current rate of exchange in addition to interest may be taken in advance in the case of the purchase, discount, or sale of bona fide bills of exchange payable in another place. Wheeler v. Union Nat. Bank, (1878) 96 U. S. 268, 24 U. S. (L. ed.) 833.

VIII. PAYMENT IN ADVANCE

In an early case it was held that under a state law which allowed interest only on the amount of money actually loaned and did not allow its payment in advance as was provided by the national bank law, where no rate of interest was fixed by the state statute, a national bank could not take interest in advance. Timberlake v. First Nat. Bank, (N. D. Miss. 1890) 43 Fed. 231, wherein the court said: "The Code of 1880 of this state only allows interest on the amount of money actually loaned, and does not allow it retained in advance, as is provided in the national bank law, where no rate of interest is fixed by the state statute."

Sec. 5198. [Consequences of taking usurious interest.] The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases. [R. S.]


This section was amended by Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 320, by adding the last sentence beginning with the words "that suits, actions, and proceedings," etc. This provision is repeated, with other provisions relating to actions by or against national banks, infra, p. 928.

By the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 9, infra, p. 825, the provisions of this section were made applicable to state banking associations on their becoming members of the Federal reserve banks.
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I. INTRODUCTORY
Two separate and distinct classes of cases are contemplated by the statute: First, those wherein usurious interest has been taken, received, reserved, or charged, in which case there shall be "a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon;" second, in case usurious interest has been paid, the person paying it may recover back twice the amount of the interest "thus paid from the association taking or receiving the same." Barnett v. Merchants’ Nat. Bank, (1879) 95 U. S. 555, 25 U. S. (L. ed.) 212; Hassetine v. Central Bank, (1901) 183 U. S. 322, 22 S. Ct. 50, 46 U. S. (L. ed.) 118; Talbot v. Sioux City First Nat. Bank, (1902) 185 U. S. 172, 22 S. Ct. 612, 46 U. S. (L. ed.) 957.

II. CONSTITUTIONALITY
The fact that a penalty for usury may be recovered from a national bank but not from a state bank, does not render the law obnoxious to the constitutional requirements of a state that all laws of a general nature have uniform operation. It is sufficient answer to this suggestion to say that laws are of uniform operation, if they apply to all persons in the situation. Inghram v. Merchants’ Nat. Bank, (1913) 153 Ia. 408, 132 N. W. 869.

III. VALIDITY OF CONTRACT
But a note given to cover interest in balancing accounts on usurious transactions cannot be enforced where the defense of usury is set up. Marion Nat. Bank v. Thompson, (1897) 101 Ky. 277, 46 S. W. 903; Tomblin v. Higgins, (1897) 53 Neb. 92, 73 N. W. 461, 68 A. S. R. 596.

IV. "FORFEITURE OF ENTIRE INTEREST"
1. In General
Under the first clause of this section the taking, receiving, renewing, or charging a rate of interest greater than is allowed by the preceding section, when

Under this section providing that knowingly charging usurious interest forfeits all interest, a national bank holding for value and innocently a bond and mortgage tainted with usury, may recover the principal due. Slade v. Squier, (1909) 133 App. Div. 666, 118 N. Y. S. 278.

A national bank, which has made a twelve per cent, charge on overdrafts, where eight per cent, is the highest rate of interest permitted by the state laws, cannot escape the forfeiture prescribed by this section where a greater rate of interest is charged than the state laws allow, because of the fact that the amount not collected, or the interest on the charge in a penalty because of the failure to pay a debt when due. Citizens' Nat. Bank v. Donnell, (1904) 195 U. S. 369, 25 S. Ct. 49, 49 U. S. (L. ed.) 238, affirming (1903) 172 Mo. 384, 72 S. W. 925.

The provision limiting the forfeiture to the interest applies as well to banks established in states where a rate of interest is fixed by law as to banks in states where no rate is fixed. Central Nat. Bank v. Pratt, (1874) 115 Mass. 539, 15 Am. Rep. 138.

In an action by a national bank on a note defendant can, under this section, reduce the recovery by the amount of usury included in the note, but for illegal interest paid he must bring action. National Bank v. Lynch, (1911) 69 W. Va.: 333, 71 S. E. 880.

Where a note is given for a sum in excess of the amount actually received and proper interest thereon, a forfeiture of the entire interest on the loan is warranted. Wagoner Nat. Bank v. Welch, (1907) 7 Indian Ter. 259, 104 S. W. 610.

2. Renewal Notes

3. Collateral Notes
Usurious interest charged in an account may be set up in defense to collateral notes given on account of the same accounts. Philadelphia Third Nat. Bank v. Miller, (1879) 90 Pa. St. 241.
4. Necessity That Interest Stipulated for Be Unpaid

While the language of the first clause relating to "forfeiture of the entire interest," refers to interest taken and received, as well as that received or charged, the latter part of the clause has the effect of limiting the forfeiture to such interest as the evidence of debt carries with it or which has been agreed to be paid in contradistinction to interest actually paid, which is covered by the second clause of the section. Barnet v. Muncie Nat. Bank, (1879) 98 U. S. 555, 25 U. S. (L. ed.) 212; Haselett v. Central Nat. Bank, (1901) 183 U. S. 132, 22 S. Ct. 56, 46 U. S. (L. ed.) 118; Talbot v. Sioux City First Nat. Bank, (1902) 186 U. S. 172, 22 S. Ct. 612, 46 U. S. (L. ed.) 587.

5. Necessity That Agreement for Usury Appear in Note for Principal


"It is not necessary, in order to effect a forfeiture of the entire interest, that the agreement to pay usury should appear in the note or that the agreement should be made simultaneously with the agreement to lend the money. Were the law so construed, the effect would be to enable the bank to evade the law every day by reducing the usurious contract to writing on a separate piece of paper, or by making it after the contract to loan the money was entered into." Alves v. Henderson Nat. Bank, (1888) 89 Ky. 126, 9 S. W. 504.

6. "Carries With It"

"The expression, 'carries with it,' means any interest that the note, bill or other evidence of debt may carry by operation of law, for the next succeeding clause, to-wit, 'or which has been agreed to be paid thereon,' leaves no doubt as to the meaning of said expression. In many states of the Union, as was the case in this state at one time, there was, at the time of the passage of said act of Congress, a fixed rate of interest to be charged in the absence of contract; and, by contract, a greater rate of interest might be charged. It seems clear, therefore, that the expression, 'carries with it,' refers to such interest as the note, &c., may carry without reference to any agreement; and that the succeeding clause refers to such conventional legal rate of interest as the parties may have agreed on, both of which shall be forfeited, if any usurious interest has been taken, received, reserved or charged. Also, the language clearly means that if usury has been agreed to be paid for any part of the time that the note is entitled to run, or that it may, by indulgence, run, such agreement forfeits the entire interest that the note or bill carries with it; or, if the note or bill bears a conventional rate of interest, such as some states allow, and, in addition thereto, usury has been charged for any part of the time, such conventional rate of interest is thereby forfeited. The framers of the act of Congress under consideration doubtless understood that much of the business of the banks created by the act would consist of lending money secured by notes, &c., made due and payable, not exceeding four months from date, and, if need be, renewed from time to time; that the usurious contracts would relate to the time such notes were to run; and, in case of their renewal, so also would the usurious contracts be renewed. Hence, the act provides, in substance, that in case usury is taken, received, reserved or charged, the entire interest that the note carries, or that may exist by agreement, shall be forfeited." Alves v. Henderson Nat. Bank, (1888) 89 Ky. 126, 9 S. W. 504.

7. Election to Remit Excessive Interest

A national bank, whose action on a promissory note is met by the plea of usury, may not avoid the forfeiture of the entire interest, imposed by this section in absolute terms, by then declaring an election to remit the excessive interest. Citizens' Nat. Bank v. Donnell, (1904) 195 U. S. 369, 25 S. Ct. 49, 49 U. S. (L. ed.) 238, affirming (1903) 172 Mo. 384, 72 S. W. 925.

A note given for a usurious amount which carries legal interest on its face cannot be purged of usury by having the amount of excess over the legal rate and interest on such excess credited thereon as a payment without the concurrence of the maker, so as to prevent a forfeiture under this section of all interest which it carries. National Bank v. Eyre, (1879) 52 Ill. 114, 2 N. W. 993.

8. Courts Having Jurisdiction of Defense of Usury

9. Limitation of Action


"There is no limitation of time within which the defense given by the statute may be made by the debtor when sued by the bank. If he pleads and proves that the debt agreed to be paid is usurious, all interest on such debt, legal as well as illegal is forfeited, and there can be no judgment rendered except for the principal only sued for." Baker v. Lynchburg Nat. Bank, (Va., 1917) 91 S. C. 167.

10. Defense of Usury, by Whom Made

In general.—The better rule is to the effect that the forfeiture of interest in the mercantile paper by the payment of interest at a usurious rate following the apparently plain provisions of the section attaches to the instrument itself and the defense is available to any party thereto. Danforth v. National State Bank, (C. C. A. 3d Cir. 1891) 48 Fed. 271, 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 662, wherein the court said: "The forfeiture here denounced attaches to the instrument itself, and the consequences inheres in it. As it carries no interest, how can any interest thereon be recoverable? The clause operates directly upon the bank, and affects its power. The statutory franchise to recover interest is lost by the commission of the illegal act. Being without right to demand interest, the offending bank cannot recover interest from any one. The right to defend is not made a personal one; and herein, it will be perceived, there is a marked difference between this provision of the law and the one immediately succeeding, which gives a particular remedy to the person by whom the excessive interest has been paid. We are therefore of the opinion that the plaintiff in error may defend under the forfeiture clause of the act. We are aware that this conclusion is at variance with the ruling of the Supreme Court of Ohio in Smith v. Exchange Bank, (1875) 26 Ohio St. 141, and of the Supreme Court of New Jersey in Importers, etc., Nat. Bank v. Littell, (1885) 47 N. J. L. 233; but we are in accord with a provision of the Supreme Court of Pennsylvania in Guthrie v. Reid, (1884) 107 Pa. St. 251. There, the objection being made that the maker of a note discounted by a national bank (the equitable plaintiff) for the payment of the usurious rate of interest could not defend because the illegal interest had been paid by the payee, the court declared:

'The answer to this is that the bank, by its act, has destroyed the interest-bearing power of the note, and can recover no interest upon it from anybody.'


"It is settled law that where a national bank takes, receives, or charges more than the legal rate of interest in the discount of a note, the interest earning power of the note is destroyed. And when once so destroyed it remains so. The taint of usury clings to it until paid. It is a dead note thereafter so far as interest is concerned." Guthrie v. Reid, (1884) 107 Pa. St. 251, quoted in Danforth v. National State Bank, (C. C. A. 3d Cir. 1891) 48 Fed. 271, 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 622.


An accommodation maker of a note given to a national bank can set up the defense of usury to defeat the recovery of interest. Trabue v. Cook, (Tex. Civ. App. 1910) 124 S. W. 465.

Acceptor.—In Danforth v. National State Bank, (C. C. A. 3d Cir. 1891) 48 Fed. 271, 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 622, the acquirer of a draft discounted at a usurious rate by a broker for the drawer was allowed to set up usury to defeat a recovery of interest beyond the face of the draft.

Borrower or Director.—The borrower is not estopped to defend against a recovery of interest on the ground of usury because of the fact that he is a director of the bank. Cadiz Bank v. Simmons, (1877) 34 Ohio St. 142, 32 Am. Rep. 364.

11. Proof of Current Exchange

A bank is not liable to forfeit interest unless it appears affirmatively that the bank knowingly received or reserved an
amount in excess of the statutory ra : of interest and the current exchange; and where there is no proof of the current rate of exchange the bank is entitled to recover interest in a suit on the bill. Wheeler v. Union Nat. Bank, (1878) 96 U. S. 268, 24 U. S. (L. ed.) 333.

V. RECOVERY BACK OF TWICE AMOUNT OF INTEREST PAID

1. In General

Where a national bank knowingly charges and receives a greater rate of interest than that prescribed by the laws of the state in which such bank is located, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid, provided such action is commenced within two years from the date of the usurious transaction. Farmers' Nat. Bank v. Mc Coy, (1914) 42 Okla. 420, 141 Pac. 791, Ann. Cas. 1916D 1243.

A debtor who has actually paid excess interest is not precluded from recovering the penalty for the exactions of usurious interest by the fact that he has pleaded usury in defense to a suit on the note and has recovered judgment therein forfeiting the interest. Gadsden First Nat. Bank v. Denson, (1898) 115 Ala. 650, 22 So. 518.


2. Necessity That Interest Be "Paid"

To recover the penalty provided by the second clause of this section, it is clear from the reading thereof that interest must have been "paid." Hazeltine v. Central Nat. Bank, (1901) 183 U. S. 139, 22 S. Ct. 50, 46 U. S. (L. ed.) 118.


3. When Is Interest "Paid"

a. In General

It is often difficult to determine when interest is "paid" as will be seen from an examination of the authorities which follow.

b. Running Accounts

Charging interest in a running account is not a payment within the meaning of this section. Davey v. Deadwood First Nat. Bank, (1898) 8 S. D. 214, 66 N. W. 122.

c. Extension of Renewal Notes


The statute "clearly makes a difference between interest which a note, bill, or other evidence of debt held by a national bank carries with it, or which has been agreed to be paid thereon, and interest which has been paid. Interest included in a renewal note or evidenced by a separate note does not thereby cease to be interest within the meaning of section 5198 and become principal." Brown v. Marion Nat. Bank, (1905) 169 U. S. 416, 18 S. Ct. 390, 42 U. S. (L. ed.) 801.

The payment contemplated by this section is an actual payment and not a further promise to pay, consequently the giving of a renewal note will not sustain a recovery from a national bank on account of usurious interest in the original note. Tishomingo First Nat. Bank v. Latham, (1913) 37 Okla. 286, 132 Pac. 891.

"There is a line of cases of actions on renewal obligations for balance left due of an originally usurious debt after application of payments sufficient in amount to pay off and discharge all of the usury, which hold that in such situation the renewal obligation is purged of the usury and there may be recovery upon it in suits by the creditor against the debtor. * * * The rule of these authorities, as noted, is applied even in cases of suits by the creditor on the executory contract in question. But they were not controlled by such a statute as said section 5198 with its phrasesology with respect to the
forfeiture of "the entire interest," and hence we do not consider that such rule would be applicable to a suit by a national bank on the executory obligation. But we do think that this rule should apply to suits by the debtor to recover the penalty provided by the statute with respect to leaving undisturbed all payments of interest actually made and applied in accordance with the principle underlying such rule." Baker v. Lynchburg Nat. Bank, (Va. 1917) 91 S. E. 157.

Renewal note by surety.— A discharge of a note by a surety by giving his own note in renewal thereof does not operate as a payment by the principal in such sense as to entitle him to avail himself of the federal statute authorizing the recovery from a national bank of twice the amount of usurious interest paid to the bank, nor does the subsequent payment of the renewal note by the surety suffice to give the principal a cause of action under such statute. Lasater v. Jacksboro First Nat. Bank, (1905) 40 Tex. Civ. App. 237, 88 S. W. 429.

d. Settlement Notes


e. Usurious Discount

Usury is not paid within the meaning of the section where, on the simple discount of a note or bill at a usurious rate, the bank pays over the proceeds less the discount to the transferrer or borrower or credits such proceeds on his account. Knapp v. Williamsport Nat. Bank, (W. D. Pa. 1882) 15 Fed. 333; Synder v. Mt. Sterling Nat. Bank, (1893) 94 Ky. 231, 21 S. W. 1050; Marion Nat. Bank v. Thompson, (1897) 101 Ky. 277, 40 S. W. 903; Citizens' Nat. Bank v. Forman, (1901) 111 Ky. 206, 63 S. W. 454, 757, 56 L. R. A. 673; Haseltine v. Central Nat. Bank, (1900) 155 Mo. 66, 56 S. W. 893; National Bank v. Lewis, (1880) 81 N. Y. 15; Hade v. McVay, (1877) 31 Ohio St. 231; Guthrie v. Reid, (1884) 107 Pa. St. 281; Contra, subo v. Peoples' Nat. Bank, (1802) 92 Tenn. 444, 21 S. W. 888.

In such case usury is not paid until the note is paid or a judgment is entered therefor, for up to such time there is a locus penitentiae for the party charging the excessive interest. Duncan v. Mt. Pleasant First Nat. Bank, (1877) 29 Pittab. Leg. J. N. S. (Pa.) 129, 8 Fed. Cas. No. 4,135; Lanham v. Crete First Nat. Bank (1894) 42 Neb. 767, 60 N. W. 1041; Hall v. Fairfield First Nat. Bank, (1890) 30 Neb. 99, 46 N. W. 150; Ilgley r. Beverly First Nat. Bank, (1875) 26 Ohio St. 75, 20 Am. Rep. 730; Smith r. Crete First Nat. Bank, (1894) 42 Neb. 687, 60 N. W. 866; Baker v. Lynchburg Nat. Bank, (Va. 1917) 91 S. E. 157.

A distinction is made between a discount of paper of a third person and a discount of the paper of the borrower. In the former case payment is made at the time of the discount, while in the latter case it is not made until the note or obligation is paid. In the first case the borrower pays the amount charged for discount in the negotiable obligation of another, while in the latter case the borrower's paper does not have its inception and hence is a mere promise to pay made at the time when the interest is taken. Knapp v. Williamsport Nat. Bank, (W. D. Pa. 1882) 15 Fed. 333; Danforth v. National State Bank, (C. C. A. 3d Cir. 1891) 48 Fed. 271, 3 U. S. App. 7, 1 C. C. A. 62, 17 L. R. A. 622; National Bank v. Carpenter, (1889) 52 N. J. L. 165, 19 Atl. 181; Clarion Second Nat. Bank v. Morgan, (1895) 165 Pa. St. 169, 30 Atl. 567, 44 A. S. R. 652; Nash v. White's Bank, (1877) 68 N. Y. 396.

f. Partial Payment


Under a state statute which provides that "partial payment on a debt bearing
interest shall be first applied to the ex-
tingishment of the interest then due, "where a statement is made of various ac-
counts and a large amount thereof is 
paid in cash and a new note given for 
the balance, it will be presumed, in the 
absence of evidence to the contrary, that 
the interest and usury in the prior trans-
actions were paid at such time, and the 
statute of limitations for the recovery of 
the penalty will run from the date of 
such settlement. Louisville Trust Co. 
r. Kentucky Nat. Bank, (C. C. Ky. (1900) 
102 Fed. 442).

A presumption of application by the 
debtor of a payment toward the interest 
does not arise from the fact that the 
bank so applied the payment on its 
books without his knowledge. Richmond 
Second Nat. Bank v. Fitzpatrick, (1901) 
111 Ky. 228, 63 S. W. 459, 62 L. R. A. 
509.

g. Payment on Renewal 
A payment of usurious interest or any 
interest on renewing a note discounted 
or given at a usurious rate is a payment 
of interest and will not be applied on a 
principal. Richmond Second Nat. Bank 
v. Fitzpatrick, (1901) 111 Ky. 228, 63 
S. W. 459, 62 L. R. A. 509; Peterborough 
First Nat. Bank v. Childs, (1852) 133 
Mass. 248, 43 Am. Rep. 509; Lanham r. 
Crete First Nat. Bank, (1894) 42 Neb. 
757, 60 N. W. 1041. Contra, Heseltine 
v. Central Nat. Bank, (1900) 155 Mo. 
66, 56 S. W. 895.

h. Transfer of Property 
A transfer of property by the maker to 
 a surety who thereupon assumes the note 
and pays it, is payment by the maker 
entitling him to sue for the penalty. 
Laaster v. Jacksboro First Nat. Bank, 
(1903) 96 Tex. 345, 78 S. W. 1067.

i. Remission of Usury 
If a note when sued on includes an 
agreement to pay usurious interest or 
interest upon usurious interest the holder 
may in due time elect to remit such 
interest, and it cannot then be said that 
usurious interest was paid to him. 
Brown v. Marion Nat. Bank. (1888) 109 
U. S. 416, 18 S. Ct. 390, 42 U. S. (L. ed.) 
805; National Bank v. Eyre, (1579) 62 
Ia. 114, 9 N. W. 995; Higley v. Beverly 
First Nat. Bank, (1875) 26 Ohio St. 75, 
20 Am. Rep. 759.

In a suit on a debt in which usurious 
interest is reserved, where the amount of 

excessive interest is deducted from the 
judgment or decree there is no payment 
of usury within the statute. Talbot v. 
Sioux City First Nat. Bank, (1898) 106 
Ia. 361, 76 N. W. 726; Kearney v. Clarion 
First Nat. Bank, (1899) 129 Pa. St. 577, 
18 Atl. 598.

4. Payment of Principal 
The payment of the principal sum is 
not a condition precedent to the right to 
maintain an action for the penalty. 
43 Neb. 579, 61 N. W. 833; Dorchester 
First Nat. Bank v. Smith, (1893) 56 
Neb. 199, 54 N. W. 254; Monongahela 
Nat. Bank v. Overholt, (1899) 96 Pa. N. 
323; National Bank v. Karmay, (1881) 
98 Pa. St. 65; McCarthy v. Rapid 
City First Nat. Bank, (1909) 23 S. D. 
269, 121 N. W. 853, 21 Ann. Cas. 457, 
23 L. R. A. (N. S.) 335; Lyon v. Mer-
chants' Nat. Bank, (1858) 22 N. Va. 554, 
46 Am. Rep. 590. But see contra, Hesel-
tine v. Central Nat. Bank, (1900) 155 
Mo. 66, 56 S. W. 895, which case, how-
ever, apparently failed to discriminate 
between a reservation and an actual pay-
ment of the interest.

5. Exclusiveness of Remedy Provided 
In general.—As, without the statute 
there can be no recovery from the bank 
for usurious interest actually paid, and 
as the statute which creates the right to 
usurious recovery also prescribes the remedy, 
that remedy is exclusive of all others for 
the enforcement of such right. Farmers', 
etc., Nat. Bank v. Dearing, (1875) 91 
U. S. 29, 23 U. S. (L. ed.) 196; Stephens 
v. Monongahela Nat. Bank, (1884) 111 
U. S. 197, 4 S. Ct. 336, 337, 28 U. S. 
(L. ed.) 399; Heseltine v. Springfield 
Cent. Bank, (1901) 183 U. S. 132, 22 S. 
Ct. 50, 46 U. S. (L. ed.) 115, affirming 
(1900) 156 Mo. 58, 55 S. W. 1015, 85 A. 
S. R. 531; Schuyler Nat. Bank v. Gads-
den, (1903) 101 U. S. 451, 24 S. Ct. 129, 
48 U. S. (L. ed.) 256, reversing Gadsden 
v. Thruhs, (1902) 63 Neb. 881, 89 N. W. 
403, (1899) 58 Neb. 340, 78 N. W. 632, 45 
L. R. A. 654, (1898) 56 Neb. 556, 76 N. 
W. 1060; Cox v. Beck, (1897) 53 Fed. 
1208; Weyer v. Starbuck, (1878) 28 
Ia. 208; Marion Nat. Bank v. Thompson, 
(1897) 101 Ky. 277, 40 S. W. 903; Bar-
er v. Rochester Nat. Bank, (1879) 59 
N. H. 310; National State Bank v. Boy-
lan, (1877) 2 Abb. N. Cas. (N. Y.) 216; 
Oldham v. Wilmington First Nat. Bank, 
(1881) 86 N. C. 240; Clarion First Nat. 
Bank v. Gruber, (1879) 91 Pa. St. 377; 
Fayette County Nat. Bank v. Duhaney, 
(1880) 96 Pa. St. 340; Dow v. Irasburg 
National Bank, (1877) 50 Vt. 112, 26 Am. 
Rep. 495; Hambright v. Cleveland Nat. 
Bank, (1879) 3 Les. (Tenn.) 40, 31 Am. 
Rep. 629; Hill v. National Bank, (1884) 
56 Vt. 582. Contra, Farrow v. First Nat. 
Bank, (Ky. 1898) 47 S. W. 594; Stedman 
v. Redfield, (1874) 8 Baxt. (Tenn.) 337; 
Baker v. Lynneburg Nat. Bank, (Va. 1917) 
91 S. E. 157; Reese v. Colquitt Nat. Bank, 
(1918) 12 Ga. App. 472, 77 S. E. 320; 
Chipman v. Farmers', etc., Nat. Bank 
(1913) 121 Md. 343, 88 Atl. 151; Mer-
chants' Nat. Bank v. Sharkey, (1913) 
84 Ore. 32, 128 Pac. 1008.

But in Exeter Nat. Bank v. Orchard, (1894) 39 Neb. 485, 58 N. W. 144, though the principal was acknowledged, it was held that a debtor was not then recovered from availing himself of any defenses on account of usury, to which he was entitled under the state law, and which accrued before he was aware that the debt had been assigned to a national bank, notwithstanding he subsequently paid usury to the bank.

So it has been held that where a national bank, in order to evade the burdens attaching to its position as such, causes a note and mortgage to be executed to a third person, it will not be permitted to show the truth to evade the burdens cast upon it by a contract in the form which has been chosen, and in such case a remedy under the state law is applicable. Gadsden v. Thrush, (1898) 56 Neb. 565, 76 N. W. 1060.


The maker of commercial paper free from usury in its inception cannot set up to defeat a recovery of interest the fact that the instrument was purchased from the payee by the bank at a usurious discount. Lazard v. National Union Bank, (1879) 52 Md. 78, 36 Am. Rep. 355; Importer's, etc., Nat. Bank v. Little, (1855) 47 N. J. L. 233; Smith v. Exchange Bank, (1875) 26 Ohio St. 141; Clarion Second Nat. Bank v. Morgan, (1895) 165 Pa. St. 190, 30 Atl. 951, 44 A. S. R. 652.

In a suit to foreclose a mortgage on real estate given to the president of a national bank as security for a loan by the bank in practical violation of the statute, defendant cannot plead as an offset under the state law the usury paid on the debt. Schuyler Nat. Bank v. Gadsden,

Norfolk Nat. Bank v. Schwenk. (1886) 46 Neb. 351, 64 N. W. 1073, was an action brought by the maker of a series of renewal notes to recover the penalty of double the amount of usurious interest paid on the first note and on subsequent extensions in the shape of renewals, and the defendant sought to recover as a counterclaim the amount of the last renewal note not then paid. The payments of usurious interest had been made more than two years before the action was brought. The court evidently treated the action as though it had been brought by the bank to recover on the notes, and held that the plaintiff could not set off against the defendant's demand the amount paid as interest on the usurious transactions.

Where two persons execute a note to a national bank and one of them pays usurious interest thereon, the other cannot take advantage of such payment in an action by the bank to collect the note, as the party paying the interest or his legal representative alone has a right of action to recover the penalty for receiving such interest, and such payment cannot be set up as an offset or defense in an action brought by the bank on the note. Trabue v. Cook. (Tex. Civ. App. (1910) 124 S. W. 405.


6. Scire facere


A national bank is not liable for the penalty where it sold and assigned the note before maturity in good faith, and acted merely as the assignee's agent in collecting the principal and usurious interest. North Bend First Nat. Bank v. Miltonberger. (1892) 33 Neb. 847, 51 N. W. 232.

In an action under this section for usury on a note to a national bank, refusal to instruct that the defendant must have received the usury knowingly was held to be error. Merchants'. etc. Nat. Bank v. Horton. (1911) 27 Okla. 689, 117 Pac. 201.

7. Mode of Payment of Interest

Transfer of property.—This section comprehends payment of the usurious interest by transfer of property as well as payment in cash, but to constitute a payment by transfer of property within the statute, the parties must intend that the property be accepted as a payment. Blakely First Nat. Bank v. Davis. (1911) 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134.

Where property is accepted as payment its market value at the time must exceed the principal and lawful interest, to amount to payment and receipt of illegal interest. Blakely First Nat. Bank v. Davis. (1911) 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134.

Where property is accepted in payment of a debt infected with usury, it must appear, not only that the market value of the property was in excess of the principal and debt interest, but that the transfer and delivery thereof was intended by the debtor and accepted by the bank as payment, not only of the lawful interest, but of the illegal interest; the word "knowingly," as used in this section, meaning "with knowledge." Blakely First Nat. Bank v. Davis. (1911) 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134.

Several payments.—It is immaterial whether the interest was paid in one or in several payments, if each payment was made within the period limited. Hintemister c. Chittenango First Nat. Bank. (1876) 64 N. Y. 212.

8. Voluntary Payment of Interest

A voluntary payment of both principal and interest will not prevent recovery of the penalty. Tobias First Nat. Bank v. Barnett. (1897) 51 Neb. 397, 70 N. W. 937.

9. Payments of Interest by Third Persons

This section does not apply to voluntary payments of debts of third persons to the bank, which may be infected with usury. Blakely First Nat. Bank v. Davis. (1911) 135 Ga. 687, 70 S. E. 246, 36 L. R. A. (N. S.) 134.
10. Parties

a. Plaintiffs

In general.--It is expressly provided that no action for twice the amount of illegal interest paid may be brought save by the "person paying the same" or his "legal representative.

Joint makers.--One of the joint makers of a note on which illegal interest has been paid by the other joint maker cannot sue for the penalty. Timberlake v. First Nat. Bank, (N. D. Miss. 1890) 43 Fed. 231; Concordia First Nat. Bank v. Rowley, (1803) 52 Kan. 394, 54 Pac. 1040. And where illegal interest has been paid by such makers individually they cannot unite in one action to recover the penalty, though they have paid equal amounts. Teague v. Salina First Nat. Bank, (1897) 5 Kan. App. 300, 48 Pac. 603. The rule is different, however, in the case of a note made by partners, where the firm paid the illegal interest. Albion Nat. Bank v. Montgomery, (1889) 54 Neb. 681, 74 N. W. 1192; Lasater v. Jackson Nat. Bank, (Tex. Civ. App. 1902) 72 S. W. 1054.

And joint makers of a note to a national bank who have separately, but from a joint fund, paid usury, are entitled to jointly maintain an action for penalty under this section. Merchants, etc., Nat. Bank v. Horton, (1911) 27 Okla. 689, 117 Pac. 201.


Sale and assignment of right.--The right to recover the penalty is personal and cannot be transferred by the ordinary sale and assignment of the right. Pardee v. Iowa State Nat. Bank, (1898) 106 Iowa 345, 76 N. W. 800. But see Lasater v. Jackson Nat. First Nat. Bank, (Tex. Civ. App. 1902) 72 S. W. 1054.

The term "legal representatives" as used in this section, has been held to include a receiver. Barbour v. National Exch. Bank, (1887) 45 Ohio St. 133, 12 N. E. 5, 4 A. S. R. 525; a trustee, Tiffany v. National Bank, (1873) 18 Wall. 409, 21 U. S. (L. ed.) 862; an assignee in bankruptcy, Wright v. Greensburg First Nat. Bank, (1878) 8 Biss. 243, 30 Fed. Cas. No. 18,078; In re Prescott, (1874) 5 Biss. 523, 19 Fed. Cas. No. 11,389; Crocker v. Chetopah First Nat. Bank, (1876) 4 Dill. 365; City Bank v. Taylor, (1889) 22 S. W. 202; Markson v. Kansas City First Nat. Bank, (1876) 16 Fed. Cas. No. 9,007; National Bank v. Trimble, (1884) 40 Ohio St. 629; Monongahela Nat. Bank v. Overholt, (1891) 96 Pa. St. 327; and as assignee for benefit of creditors under a common-law deed of assigment. Louisville Trust Co. v. Kentucky Nat. Bank, (C. C. Ky. 1898) 87 Fed. 143; Henderson Nat. Bank v. Alves, (1891) 91 Ky. 142, 15 S. W. 132. See also Louisville Trust Co. v. Kentucky Nat. Bank, (C. C. Ky. 1900) 102 Fed. 442 (following but criticizing prior holding in Louisville Trust Co. v. Kentucky Nat. Bank, (C. C. Ky. 1898) 87 Fed. 143); Contra. Barnits v. Hamilton First Nat. Bank, (1876) 1 Cinc. L. Bul. 45, 2 Fed. Cas. No. 1,034, and Osborn v. Athens First Nat. Bank, (1898) 175 Pa. St. 494, 54 Atl. 888, in which latter case it was held that the question whether a voluntary assignee for the benefit of creditors is a legal representative within the meaning of the law, must depend upon the local law and procedure; and this reasoning may explain the conflict in the decisions, though it is not generally set out as the ground of the holdings.

The term has also been held to include an assignee of the right to recover the penalty. Lasater v. Jackson Nat. Bank, (1903) 96 Tex. 345, 72 S. W. 1057.


b. Defendants

Where a note containing usurious interest is transferred and indorsed to a third party by the nominal payee, and the borrower pays the note in full to such third party, his right of action to recover double the amount of interest paid, as provided by section 5198, is against the party who took and received such interest, and the payee is not a necessary party defendant. Wellston First Nat. Bank v. Sensebaugh, (Okla. 1916) 160 Pac. 455.

11. Jurisdiction of Courts

The subject of jurisdiction of courts which is covered by the last paragraph of the section is treated infra, p. 926.

12. Limitation of Action

Those courts which hold that the statute begins to run from the payment of the debt, instead of the payment of the interest, have been influenced by the statements of Mr. Justice Harlan in McBroome v. Scottish Mortgage, etc., Co., (1894) 153 U. S. 318 [14 S. Ct. 852, 38 U. S. (L. ed.) 729], which involved the construction of the usury statute of the Territory of New Mexico. That act differed in several respects from Rev. Stat. § 5198. But that case did not rule that in a suit under the act of Congress the statute did not run from the date the usury was paid and received as such. This court did not understand that such was the meaning of that case, as appears from his opinion in Brown v. Marion Nat. Bank, (1898) 169 U. S. 416, 18 S. Ct. 390, 42 U. S. (L. ed.) 891, which involved a construction of Rev. Stat. § 5198. For he there points out the difference between paying and ‘agreeing to pay,’ and says that, ‘if at any time the obligee actually pays usurious interest, as such, the usurious transaction must be held to have been and not before canceled, and he must sue within two years thereafter.’


In Talbot v. Sioux City First Nat. Bank, (1898) 106 la. 361, 76 N. W. 724, it was intimated though not decided that the usurious transaction occurred at a time when a bond which included usury in prior indebtedness was given in settlement, the bond itself carrying only the legal rate.

The bank incurs the penalty when it exacts the usury. The right of action for the penalty accrues when the usury is paid. Suit under this statute is not postponed until the debt is paid, and a bill is not demurrable for failure to aver payment of the principal obligation. Meredith v. American Nat. Bank, (1913) 127 Tenn. 90, 153 S. W. 479.

In an action against a national bank brought under the provisions of this section, the government was precluded from charging usurious interest, where all the evidence shows that the interest was paid within two years from the time the action was commenced, it is not error to fail to instruct that the ‘usurious transaction’ had reference to...
the time of actual payment of the interest from which the penalty arises, and not the time of making the payment contract. Western Union Tel. Co. v. Foy, (1912) 32 Okla. 301, 24 Pac. 305, 49 L. R. A. (N. S.) 743.

Each payment is regarded as a transaction within the intent of the statute, so that on successive payments of interest on renewals of the same loan the limitation runs from the time when each payment is made. Kinser v. Farmers' Nat. Bank, (1889) 58 Ia. 728, 13 N. W. 59; Bobo v. People's Nat. Bank, (1893) 92 Tenn. 444, 21 S. W. 888; Baker v. Lynchburg Nat. Bank, (Va. 1917) 91 S. E. 157; Lynch v. Merchants Nat. Bank, (1883) 29 W. Va. 554, 46 Am. Rep. 520. Cowser, Duncan v. Mt. Pleasant First Nat. Bank, (1877) 26 Pittsb. Leg. J. (Pa.) 129, 8 Fed. Cas. No. 4,135, wherein it was held that the limitation did not begin to run until the actual payment of the loan, for until then the bank might elect to apply the payments on the principal; but the authority of this case may well be doubted for failure to distinguish between an actual payment and a mere reservation of usury.

An application by a national bank of a payment on a usurious note to payment of the usurious interest, with the knowledge and consent of the maker, so that the two-year limitation for recovery prescribed by this section, of the penalty, begins to run, is shown, where on the back of the note is indorsed interest paid at a usurious rate, and such note is taken up and a new note given, in renewal, for the amount remaining unpaid after allowing such usurious rate. McCarthy v. Rapid City First Nat. Bank, (1909) 23 S. D. 289, 121 N. W. 583, 21 Ann. Cas. 437, 23 L. R. A. (N. S.) 335.

13. Plaintiff's Pleading

A complaint under this section making the taking or reserving of usurious interest, when knowingly done, a forfeiture of all interest, and if such interest has been paid, authorizing a recovery of double the amount thereof, must allege that the interest was knowingly taken. Garrawle v. Charleston Bank, (1908) 79 S. C. 404, 60 S. E. 102.

A petition against a national bank, filed for the recovery of alleged usurious interest should contain an allegation that the taking and receiving of the same was knowingly done, or an allegation to an equivalent effect, and where such an averment is lacking it is error to overrule a general demurrer thereto. Temple Nat. Bank v. Johnson, (Okla. 1916) 161 Pac. 535.

In an action to recover twice the amount of interest paid on a usurious note, where a copy of the note is attached to the petition, and the date thereof, amount of interest charged, and consideration both on its face and in fact, are shown, and it is further alleged that the interest charged was in excess of the legal rate, and that the defendant well knew that said interest charged was in excess of the legal rate, and that defendant well knew that said interest so charged by defendant and paid by plaintiff was corrupt and unlawful, notwithstanding which defendant knowingly and unlawfully received the same of the plaintiff, a cause of action is sufficiently stated, as against a demurrer thereto. Wellston First Nat. Bank v. Sensebough, (Okla. 1916) 160 Pac. 465.

14. Proof

Burden.—One seeking to recover the penalty given by this section for usury on a note to a national bank, has the burden of showing that the interest paid exceeded the legal rate, and that the bank received it knowingly. Merchants', etc., Nat. Bank v. Horton, (1911) 27 Okla. 589, 117 Pac. 201.


Ownership in third party.—In an action to recover the penalty of double the interest paid, the bare indorsement of a note in the usual course of business by a national bank raises no presumption in its own favor as against the maker thereof from whom it has collected usurious interest, but ownership in a third party at the time when it was demanded and received payment must, like other defenses, be proved by the bank. North Bend First Nat. Bank v. Miltonberger, (1892) 33 Neb. 847, 51 N. W. 232.

Scinters.—To entitle the plaintiff to recover for usurious interest paid, it must be shown by a preponderance of the evidence "that the taking, receiving, reserving, or charging" of interest greater than allowed by the preceding section, was knowingly done. Soper First Nat. Bank v. Beecher, (Okla. 1916) 161 Pac. 327.

Where the facts are undisputed and show a simple loan of money, upon which a sum is collected as interest in amount greatly in excess of that allowed by law, there being no other contracts or transactions involved, and the whole matter being carried on by one of the officers of the defendant bank, the trial court is justified in assuming that the collecting of such usurious interest was knowingly done, and in peremptorily charging the jury to return a verdict for the plaintiff. Commercial Nat. Bank v. Phillips, (Okla. 1916) 160 Pac. 920.

Accord and satisfaction.—In an action brought to recover the penalty provided
for the payment of usurious interest, facts constituting an accord and satisfaction cannot be proven under the general allegation of payment. Tishomingo First Nat. Bank v. Latham, (1913) 37 Okla. 286, 132 Pac. 891.

15. Set-off

16. Instruction
In Wellston First Nat. Bank v. Senebaugh, (Okla. 1916) 160 Pac. 435, it was held that the trial court did not err in refusing to give an instruction that the action was controlled by the federal statute, and not by the laws of the state of Oklahoma, relating to usury, where the requirements of the federal statute, applicable to the issues, were fully and correctly given in the instructions.

17. Amount of Recovery


An instruction of the court directing a verdict to be rendered for the plaintiff in an amount in excess of the amount shown by the evidence, that the plaintiff is entitled to recover, is prejudicial error. Super First Nat. Bank v. Beecher, (Okla. 1916) 161 Pac. 327.

18. Appeals
In Missouri an appeal by the defendant in an action brought against him in a state court under this section must be direct to the state Supreme Court and not to the court of appeals of the state by virtue of a provision of the state constitution. Mitchell v. Joplin Nat. Bank, (1914) 184 Mo. App. 483, 170 S. W. 674.

Sec. 5199. [Dividends.] The directors of any association may, semi-annually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half-year to its surplus fund until the same shall amount to twenty per centum of its capital stock. [R. S.]


Refusal of directors to declare dividends.
The shareholders have a right to dividends where the surplus of the corporation properly applicable thereto is without doubt ample for the purpose, and where the directors or a majority of them, acting in bad faith and without reasonable excuse, refuse to declare a dividend, a state court may, upon interplea in favor of the minority stockholders to compel the directors to declare a dividend. Hiscock v. Lacy, (1894) 9 Misc. 578, 30 N. Y. S. 860.

Refund of dividend on subsequent insolvency. Where, on the voluntary liquidation of the bank, a dividend out of its capital stock is paid and received in good faith, the solvency of the bank not being affected thereby, the shareholders are not liable to refund such dividend at the suit of a receiver appointed on the subsequent insolvency of the bank. Lawrence v. Greenup, (C. C. A. 6th Cir. 1899) 97 Fed. 906, 38 C. C. A. 546. For the capital stock of the bank does not constitute a trust fund for the payment of debts. McDonald v. Williams, (1899) 174 U. S. 397, 19 S. Ct. 743, 43 U. S. (L. ed.) 1022; Lawrence v. Greenup, (C. C. A. 6th Cir. 1899) 97 Fed. 906, 38 C. C. A. 546.

Disposition of assets not necessary to retain as capital or surplus.—Under R. S. secs. 5109, 5204, authorizing directors of a national bank to declare semi-annual dividends out of net profits after carrying one-tenth part of the net profits of the preceding half year to the surplus fund until the same shall amount to twenty per centum of the capital stock, and prohibiting the withdrawal, in the form of dividends or otherwise, of any portion of the capital, assets which it is not necessary to retain as capital or for the surplus fund may be returned to the shareholders by the directors, and dividends so ordered may be made payable in the future, and on the contingency of future collections on such assets. Cogswell v. Second Nat. Bank, (1905) 78 Conn. 75, 60 Atl. 1059.

Sec. 5200. [Limit to liabilities which may be incurred by any one person, etc.] The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association, actually paid in and unimpaired and one-tenth part of its unimpaired surplus fund: Provided, however, That the total of such liabilities shall in no event exceed thirty per centum of the capital stock of the association. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same shall not be considered as money borrowed. [R. S.]

As originally enacted this section was as follows:

"Sec. 5200. The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed." Act of June 3, 1864, ch. 106, 13 Stat. L. 108.

It was amended to read as given in the text by an Act of June 22, 1906, ch. 3516, 34 Stat. L. 451, entitled:

"An Act to amend section fifty-two hundred, Revised Statutes of the United States, relating to national banks." By the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 9, infra, p. 825, this section was made applicable to state banks becoming members of Federal reserve banks.

"This provision is very clearly a restriction upon the power of the officers of such an association in conducting its business against backing loans of its funds, either to themselves or others, beyond the limit therein specified." Huff v. Union Nat. Bank, (N. D. Cal. 1909) 173 Fed. 333.

The object of this provision of the statute was to guard national banks from the hazard of speculative loans, but it contemplated and permitted to an unlimited amount the discount of paper used and required in facilitating the transfer of property and money in the transaction of the legitimate business of the country. Oswego Second Nat. Bank v. Burt, (1883) 93 N. Y. 233.

Branch banks.—There is no restriction of law prohibiting the comptroller of the currency from permitting a national bank having a lawfully established branch to make loans at either place, based on the total amount of the capitalization and
surplus of the corporation. The only restriction in law in this respect is that the aggregate loans made by the mother bank and all its branches shall not at any one time exceed the limitations expressed in this section. (1909) 27 Op. Atty-Gen. 401.

The acceptance of a check where the drawer has no funds on deposit is a loan of the credit of the bank rather than a loan of money, and, if otherwise unobjectionable, is not within the restriction provided by this section. (1882) 17 Op. Atty-Gen. 471.

Drafts against existing values.—Drafts may be bona fide bills of exchange drawn against actual existing values within the meaning of the statute, though not accompanied by specific bills of lading in each case. It is sufficient if they are drawn against property previously consigned and existing either in its original form or in the shape of proceeds of sales in the hands of the consignees. Oswego Second Nat. Bank v. Burt, (1883) 93 N. Y. 233, affirmed (1882) 26 Hun (N. Y.) 672.

Assets of reorganized state bank.—The statute does not apply to a national bank organized from a state bank which at the time of its organization took from the state bank, among the discounted notes, one for a larger amount than the national bank was authorized to loan to a single borrower, nor to a note subsequently given in renewal thereof. Allen v. Xenia First Nat. Bank, (1872) 23 Ohio St. 97.


A violation of this section, prohibiting a national bank from loaning more than ten per cent. of its capital to any person or corporation, can be taken advantage of only by the government. Maryland Trust Co. v. National Mechanics' Bank, (1906) 102 Md. 608, 63 Atl. 70.

Where, in evidence of a loan actually made to a bank, the loaning bank accepted from the borrowing bank a note signed by the latter's cashier personally and indorsed by the borrowing bank, to avoid disclosing on the face of the transaction an excessive loan, it was held that the borrowing bank was not thereby relieved from its obligation as a debtor. Portage First Nat Bank v. Northwood State Bank, (1906) 15 N. D. 354, 109 N. W. 61.

Penalty.—"The law has imposed no penalty upon a national bank for its failure to obey the restriction, unless it be that its charter thereby becomes subject to forfeiture under section 3539." The Seattle, (C. C. A. 9th Cir. 1909) 170 Fed. 284, 95 C. C. A. 480.

It is not a criminal offense to permit an individual or company to borrow at one time more than one-tenth of the capital stock actually paid in. U. S. v. Harper, (S. D. Ohio 1887) 33 Fed. 471.


Where paper representing a loan in excess of the limit allowed by law is retailed by the payment of dividends declared, when bad paper of the bank reckoned to make up its surplus and as a foundation for its dividend would more than wipe out its capital stock, the directors consenting to such loan and dividend are personally liable for the amount thereof." Witters v. Sowles, (C. C. Vt. 1890) 43 Fed. 405, (C. C. Vt. 1887) 31 Fed. 1.

Sec. 5201. [Associations not to loan or purchase their own stock.] No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired
shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or, in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four. [R. S.]


By the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 9, infra, p. 825, this section was made to apply to any state bank, becoming a member of a Federal reserve bank.

Loan on security of own stock—In general.—Banking associations "were created to subserve public purposes, and not the mere private interest of their stockholders. And in no better way could this object be attained than by placing shareholders, in their pecuniary dealings with the bank, on the same footing with other customers. Besides, how could the capital of the bank be kept available for active use, if the shareholder, who had pledged his stock for borrowed money, should be unable to meet his obligation? To the extent of the debt the capital would be withdrawn, and it is hardly possible that this could be the case for any length of time, were the debt secured outside of the reason of this prohibition, as the provision concerning it is explicit, and free from ambiguity." South Bend First Nat. Bank v. Lanier, (1871) 11 Wall. 369, 20 U. S. (L. ed.) 172.

Security necessary to prevent loss.—This section does not prohibit a national bank from accepting a pledge of its own capital stock, when to do so is necessary to secure the payment of an unsecured pre-existing debt, and so prevent loss to the bank. Lake Charles First Nat. Bank v. Lenz, (C. C. A. 1913) 292 Fed. 117, 120 C. C. A. 271.


Where, in a suit by a national bank upon a promissory note against the maker and indorser, the latter pleaded that the bank had allowed the maker to sell and transfer certain stock in the bank, upon which the bank had a lien "under the laws governing national banks," without first requiring the payment of the note, and that the consequent increase in the risk of the surety had operated to release him, it was not error to strike such plea for the reason that the bank, organized under the National-Bank Act, had and could have no such lien upon the stock of its shareholder. Smith v. Marietta First Nat. Bank, (1895) 116 Ga. 696, 41 S. E. 983.

Deposits made by one bank with another.—The placing by one bank of its funds on permanent deposit with another bank is a loan within the spirit of this section. South Bend First Nat. Bank v. Lanier, (1871) 11 Wall. 369, 20 U. S. (L. ed.) 172, wherein the court said: "Although the section in question forbids loans or discounts by a bank on the security of its own shares of stock, it is argued that this duty does not extend to the case of deposits made by one bank with another. But a deposit is nothing but a loan of money, and is within both the letter and spirit of the provision. It is well known that country banks keep on deposit in New York, with bankers and merchants, a considerable amount of money for their own convenience, for which they receive more or less of interest. But whether interest be obtained or not, these deposits are, equally with paper discounted over the counter of the bank, loans of money, and the reason of the rule is equally applicable to them. The banker is accountable for the deposits he receives as debtor, and the individual borrower of money from the bank sustains no other relation to it. In both cases money is borrowed, to be returned in a greater or less period of time, according to the contract of the parties." South Bend First Nat. Bank v. Lanier, (1871) 11 Wall. 369, 20 U. S. (L. ed.) 172, disapproved Guilford v.

Bank of First Nat. Bank v. Hawkins, (1899) 174 U. S. 364, 19 S. Ct. 739, 43 U. S. (L. ed.) 1007, it was held that one national bank could not lawfully acquire and hold the stock of another as an investment and was not estopped to deny its liability, as an apparent stockholder, for an assessment on such stock ordered by the comptroller of the currency. The court said: "This provision, forbidding a national bank to own and hold shares of its own capital stock, would, in effect, be defeated if one national bank were permitted to own and hold a controlling interest in the capital stock of another."

Agreement by bank to purchase own stock.—An agreement by a bank to purchase its own stock being in violation of this section cannot be enforced. Bowden v. Santos, (1877) 1 Hughes 156, 3 Fed. Cas. No. 1,716; Atwater v. Stromberg, (1899) 75 Minn. 277, 77 N. W. 963.


It has been held that in case of a purchase of stock by a bank in violation of the section the bank may maintain an action at law to recover the money paid without tendering back the stock. Burrows v. Niblack, (C. C. A. 7th Cir. 1898) 84 Fed. 111, 85 S. App. 712, 28 C. C. A. 130; through in Chapin v. Merchants Nat. Bank, (1888) 14 N. Y. St. Rep. 272, it was held that in a case of a purchase of its own stock by a bank, in violation of the statute, no relief would be granted by the court, the parties being in pari delicto.

Purchase by bank to protect debt.—Where a national bank has purchased its own stock to protect itself from loss upon a debt previously contracted, it is bound may sell on credit and take the purchaser's note with the stock as collateral to secure it, provided this is done in good faith. Union Nat. Bank v. Hunt, (1882) 76 Mo. 430, affirmafing (1870) 7 Mo. App. 42.

Purchase of stock by officers of bank.—It has been held that, where officers of a bank used bank funds to buy stock of the bank in their own names, the bank could not be charged as owner. Meyers v. Valley Nat. Bank, (1879) 18 Nat. Banker. Reg. 34, 17 Fed. Cas. No. 9,519; Prosser v. Buffalo First Nat. Bank, (1887) 106 N. Y. 677; Bundy v. Jackson, (E. D. Ark. 1885) 24 Fed. 628. But in such case, where the owner acted in good faith and dealt without knowledge of the facts, he was released as a stockholder. Johnston v. Laffin, (1878) 5 Dill. 69, 13 Fed. Cas. No. 7,393, affirmed (1881) 103 U. S. 800, 20 U. S. (L. ed.) 592.

Agreement by bank to purchase in good faith from a bank of stock purchased by it is a violation of this section gets a good title as against both the bank and its creditors. Lantry v. Wallace, (1901) 182 U. S. 538, 21 S. Ct. 878, 45 U. S. (L. ed.) 1218, affirming (C. C. A. 8th Cir. 1899) 97 Fed. 865, 35 C. C. A. 510; Wallace v. Hoed (C. C. A. Kan 1898) 89 Fed. 11, affirmed (C. C. A. 8th Cir. 1899) 97 Fed. 963, 35 C. C. A. 692.

Agreement by president to donate stock.—An agreement by the president of a national bank to give to the plaintiff ten shares of its stock if he would act as director, and if his firm would give to the bank all of its business and use its influence in behalf of the bank, is enforceable where the bank has received the benefits arising therefrom. Rich v. State Nat. Bank, (1878) 7 Neb. 201, 29 Am. Rep. 382.

Agreement to return shares.—A stockholder who gave his note to a national bank in payment of its shares of stock cannot set up in defense of an action thereon by a receiver of the bank that the officers of the bank agreed at the time of the transaction that when the note fell due he might, at his election, return the shares of stock therefor. Atwater v. Stromberg, (1899) 75 Minn. 277, 77 N. W. 963.

Transaction with bank as loan or purchase.—In an action against the receiver of a national bank to recover for money alleged to have been loaned to the bank, the plaintiff may show that a certificate of stock in such bank, which he holds, was given to him by the bank as collateral security for the loan as against the claim of the receiver that the money alleged to be a loan was the purchase price of the stock which stands in the plaintiff's name on the books of the bank. Williams v. American Nat. Bank, (C. C. A. 8th Cir. 1896) 85 Fed. 376, 55 U. S. App. 316, 29 C. C. A. 203.

Effect of ultra vire in loan.—While the statute in terms prohibits a national bank from making a loan upon the security of shares of its own stock, yet, inasmuch as no penalty is imposed either upon the bank or the borrower for a violation of its provisions, such violation cannot be urged against the validity of the transaction by any one except the government, where the objection is not raised before the contract is executed or while the security is in the hands of the bank. Xenia First Nat. Bank v. Stewart, (1853) 107 U. S. 678, 2 S. Ct. 778, 27 U. S. (L. ed.) 592; Brown v. Ohio Nat. Bank, (1901) 18 App. Cas. (D. C.) 598; Walden Nat. Bank v. Birch, (1891) 130 N. Y. 221; 29 N. E. 127, 14 L. R. A. 211, affirming (1889) 55 Hun 806, 17 N. Y. S. 55. See also Chemical Nat. Bank v. City Bank, (1896) 160

In Xenia First Nat. Bank v. Stewart, (1883) 107 U. S. 676, 2 S. Ct. 778, 27 U. S. (L ed.) 592, the bank had taken as security for a debt due from the stockholder thirty shares of its own stock, and upon default in payment had sold such shares and applied the proceeds in payment of the debt. The action was brought to recover back the proceeds of sale, upon the ground that the bank had no right to take the security. The right to recover was denied on the ground that "the contract had been executed, the security sold, and the proceeds applied to the payment of the debt," and that "both bank and borrower are in such case equally the subjects of legal censure, and they will be left by the courts where they have placed themselves." By suing for the proceeds of the sale, it was observed, the plaintiff had affirmed the sale, and the moneys loaned were an offset to the proceeds.

In Barron v. McKinnon, (C. C. A. 1st Cir. 1912) 196 Fed. 933, 110 C. C. A. 483, the court said: "Several cases have arisen under this section where national banks have loaned money on their own shares of stock or purchased such shares, in violation of this section of the statute. In these cases the court has held, as in the cases relating to real estate, that the bank's title to stock, obtained under these ultra violes transactions, is not void, but only voidable, and hence that the bank can convey a good title to a purchaser."

The United States alone can complain of a violation of this section by a national bank, at least after the contract of pledge has been executed by foreclosure. Lake Charles First Nat. Bank v. Lanz, (C. C. A. 5th Cir. 1913) 202 Fed. 117, 120 C. C. A. 271.

Conversion of stock.—The bank's inability to hold its own shares in violation of the statute will prevent an action against it for the conversion of its own capital stock, as a judgment in such action would vest the title to the converted property in the bank as the wrongdoer. Meyers v. Valley Nat. Bank, (1879) 18 Nat. Bankr. Reg. 34, 17 Fed. Cas. No. 9,510.

Sec. 5202. [Limit upon indebtedness to be incurred.] No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act. [R. S.]

As originally enacted this section was as follows: "Sec. 5202. No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserved profits."


It was amended to read as given in the text by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 13, 38 Stat. L. 264. The remainder of said section 13 is given, infra, p. 831.

The amendment consisted in the insertion of the words "National banking" before the word "Association" and the addition of the "Fifth" and last clause.


The purpose of this limitation of indebtedness is to protect depositors and others dealing with the bank. Weber v. Spokane Nat. Bank, (C. C. A. 9th Cir.
1894) 64 Fed. 208, 29 U. S. App. 97, 12 C. C. A. 93.

Extent of indebtedness.— This section has been construed to mean that to the extent of its unpaired capital the bank may become indebted upon any contract or transaction which lies within the scope of its power, no matter what may be the amount of its debt or liability upon demands within the classes named. Weber v. Spokane Nat. Bank, (C. C. A. 9th Cir. 1894) 64 Fed. 208, 29 U. S. App. 97, 12 C. C. A. 93, reversing (C. C. Wash. 1892) 50 Fed. 735.

Acceptance of check.— Liabilities incurred by a bank by the acceptance of a check, where the drawer has no funds on deposit, are within the limit imposed by this section. (1892) 17 Op. Atty.-Gen. 471.

Bond to secure deposit of public money. — The execution of a bond by a national bank to secure county deposits does not constitute an increase of the bank's liability, in violation of this section, declaring that no national banking association shall at any time be indebted or liable to an amount exceeding its capital stock actually paid in, except on account of moneys deposited with or collected by the association. Gratiot County v. Mun-

Sec. 5203. [Restriction upon use of circulating notes.] No association shall, either directly or indirectly, pledge or hypothecate any of its notes or circulation, for the purpose of procuring money to be paid in on its capital stock, or to be used in its banking operations, or otherwise; nor shall any association use its circulating notes, or any part thereof, in any manner or form, to create or increase its capital stock. [R. S.]


Sec. 5204. [Prohibition upon withdrawal of capital.] No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three. [R. S.]


R. S. sec. 5143 mentioned in the text is given supra, p. 702.

Bank in voluntary liquidation.— This section has no application to a case where the bank declaring a dividend was not engaged in its ordinary banking operations but was in voluntary liquidation. Lawrence v. Greenup, (C. C. A. 6th Cir. 1899) 97 Fed. 506, 38 C. C. A. 546.

Withdrawal must be with knowledge.— The provision prohibiting the withdrawal of capital applies to some positive or
affirmative act on the part of the shareholder by which he knowingly withdraws the capital or some portion thereof, or with knowledge permits some act which results in a withdrawal which might not have taken place without his action, and it does not apply where a shareholder has simply and in good faith received a dividend, declared by a board of directors of which he was not a member, which he honestly supposed was declared out of the profits, but which was in fact paid out of the capital. McDonald v. Williams, (1899) 174 U. S. 397, 19 S. Ct. 743, 43 U. S. (L. ed.) 1022.

Effect of unlawfully declaring dividend.—The declaring of a dividend by a banking association when there were no net profits to pay it is not a criminal misapplication of its funds. It is an act done by an officer of the association in his official and not in his individual capacity. It is, therefore, an act of its administration and not one involving fraud, which, while it may subject the association to a forfeiture of its charter, and the directors to a personal liability for damages suffered in consequence thereof by the association or its shareholders, does not render them liable to a criminal prosecution. U. S. r. Britton. (1883) 108 U. S. 199, 2 S. Ct. 531. 27 U. S. (L. ed.) 698.

Where there were in fact sufficient bad debts to wipe out the profits from which dividends would have been made, but which debts were supposed by the directors to be good, they will not be held personally liable for a violation of the statute in paying the dividends. Witters v. Bowles, (C. C. Vt. 1887) 31 Fed. 1.

Suit to recover unlawful dividends.—A suit in equity will lie by the receiver against the stockholders to recover a dividend unlawfully paid by the bank when insolvent. Finn v. Brown, (1891) 142 U. S. 36, 12 S. Ct. 136, 35 U. S. (L. ed.) 936; Hayden v. Thompson, (C. C. A. 8th Cir. 1895) 71 Fed. 60, 36 U. S. App. 361, 17 C. C. A. 592; Hayden v. Williams, (C. C. A. 2d Cir. 1899) 96 Fed. 278, 37 C. C. A. 470. But not where the stockholder receiving such dividend acted in good faith, believing that it was paid out of profits, where the bank at the time when such dividend was declared and paid was not insolvent. McDonald v. Williams, (1899) 174 U. S. 397, 19 S. Ct. 743, 43 U. S. (L. ed.) 1022.

No special order of the comptroller is necessary to authorize a suit by the receiver to recover dividends illegally paid to stockholders. Hayden v. Thompson, (C. C. A. 8th Cir. 1895) 71 Fed. 60, 36 U. S. App. 361, 17 C. C. A. 592.

The act of the receiver to recover such dividend accrues at the time of such payment and not when the receiver is appointed, and the necessity of other assets to pay indebtedness becomes apparent. Hayden r. Thompson, (C. C. A. 8th Cir. 1896) 71 Fed. 60, 36 U. S. App. 361, 17 C. C. A. 592.

Liability of officer as affected by drawing check for dividend in favor of third person.—An officer of a bank that has unlawfully declared a dividend, which is placed to his credit on the bank books, does not relieve himself from liability to account therefore to the receiver of the bank by drawing his check for the amount in favor of the third person. Finn v. Brown, (1891) 142 U. S. 56, 12 S. Ct. 136, 35 U. S. (L. ed.) 936.

Sec. 5205. [Enforcing payment of deficiency in capital stock.] Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders pro rata for the amount of capital stock held by each; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four. And provided, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months’ notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days’ notice shall be given by posting such notice of sale in the office of the bank, and by publishing
such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto,) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders. [R. S.]

Act of March 3, 1873, ch. 269, 17 Stat. L. 603. This section was amended by the Act of June 30, 1876, ch. 156, § 4, 19 Stat. L. 64, by adding the proviso at the close.

Assessment discretionary.—"Section 5205 is intended to and does confer upon the association the privilege of declining to make the assessment, to make good the deficiency to the capital, and to elect instead to wind up the business of the bank under section 5220, which provides for voluntary liquidation by a vote of two-thirds of the shareholders," and this decision is for the shareholders and not the directors. Commercial Nat. Bank v. Weinhard, (1864) 19 U. S. 243, 24 S. Ct. 233, 48 U. S. (L. ed.) 425, affirming (1902) 41 Ore. 339, 68 Pac. 806.

Assessment, by whom made.—The assessment under this section must be made by the shareholders themselves. An assessment by the directors is void. Hulitt v. Bell, (S. D. Ohio 1898) 85 Fed. 98. Shareholders who have paid an assessment by the directors are entitled to be repaid the amount out of the surplus in the hands of the receiver before distribution to other shareholders. In re Hulitt, (S. D. Ohio 1899) 98 Fed. 785.

A second assessment of 49 per cent, after an original assessment of 100 per cent. is not enforceable, there being nothing to indicate that the first assessment has been annulled. Pepper v. Springfield Sav. Inst., (C. C. A. 1st Cir. 1913) 218 Fed. 814, 134 C. C. A. 502.


Decision of comptroller conclusive.—The decision of the comptroller of the currency that the capital stock of a national bank is impaired is conclusive on the stockholders of the bank and on the courts: the bank having no alternative but to make good the impairment or liquidate. Thomas v. Gilbert. (1909) 55 Ore. 14, 101 Pac. 303, 104 Pac. 888, Ann. Cas. 1912A 516.

The only remedy to enforce the assessment is by a sale of the stock of the delinquent shareholder. An action will not lie against shareholders to recover such assessment. Hulitt v. Bell, (S. D. Ohio 1898) 85 Fed. 98.

Stock cannot be sold for less than the amount of the assessment, and a sale for a less amount is void. Merchants' Nat. Bank v. Fouche, (1888) 103 Ga. 831, 31 S. E. 87.

Sale of stock by owner but no transfer on books as releasing him from liability.—For all objects intended to be accomplished by the provision of the statute imposing liability upon shareholders for the debts of national banks, the responsibility of a shareholder ceases upon a sale of stock, the surrender of the certificate of stock to the bank and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knows, a transfer of the stock on the books of the association, to the purchaser. Whitney v. Butler, (1886) 118 U. S. 655. 7 S. Ct. 61, 30 U. S. (L. ed.) 260.

Subsequent liquidation.—Where, notwithstanding the assessment, the bank is subsequently forced into liquidation, the amount paid cannot be set off against the claim on an assessment subsequently levied under R. S. sec. 5234 (see infra, p. 850), by the comptroller to pay debts. Delano v. Butler, (1886) 118 U. S. 634, 7 S. Ct. 39, 30 U. S. (L. ed.) 260, affirming (C. C. Mass. 1885) 23 Fed. 217.

Interest on assessment.—An assessment levied by the comptroller of the currency on a stockholder of a national bank draws interest from the date such assessment is made payable. Davis v. Watkins, (1898) 56 Neb. 288, 76 N. W. 575.

Sec. 5206. [Restriction upon use of notes of other banks.] No association shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of deposits, or in any other mode pay or put in circulation, the notes of any bank or banking association which are not, at any such time, receivable, at par, on deposit, and in payment of debts by the association so paying out or circulating such notes; nor shall any association knowingly pay out or put in circulation any notes issued by any bank or banking association which at the time of such paying out or
putting in circulation is not redeeming its circulating notes in lawful money of the United States. [R. S.]


Sec. 5207. [United States notes not to be held as collateral, etc.; penalty.] No association shall hereafter offer or receive United States notes or national-bank notes as security or as collateral security for any loan of money, or for a consideration agree to withhold the same from use, or offer or receive the custody or promise of custody of such notes as security, or as collateral security, or consideration for any loan of money. Any association offending against the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined not more than one thousand dollars and a further sum equal to one-third of the money so loaned. The officer or officers of any association who shall make any such loan shall be liable for a further sum equal to one-quarter of the money loaned; and any fine or penalty incurred by a violation of this section shall be recoverable for the benefit of the party bringing such suit. [R. S.]

By the Act of July 12, 1882, ch. 290, § 12, infra, p. 814, the provisions of this section were made applicable to the certificates therein authorized and directed to the issued.

Sec. 5208. [Penalty for falsely certifying checks.] It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four. [R. S.]

The punishment for falsely certifying checks was prescribed by the Act of July 12, 1882, ch. 290, § 13, infra, p. 814.
By the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 9, infra, p. 825, this section was made to apply to any state bank, becoming a member of a Federal reserve bank.

Section as creating criminal offense.—This section declares that it shall be unlawful for any officer, agent, or clerk of any national bank to certify any check when the drawer has not on deposit with the bank an amount of money equal to the amount specified in the check; and Act Cong. July 12, 1882, ch. 290, § 13, 22 Stat. L. 166 (see infra, p. 814), declares that any officer, clerk, or agent of a national bank who shall certify checks before the amount thereof shall have been regularly entered to the credit of the drawer on the books of the bank shall be guilty of a misdemeanor. It has been held that the text section does not create any criminal offense, but that it should be read with section 13, and that the two create one offense, viz., the certification of a check when the drawer has not sufficient money to cover it, or before the amount shall have been regularly entered. U. S. v. Heine, (S. D. N. Y. 1908) 161 Fed. 425.
The word “certify,” as applied to bank checks, indicates that certain words have been written or printed on a check, and that the check has passed from the custody of the bank into the hands of some other party, and that thereby the person certifying created an obligation of the bank. U. S. v. Heine, (S. D. N. Y. 1908) 161 Fed. 425.
Whether the check be marked by the bank “accepted” or simply “good” can make no difference; either constitute a certification within the meaning of this section. National Banking Ass'n, (1862) 17 Op. Atty.-Gen. 471.
Conditional acceptance of check.—This
section does not invalidate a conditional acceptance of a check by a national bank having no funds of the drawer in its hands at the time, that it will pay the same whenever a draft, left with it for collection by the drawer, and sufficient in amount for the purpose, shall have been paid. Merchants' Nat. Bank v. Wheeling First Nat. Bank, (1874) 7 W. Va. 544.

An oral acceptance of a check, or an oral promise to pay a check, there being at the time sufficient funds of the drawer in possession to meet it, is not invalidated by this section. Merchants' Nat. Bank v. Wheeling First Nat. Bank, (1874) 7 W. Va. 544.


Where the bank officer, in certifying a check in good faith, relied upon information received from the cashier and exchange clerk that there was a sufficient deposit to meet it, he is not criminally liable. Spurr v. U. S., (1899) 174 U. S. 728, 19 S. Ct. 812, 43 U. S. (L. ed.) 1150, reversing (C. C. A. 6th Cir. 1898) 87 Fed. 701, 59 U. S. App. 663, 31 C. C. A. 202. Nor is he criminally liable where he in fact supposed an arrangement as to overdrafts to be equivalent to a loan and certified the check on a special deposit of funds to meet it. Potter v. U. S., (1894) 155 U. S. 458, 15 S. Ct. 144, 39 U. S. (L. ed.) 214, affirming (C. C. Mass. 1892) 56 Fed. 83.

Where there is a positive agreement by the officers of a bank that the overdraft account of a customer should be practi-
cally treated as a loan from day to day, which was to be, and in fact was, secured by ample collateral, an officer of the bank is not guilty of wrongfully certifying checks for which each day there was deposited in advance an ample amount of cash, if he in fact supposed the arrangement as to overdrafts to be the equivalent of a loan secured by the note. Potter v. U. S., (1894) 155 U. S. 438, 15 S. Ct. 144, 39 U. S. (L. ed.) 214, affirming (C. C. Mass. 1892) 56 Fed. 83.

But if an officer certifies a check with the intent that the drawer shall obtain so much money out of the bank when he knows that the drawer has not the amount on deposit, such officer not only certifies unlawfully, but the specific intent to violate the statute may be imputed. And so evil design may be presumed if the officer purposely keeps himself ignorant whether the drawer has money in the bank or is grossly indifferent to his duty in respect to the ascertainment of that fact. Spurr v. U. S., (1899) 174 U. S. 728, 19 S. Ct. 812 43 U. S. (L. ed.) 1150, reversing (C. C. A. 6th Cir. 1898) 87 Fed. 701, 59 U. S. App. 663, 31 C. C. A. 202.

Personal delivery.—Where a check is illegally certified with intent that it shall be used to create a contract on the part of the bank, actual delivery by the person making the certification is not essential to complete the offense. It is sufficient if the actual delivery has been made by some clerk or other officer of the bank, even without the knowledge of the officer certifying it. Potter v. U. S. (1894) 155 U. S. 438, 15 S. Ct. 144, 39 U. S. (L. ed.) 214, affirming (C. C. Mass. 1892) 56 Fed. 83.


Sec. 5209. [Embezzlement; penalty.] Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case; to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer
clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten. [E. S.]


By the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 9, infra, p. 825, this section was made applicable to any state bank which should become a member of a Federal reserve bank.

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I. General Considerations

1. Rule of Construction

The statute is highly penal and should be strictly construed imposing as it does for the slightest offense a minimum penalty of five years imprisonment. U. S. v. Eeg, (E. D. Pa. 1952) 49 Fed. 852; U. S. v Potter, (C. C. Mass. 1892) 50 Fed. 97.
2. Number and Nature of Offenses Created

This statute "creates and defines several distinct offenses, probably not less than nine;" and though the section terms them misdemeanors, it has been held that they are all felonies, involving as they do imprisonment in the penitentiary for a term of years. U. S. v. Cadwallader, (W. D. Wis. 1893) 59 Fed. 677; Sheridan v. U. S. (C. C. A. 9th Cir. 1916) 236 Fed. 305, 149 C. C. A. 437.

Gross maladministration and inexcusable breach of duty on the part of the officers of a national bank in its management, however disastrous to its stockholders, are not punishable unless in violation of this section. Prettyman v. U. S., (C. C. A. 6th Cir. 1910) 186 Fed. 30, 103 C. C. A. 384.

3. Effect on State Laws

Rule stated.—In so far as the statutes of the United States cover offenses by national bank officers they exclude state legislation on the same subject. State r. Tuller, (1867) 34 Conn. 250; Com. r. Felton, (1869) 101 Mass. 204.

But where an act made punishable by a state statute is not made an offense by the laws of the United States, national bank officers are amendable to the state law. State r. Tuller, (1867) 34 Conn. 250; State r. Fields, (1896) 98 Ia. 745, 62 N. W. 655; Com. r. Tenney, (1897) 97 Mass. 59; Com. r. Barry, (1874) 116 Mass. 1; State r. Bardwell, (1895) 72 Miss. 555, 18 So. 377; State r. Cross, (1888) 101 N. C. 770, 7 S. E. 715, 9 A. S. R. 53, affirmed (1889) 132 U. S. 131, 10 S. Ct. 47, 33 U. S. (L. ed.) 287.

Embezzlement.—A national bank officer may be punished under a state statute for embezzling a special deposit. State r. Tuller, (1867) 34 Conn. 250; Com. r. Tenney, (1867) 97 Mass. 59. Or committing larceny of the bank's property. Com. r. Barry, (1874) 116 Mass. 1.

Forgery.—A national bank officer may be punished under a state statute for forging bank paper. Hoke v. People, (1897) 122 Ill. 511, 12 N. E. 823.

The fact that certain negotiable paper was forged by bank officers for the purpose of sustaining false entries made in the books of the bank with intent to deceive the bank examiner does not prevent the forgery being a crime under the state laws, and as such cognizable by the state courts. State r. Cross, (1888) 101 N. C. 770, 7 S. E. 715, 9 A. S. R. 53, affirmed (1889) 132 U. S. 131, 10 S. Ct. 47, 33 U. S. (L. ed.) 287.

In Pennsylvania the offense of fraudulently making false entries in the books, reports, and statement of a national bank, with intent thereby to injure and defraud the bank, has been held to be a forgery, and as such an offense at common law and within the jurisdiction of the state courts, though not charged in the technical manner required by the rules of common law. Com. r. Luberg, (1880) 94 Pa. St. 85.

Receiving deposits with knowledge of insolvency of bank.—It has been held that a state statute making it a criminal offense for an officer of an insolvent bank to receive deposits with knowledge that the bank is insolvent is not applicable to officers of national banks. Easton r. Iowa, (1903) 188 U. S. 220, 23 S. Ct. 288, 47 U. S. (L. ed.) 452, overruling State r. Easton, (1901) 113 Ia. 516, 85 N. W. 795, 86 A. S. R. 389; but see State r. Bardwell, (1895) 72 Miss. 555, 18 So. 377.

But in Kansas a similar statute has been held not applicable to national banks, such provision being a part of the general banking law of the state regulating state banks. State r. Menke, (1895) 56 Kan. 77, 42 Pac. 350.

4. Bank Employees Affected by Section


The fact that the officers of an association which has gone into liquidation occupy the relation of trustees for the creditors does not affect their position as officers and agents of the corporation, and they may still be prosecuted for wilful misapplication of the funds of the bank when subsequently acting as officers or agents. Jewett v. U. S., (C. C. A. 1st Cir. 1900) 100 Fed. 832, 41 C. C. A. 88, 53 L. R. A. 568, affirming (C. C. Mass. 1897) 84 Fed. 142.

5. "Moneys, Funds or Credits"

In this section the word "moneys" refers to the currency or circulating medium of the country, the word "funds" refers to government, state, county, municipal, or other bonds, and to other forms of obligations and securities in which investments may be made; and the word "credits" refers to notes and bills payable to the bank, and to other forms of direct promises to pay money to it. U. S. r. Smith, (W. D. Ky. 1907) 152 Fed. 549.

The word "moneys" includes all money, whether gold, silver, legal tender notes, or national currency notes. It is not confined to money which is usually denominated "lawful money." U. S. r. Johnson, (1879) 4 Cinc. L. Bul. 361, 26 Fed. Cas. No. 15,483.

6. Intent as Ingredient of Offenses Specified

In general.—The intent to injure, defraud or deceive is an essential ingredient of every offense specified in the
with acts so far out of the line of their duties or beyond the exercise of the power conferred upon them as to be mere spoliations. The statute necessarily implies that the acts charged upon the accused were done by him in his official capacity and by virtue of the power, control, and management which he was able to exert by virtue of his official relation. U. S. r. Northway, (1887) 120 U. S. 827, 7 S. Ct. 600, 30 U. S. (L. ed.) 664; U. S. r. Potter, (C. C. Mass. 1892) 56 Fed. 97; U. S. r. Eqe, (E. D. Pa. 1892) 49 Fed. 852.

In U. S. r. Warner, (S. D. N. Y. 1888) 26 Fed. 616, Benedict J., said that "the statute is not confined to acts done by an officer of a bank in the exercise of power acquired by means of his office. Its intention was to punish certain acts, which it describes, when such acts are done by one holding the relation to the bank of president, director, cashier, teller, clerk, or agent." But his statement was disapproved by Putnam, J., in U. S. v. Potter, (C. C. Mass. 1892) 56 Fed. 97, and in view of the decisions cited herein it would appear to have been overruled.

8. Consent of Directors to Illegal Acts

The consent of directors after the commission of the criminal act by a bank officer is no defense. U. S. r. Youtsey, (C. C. Ky. 1898) 91 Fed. 864.

9. Statute of Limitations

The federal statute of limitations and not the local statute will control in the prosecution of an officer of a national bank for making false entries in the books of the bank. U. S. r. Folsom, (1894) 7 N. M. 532, 38 Pac. 70.

10. Jurisdiction of Federal Court as Exclusive

As national banks derive their existence and organization solely from the Acts of Congress, which make provision for the punishment of certain crimes committed by national bank officers and agents, it would seem that the federal courts have exclusive jurisdiction of such offenses notwithstanding the existence of state statutes punishing these offenses, for by the terms of the Judiciary Act the courts of the United States are vested with exclusive cognizance of all crimes that are made punishable by Act of Congress, except where the Act of Congress makes other provision. In re Eno, (S. D. N. Y. 1893) 54 Fed. 669; State v. Talley, (1867) 34 Conn. 280; Com. v. Felton, (1869) 101 Mass. 204; People v. Fonda, (1886) 62 Mich. 401, 29 N. W. 26; Com. v. Ketner, (1890) 92 Pa. St. 372, 37 Am. Rep. 692.

The federal courts have exclusive cognizance of the offense of embezzlement of the funds, etc., of a national bank, and the offense is punishable only under this

7. Acts Out of Line of Duty

Subordinate officers are not to be charged under the statute for unlawful acts far out of the line of their duties that they amount to forgeries or larcenies, nor are superior officers to be charged...

And the same is true of the offense of making false entries in the bank books. In re Eno, (S. D. N. Y. 1893) 54 Fed. 669.

11. Indictment

Bank doing business.—An indictment against a national bank cashier for an offense against the national banking law was not defective for failure to allege that the bank was doing business at the time the alleged offenses were committed. Geiger v. U. S., (C. C. A. 4th Cir. 1908) 162 Fed. 544, 89 C. C. A. 516.

Bank duly organized.—An indictment charging that the defendant, being then and there the cashier of a certain "national banking association," to wit, etc., was not fatally defective for failure to allege that the national banking association specified was a national banking association organized under the laws of the United States. Geiger v. U. S., (C. C. A. 4th Cir. 1908) 162 Fed. 544, 89 C. C. A. 516.

12. Evidence

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. Matter of Van Campen, (1898) 2 Ben. 419, 23 Fed. Cas. No. 16,335.

II. EMBEZZLEMENT

1. Definition and Scope

Embezzlement within the meaning of the statute is the unlawful conversion by an officer of the bank to his own use of funds intrusted to him, with intent to injure or defraud the bank. U. S. v. Youtsey, (C. C. Ky. 1898) 91 Fed. 884. See further cases under div. I. of these notes.

The crime of embezzlement by an officer, clerk, or agent of a national bank, under this section, necessarily includes the offenses of abstraction and willful misappropriation, but either of the latter offenses may be committed without embezzlement. U. S. v. Breeze, (W. D. N. C. 1904) 131 Fed. 915.

2. Elements of Offense

The crime of embezzlement from a national bank by an officer, clerk, or agent, with intent to injure or defraud the bank, involves two general elements: first, a breach of trust or duty with respect to the moneys, funds, or credits of the bank embezzled, which must have been lawfully in the custody or possession of the accused by virtue of his office or employment, although such possession need not have been exclusive of that of other officers, clerks, or agents; and, second, the wrongful appropriation of such moneys, funds, or credits to his own use, with intent to injure or defraud the association or others. U. S. v. Breeze, (W. D. N. C. 1904) 131 Fed. 915.

Where a president of a bank charged as a trustee with the administration of the funds of the bank, his hands converts them to his own use, he will be held to have embezzled and abstracted them within the meaning of the statute, unless he shows authority for so doing. Matter of Van Campen, (1898) 2 Ben. 419, 23 Fed. Cas. No. 16,335.

3. Who Liable

In Spencer v. U. S., (C. C. A. 8th Cir. 1909) 169 Fed. 502, 95 C. C. A. 60, it appeared that the accused's duty was to take drafts or other items received by a national bank by which he was employed from its patrons for collection, present them to the drawees or others liable thereon, receive the money due, and return it to the bank. He, however, reported a less amount collected than he actually received, and converted the difference. It was held that in making the collection he acted as the bank's agent, and that the money while in his possession and before it had been actually deposited in the bank, belonged to it, and that he was therefore properly convicted of embezzling the same.

4. Indictment

An indictment under this section is bad for insufficient description of the offense, where it charges the embezzlement, as well as the misapplication, of the "funds and credits" of a national bank by the defendant as president, without setting forth any particular description of either, and without any separate statement as to the amount either of "funds" or of "credits" so embezzled or misapplied. U. S. v. Smith, (W. D. Ky. 1907) 152 Fed. 542.

In a collateral attack on an indictment charging two of the offenses under this section, namely, that the petitioner did embezzle and abstract the funds in question, the court held that if the charge of abstracting the funds be regarded as surplusage, the indictment was sufficient as to embezzlement. Hopkins v. McLaughry, (C. C. A. 8th Cir. 1913) 209 Fed. 921, 128 C. C. A. 545.

III. ABSTRACTING FUNDS, ETC.

1. "Abstract" Defined

The word "abstract," as used in the statute, has no technical meaning like
"embezzle," nor is it ambiguous like the word "misally." It has but one meaning, being that which is attached to it in its ordinary and popular sense. U. S. v. Northway, (1887) 120 U. S. 327, 7 S. Ct. 580, 30 U. S. (L. ed.) 664; U. S. v. Harper, (S. D. Ohio 1887) 33 Fed. 471.

Abstraction, under this section, is the act of one who, being an officer, clerk or agent of a national banking association, wrongfully takes or withdraws from it any of its moneys, funds, or credits, with intent to injure or defraud it, or some other person or company, and without its knowledge and consent, or that of its board of directors, converts them to the use of himself, or of some person or company other than the bank. No previous lawful possession is necessary to constitute the crime, nor does it matter in what manner it is accomplished. U. S. v. Breeze, (W. D. N. C. 1864) 131 Fed. 913.

Abstraction is a conversion to his own use by an officer of the bank of funds of the bank, which are not especially intrusted to his care. U. S. v. Yountsey, (C. C. Ky. 1898) 91 Fed. 864.

2. Elements of Offense

To constitute the offense of abstracting moneys, funds, or credits of the association it is necessary that such moneys, funds, or credits should be abstracted from the bank without its knowledge or consent and with the intent to injure or defraud it or some other company or person, or to deceive some officer of the association or an agent appointed to examine its affairs. U. S. v. Northway, (1887) 120 U. S. 327, 7 S. Ct. 580, 30 U. S. (L. ed.) 664; U. S. v. Harper, (S. D. Ohio 1877) 35 Fed. 471.

In Cummins v. U. S., (C. C. A. 8th Cir. 1916) 232 Fed. 844, 147 C. C. A. 38, wherein it appeared that one Cummins was convicted in the court below of aiding and abetting a clerk of a national bank to violate section 5209, by abstracting therefrom without payment certain drafts and attached bills of lading, etc., the court said: "This statute expressly makes the intent of the bank clerk to injure or defraud or deceive and the like intent of the person aiding or abetting him an essential element of the offense. Agnew v. U. S., [1897] 165 U. S. 36, 17 S. Ct. 235, 41 U. S. (L. ed.) 624; McKnight v. U. S., [C. C. A. 8th Cir. 1901] 111 Fed. 735, 49 C. C. A. 594; McKnight v. U. S., [C. C. A. 8th Cir. 1902], 115 Fed. 972, 54 C. C. A. 358. The accused was the cashier and bookkeeper of a commission company which had dealings with the bank. Fifth defense, on which evidence was offered and received, was that he was following in good faith with the instructions of his superiors in the commission company in a course of business conduct that previously existed and of which he believed the bank was cognizant; also that he had no intent to injure or defraud the bank or to deceive any one in the examination of its affairs. When the accused was testifying in his own behalf and asked him if his counsel asked him if he had any, was he did to injure or defraud the bank or to deceive its officers or any one examining into its affairs?" The question was excluded upon objection by counsel for the government. The rule long settled in this country, almost without exception, is that, whenever the motive or intent of an act or the conduct of a person is material he may testify directly what it was. He may be asked whether he had a motive or intent in question. * * * Upon the question of the intent required under section 5209, Rev. Stat. the inference to be drawn from the evidence are peculiarly within the province of the jury.

No previous lawful possession as in the case of embezzlement is necessary in order to the commission of this offense, nor is it material by what means, contrivances, or devices the abstraction of its funds from the possession of the bank is effected and accomplished. It may be done by one act or a succession of acts, or it may be affected by fraudulent schemes and contrivances under the color of loans, discounts, checks, or entries. U. S. v. Harper, (S. D. Ohio 1887) 33 Fed. 471; U. S. v. Northway, (1887) 120 U. S. 327, 7 S. Ct. 580, 30 U. S. (L. ed.) 664.

3. Larceny Differentiated

The offense of abstracting is differentiated from larceny in U. S. v. Northway, (1887) 120 U. S. 327, 7 S. Ct. 580, 30 U. S. (L. ed.) 664, wherein the court said: "We do not admit the proposition that the offense of 'abstracting' the funds of the bank under this section is necessarily equivalent to the offense of larceny. The offense of larceny is not complete without the animus furandi, the intent to deprive the owner of his property, but under § 5209 an officer of the bank may be guilty of 'abstracting' the funds and money and credits of the bank without that particular intent. The statute may be satisfied with an intent to injure or defraud some other company, body politic or corporate, or individual person, than the banking association whose property is abstracted, or merely to deceive some other officer of the association, or an agent appointed to examine its affairs. This intent may exist in a case of abstracting without that intent which is necessary to constitute the offense of stealing."

4. Discounting Worthless Notes

A conviction for unlawfully abstracting the funds of a bank is sustained by evidence that the defendant, a director and agent of the bank, without the knowledge
and consent of the board of directors, procured notes to be signed by a person in his employ as maker who was absolutely irresponsible, and to be placed to his credit on the books of the bank, and drew from the bank the amount thereof. Dörsey v. U. S., (C. C. A. 5th Cir. 1900) 101 Fed. 746, 41 C. C. A. 652.

5. Cashing Checks and Converting Proceeds

Where a customer of a national banking association, whose note to the bank was about to mature, delivered a check to the bank to pay the note when due, and, the check coming into the hands of defendant as cashier of the bank, he cashed it and converted the proceeds, it was held that the loss was that of the bank, and the defendant's offense a wilful misapplication and abstraction of the bank's funds and credits, and not a mere breach of trust. Geiger v. U. S., (C. C. A. 4th Cir. 1908) 162 Fed. 844, 89 C. C. A. 516.

6. Indictment

Abstraction of general deposit.—In Sheridan v. U. S., (C. C. A. 9th Cir. 1916) 236 Fed. 305, 149 C. C. A. 437, the court said: "The plaintiff in error was convicted on two counts of an indictment which charged him with the violation of section 5309, Revised Statutes, * * * by abstracting and converting to his own use the moneys and funds of a national banking association, with intent to defraud the association and the depositor of the money. It is contended that the demurrer to the indictment should have been sustained on the ground that the plaintiff in error is therein charged with the unlawful abstraction and conversion of a special deposit. The contention that the deposits were special is based on the allegation contained in each count that the deposit which was alleged to have been abstracted and converted was a deposit made for the 'sole use and benefit' of the depositor; and it is argued that to abstract and convert a special deposit is not an offense against the United States. But the allegation so referred to is not all that the indictment charges as to the nature of the deposits. It is also alleged in each count that the property abstracted and converted consisted of certain moneys, funds, and credits of the national banking association, and that the depositor in each case 'was a depositor and creditor' of the bank, and that the intent of the plaintiff in error was 'to injure and defraud said national banking association and said depositor and creditor.' All the allegations, when taken together, can only mean that the deposit referred to in each count was a general deposit, creating the relation of debtor and creditor between the depositor and the bank. In a sense the primary purpose of a general depositor in a bank is to deposit his money for his own 'sole use and benefit,' and not for the use and benefit of another. It is evidently in that sense that the words are used in the indictment. The purpose of them is to show that the money deposited was the property of the depositor, and that it created a fund in the bank which he, and no other, had the right to draw out by check. It is not alleged in the indictment that there was any agreement as to the character of the deposit, or that the deposit was accompanied with a request that the money be kept 'vested' * * * We entertain no doubt that the deposit referred to in each count is therein alleged to have been a general deposit to the credit of the depositor.'"

The indictment in Sheridan v. U. S., (C. C. A. 9th Cir. 1916) 236 Fed. 305, 149 C. C. A. 437 was held sufficient and not objectionable in the matters mentioned.

IV. Misapplication of Funds, Etc.

1. Definition and Scope

A misapplication of funds, etc., within the meaning of this section is a conversion to his own use, by one of the officers mentioned in the section, of funds of the bank which were especially intrusted to his care. U. S. v. Yousef, (C. C. Ky. 1898) 91 Fed. 864; U. S. v. Heinz, (S. D. N. Y. 1908) 161 Fed. 423.

The words "wilfully misapply" have no settled technical meaning such as "embezzle" has in the statutes. "Misapply" was intended to include acts not covered by "embezzle" or "abstract." The words were not used as synonymous. Batchelor v. C. S., (1895) 156 U. S. 426, 15 S. Ct. 446, 39 U. S. (L. ed.) 476, U. S. v. Fish, (S. D. N. Y. 1885) 24 Fed. 585; U. S. v. Northway, (1857) 120 U. S. 327, 7 S. Ct. 580, 30 U. S. (L. ed.) 684; U. S. v. Harper, (S. D. Ohio 1887) 33 Fed. 471.

2. Elements of Offense

a. In General

But the intent to injure or defraud, which is an essential element of such offenses, does not mean malevolent or ill-will. Such intent is shown by knowingly committing the wrongful, fraudulent, and illegal acts which in their necessary results naturally produce loss or injury. U. S. v. Harper, (S. D. Ohio 1887) 32 Fed. 471.

b. Presumption of Wrongful Intent


c. Previous Lawful Possession

In general.—Wilful misapplication of the moneys, funds or credits of a national bank consists in their misapplication by an officer, clerk, or agent of the bank, made wilfully and wrongfully, and with intent to injure or defraud the association or some other person or company, and their conversion to his own use, or to the use of some one other than the bank. No previous lawful possession is necessary to constitute the crime. U. S. v. Breece, (W. D. N. C. 1904) 161 Fed. 915.

Manual possession not necessary.—It is not essential to the offense of misapplying the funds and so forth of the bank that the officer should have previously received them into his manual possession by virtue of his official relation to the bank; he may have such control, direction, and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offense of wilful misapplication. Evans v. U. S., (1894) 153 U. S. 584, 14 S. Ct. 934, 939, 38 U. S. (L. ed.) 830; U. S. v. Northway, (1887) 120 U. S. 327, 7 S. Ct. 550, 30 U. S. (L. ed.) 664; U. S. v. Harper, (S. D. Ohio 1887) 32 Fed. 471; U. S. v. Fish, (S. D. N. Y. 1885) 24 Fed. 585.

d. Withdrawal of Funds

The withdrawal of funds, etc., from the possession or control of the bank, or a conversion thereof in some form so that the bank will be deprived of the benefit of the funds, is essential to complete a misapplication under the section, though it is not necessary in all cases that the money should actually be withdrawn from the bank. Dow v. U. S., (C. C. A. 8th Cir. 1897) 52 Fed. 904, 49 U. S. App. 605, 27 C. C. A. 140.

To complete a criminal misapplication of the funds of the bank, where fictitious checks are deposited by a customer by connivance with the bank officials, some sum must be paid by the bank to the customer, or to a third person on his order, or it must be credited to third persons under such circumstances that the bank becomes bound for the payment thereof. Merely crediting upon his account fictitious checks drawn by the depositor does not alone amount to a criminal misapplication of the funds of the bank. Dow v. U. S., (C. C. A. 8th Cir. 1897) 52 Fed. 904, 49 U. S. App. 605, 27 C. C. A. 140.

To constitute the offense of wilful misapplication of funds under this section there must be a conversion to the use of the defendant or of some one else; and a misapplication of the funds of the bank by the purchase of shares of the bank's stock which are held in trust for the use of the association or the purchase of real estate for the bank in violation of law is not within the meaning of the section. Evans v. U. S., (1894) 153 U. S. 584, 14 S. Ct. 934, 939, 38 U. S. (L. ed.) 830, quoting U. S. v. Britton, (1882) 107 U. S. 655, 2 S. Ct. 512, 27 U. S. (L. ed.) 520. See also U. S. v. Eno, (S. D. N. Y. 1893) 96 Fed. 218; U. S. v. Harper, (S. D. Ohio 1887) 33 Fed. 471.

Funds of a national bank are not misapplied by an officer for the purpose of constituting a criminal offense, under this section, merely by the drawing of a draft on a fund on deposit in another bank, or by entering a credit to a depositor on the books; but it is necessary that the fund should have been actually withdrawn or converted in some form, so that it is lost to the bank, and such loss must be averred in an indictment for the offense, and the facts set out showing it to have been unavailing. U. S. v. Moraindale, (D. C. Kan. 1903) 146 Fed. 280.

The mere renewal of a note by the officers of a national bank to cover a loan not sufficiently secured did not constitute a misapplication of the bank's funds, because the transaction was accomplished in the form of a discount of the renewal note, by placing the proceeds to the customer's credit and receiving from him a check against the fund for an amount sufficient to pay the old note, without the bank parting with any money. Adler v. U. S., (C. C. A. 5th Cir. 1910) 182 Fed. 464, 104 C. C. A. 608.

e. Personal Benefit from Misapplication

It is not necessary that the person making the misapplication should have himself received any of the misapplied...

f. Knowledge or Consent of Bank Lacking

An officer of a national bank is not guilty of embezzlement, abstraction, or willful misapplication of its funds because of his obtaining money from the bank for his own use by means of overdrafts or loans by bona fide arrangement with its authorized officers or committees, but he is only protected by such arrangement where it was made by those representing the bank, in good faith, and in the supposed interest of the bank. U. S. v. Breese, (W. D. N. C. 1904) 131 Fed. 915.

An indictment under this section charging the defendant, as president and director, with having wilfully misapplied certain credits of the bank, "by procuring the authority of the board of directors . . . to an acceptance of an assignment" of an interest in a partnership in satisfaction of an indebtedness due the bank, and charging the amount of such indebtedness to the account of stocks and bonds, knowing that the assignor had in fact no interest in such partnership, was held not to state an offense under the statute, since what was claimed was in fact not have been by authority of the board of directors, and the facts set out did not show a misapplication of credits by the defendant, nor was it averred that such misapplication was made to his own use, benefit, or gain, nor to that of any person other than the bank. U. S. v. Smith, (W. D. Ky. 1907) 159 Fed. 542.

An officer acting with the knowledge or consent of the board of directors may do those things which, without such consent, might amount to a criminal misapplication. This it has been held that an officer is not guilty of a misappropriation of the bank's funds where the exchange committee of the bank permits him to substitute worthless paper for his own good paper. U. S. v. Younts, (C. C. Ky. 1898) 91 Fed. 864. And where an officer by consent of the board of directors procures the discount of paper known to him to be worthless, whether made by himself or another, the appropriation of the proceeds of the officer's own purchase is not necessarily a criminal misapplication. U. S. v. Younts, (C. C. Ky. 1898) 91 Fed. 864; U. S. v. Britton, (1883) 108 U. S. 193, 2 S. Ct. 526, 27 U. S. (L. ed.) 701. But where the officer's original intent was to procure the discount of the note in order to refund the bank, he is criminally liable. U. S. v. Eno, (S. D. N. Y. 1893) 56 Fed. 218; Evans v. U. S., (1894) 153 U. S. 584, 14 S. Ct. 934, 939, 38 U. S. (L. ed.) 830; Breese v. U. S., (C. C. A. 4th Cir. 1901) 106 Fed. 680, 45 C. C. A. 535. The fact that the act of the officer subsequently became known to the other officers of the bank, and that they impliedly assented thereto by taking no action, does not affect the criminality of the act. Rieger v. U. S., (C. C. A. 8th Cir. 1901) 107 Fed. 916, 47 C. C. A. 61.

3. Fraudulent Credits

The offense may be consummated by giving fraudulent credits and procuring the transfer of such credits in the usual way by means of checks. Rieger v. U. S., (C. C. A. 8th Cir. 1901) 107 Fed. 916, 47 C. C. A. 61.

4. Withdrawal of Deposits by Debtor

For an officer to permit a depositor largely indebted to the bank to withdraw his deposits without first paying his indebtedness to the bank is not a misaplication; even if he act with intent to defraud the bank. U. S. v. Britton (1883) 108 U. S. 193, 2 S. Ct. 526, 27 U. S. (L. ed.) 701.

5. Overdraft

In general.—While the mere recognition of a check which constitutes an overdraft does not amount to a criminal misapplication of the funds of the bank, Dow v. U. S., (C. C. A. 8th Cir. 1897) 82 Fed. 904, 49 U. S. App. 605, 27 C. C. A. 140; yet a bank officer has no right to permit overdrafts when he does not believe and has no reasonable ground to believe that the moneys can be repaid, and if, coupled with such wrongful act, it appears that he intended by the transaction to injure and defraud the bank, the wrongful act becomes a crime within the section. Coffin v. U. S., (1863) 156 U. S. 432, 15 S. Ct. 394, 39 U. S. (L. ed.) 481; U. S. v. Kenney, (C. C. Del. 1888) 90 Fed. 257.

A bank officer who allows a firm of which he is a member to overdraw its account, with intent to defraud the bank of the money, is guilty of a misapplication of the funds of the bank. U. S. v. Fisk, (S. D. N. Y. 1885) 24 Fed. 585.

A director of a bank, who, knowing that he has no money to his credit in the bank, and no right to draw money therefrom, obtains from the bank money to which he has no right by means of his overdraft, made with intent to defraud, and converts such money to his own use in fraud of the bank, is guilty of a misapplication. U. S. v. Warner, (S. D. N. Y. 1886) 26 Fed. 616.

An overdraft on a national bank may be legal or criminal, according to the intent of the person committing it, inferred from the surrounding circumstances shown by the evidence. U. S. v. Heinze (S. D. N. Y. 1892) 61 Fed. 425.

The fact alone that an officer of a national bank causes it to pay overdrafts, drawn by himself or other customers of
the bank, or makes a loan without security, does not constitute an offense, under this section; nor does an indictment averring such facts charge an offense, because it further avers an intent to injure and defraud the bank. U. S. v. Norton, (E. D. Okla. 1911) 158 Fed. 258.

An unintentional overtread by a depositor in good standing and possessing ample means to pay, or an overtread to be paid pursuant to a prior agreement resting on abundant credit, does not constitute a willful misapplication of a national bank's funds, in violation of this section. C. S. v. Steierman, (C. C. A. 3d Cir. 1909) 172 Fed. 913, 97 C. C. A. 271.

In Adler v. U. S., (C. C. A. 5th Cir. 1910) 182 Fed. 464, 104 C. C. A. 608, it appeared that the accused, who was president of a national bank, having overdrawn his account $18,303.80, executed his note to the bank for $20,000, secured by certain corporate stock, the proceeds of the note being used to cancel the overtread, and the balance credited to his account, subject to check. The note not having been paid, the collateral was sold for $5,000 cash, which paid the $1,146 additional advancement, and $3,800 on the overtread. It was held that the execution of the note was a benefit and not a loss to the bank, and that accused by that transaction was not guilty of misapplying the bank's funds, in violation of this section.

Proof of intent. — Evidence tending to show the relation of the parties, the mode in which the business was carried on, and the knowledge which the officers of the bank had of the character of the operations carried on by the person making the overtreads is admissible to show the intent in permitting such overtreads. Dow v. U. S., (C. C. A. 8th Cir. 1897) 82 Fed. 904, 49 U. S. App. 605, 7 C. C. A. 140; Breeze v. U. S. (C. C. A. 4th Cir. 1901) 106 Fed. 680, 45 C. C. A. 535.

Where, in a prosecution of the vice-president of a bank for alleged misappropriation of the bank's funds in the payment of overdrafts by the bank's cashier, there was no evidence that the checks representing the overdrafts were paid with the knowledge or under the direction of the vice-president, the offense as to him was not proved, under the rule that to constitute a willful misappropriation of a national bank's funds there must in fact be an unlawful application by the person charged, with intent to injure and defraud the bank. Prettyman v. U. S., (C. C. A. 6th Cir. 1910) 190 Fed. 90, 103 C. C. A. 384.

6. Discounting Worthless Paper

The discounting by the president of a national bank with the funds of the bank of commercial paper known to him to be worthless or fictitious, for the benefit of an insolvent corporation of which he is an officer, and with intent to injure and defraud the bank, is a willful misapplication of its funds, constituting an offense under this section. Flickinger v. U. S., (C. C. A. 6th Cir. 1906) 150 Fed. 1, 79 C. C. A. 515.

7. Bad Loans

For an officer of a national bank who is also a promoter of various enterprises to obtain the funds of the bank on the security of unmarketable bonds of his own enterprises, at the risk of the interest of the bank, is a misapplication of the funds which cannot be covered up by entering the transactions on the books as loans and investments. Walsh v. U. S., (C. C. A. 7th Cir. 1909) 174 Fed. 615, 98 C. C. A. 461.

Bad loans made in good faith do not subject the officers to any criminal liability, and where bank officers in the honest exercise of official discretion, in good faith and without fraud, make loans or discounts for the actual or supposed advantage of the association, there is no criminal responsibility though the transaction may be injudicious and unsafe, resulting in loss or damage to the bank. U. S. v. Youtz (C. C. Ky. 1898) 91 Fed. 864; U. S. v. Harper, (S. D. Ohio 1887) 33 Fed. 470; U. S. v. Fish, (S. D. N. Y. 1885) 24 Fed. 586.

But a bank officer who abuses his discretionary power by making in bad faith for private gain a series of loans which he knows the directors would not sanction, is guilty of a misapplication of funds within the section. C. S. v. Harper, (S. D. Ohio 1887) 33 Fed. 470; U. S. v. Fish, (S. D. N. Y. 1885) 24 Fed. 586, holding that as far as the question of guilt or innocence is concerned, there is no distinction between a loan in bad faith for the purpose of defrauding the bank and a misapplication of money with like intent in a form other than that of a loan.

In U. S. v. Britton, (1883) 108 U. S. 193, 2 S. Ct. 526, 27 U. S. (L. ed.) 701, the incriminating facts were that the note of which the defendant as an officer of the bank procured the discounting was not well secured, and that both the maker and indorser were to the knowledge of the defendant insolvent when the note was discounted. It was held that there was no willful misapplication of the bank's moneys by the defendant within the meaning of the statute, the criminality really depending upon the question whether the time of the discount a deliberate purpose on the part of the officer to defraud the bank of the amount.

Where the bank's funds are misapplied by putting them out on worthless paper, a subsequent application of such paper upon which nothing is actually obtained is not a misapplication within the section.
8. Dividends Declared


9. Indictment

a. Definitions

A count in an indictment, under this section, charging that defendant, as a director of a national bank, between certain given dates abstracted and misapplied a stated sum of the moneys, funds, and credits of the bank, without further specification, was held to be insufficient, as too general and indefinite. U. S. v. Martindale, (D. C. Kan. 1903) 146 Fed. 290.

But in Stout v. U. S., (C. C. A. 8th Cir. 1915) 228 Fed. 790, 142 C. C. A. 323, the appellant urged that the fifth count of the indictment under which alone conviction was had did not charge a public offense. But the court said: "We think it does. In the proximity of words there is plainly discernible the substance of a charge that the accused, whilst president of the bank and by the use of the authority of his position, loaned its funds to the mill company, which was known by him to be hopelessly insolvent, not so known to the bank or its directors, and under circumstances naturally leading to the loss of the money loaned, and also resulting with intent to injure and defraud the bank. This, with the details set forth, sufficiently states an offense under the statute."

Where in a prosecution against a national bank officer for wilful misapplication of the moneys, funds, and credits of the bank, the indictment definitely charged the value in lawful money of the United States of the misapplied property, it was not defective for failure to specify the exact thing misapplied whether moneys, funds, or credits. U. S. v. Heinze. (S. D. N. Y. 1908) 161 Fed. 425. Compare U. S. v. Smith, (W. D. Ky. 1907) 152 Fed. 542.

b. Separate Counts

Where an officer of a national bank is charged in an indictment with the fraudulent misapplication of its funds in the payment of several and distinct notes, each payment constitutes a separate misapplication, and must be charged in a separate count. U. S. v. Martindale, (D. C. Kan. 1903) 146 Fed. 290.

c. Possession of Funds

An indictment of an officer of a national bank, under this section, for misapplication of funds, sufficiently alleges his possession of the funds by an averment that he was president of the bank, and as such had access to its funds, properties, moneys, and credits, with duties to perform in their control, management, and application. U. S. v. Eastman, (C. C. N. H. 1904) 132 Fed. 581.

d. Manner of Misapplication

An indictment of an officer of a national bank, under this section, for misapplication of the funds or property of the association, sufficiently alleges the manner in which the misapplication was accomplished; it charges that he wrongfully and without the consent of the bank, converted them to his own use, or to the use of persons other than himself and other than the association. U. S. v. Eastman, (C. C. A. 8th Cir. 1904) 132 Fed. 581.

An indictment alleging that F., as cashier of a national bank, unlawfully "converted" certain "moneys, funds, credit and credits" to the use of D., was held to sufficiently charge the manner in which the misapplication was effected. Dickinson v. U. S., (C. C. A. 1st Cir. 1908) 159 Fed. 501, 86 C. C. A. 625.

e. Conversion

A conversion is charged by the allegation of an indictment for wilful misapplication of the funds of a national bank, that the defendant, being president of the bank, and having control of its funds, with intent to injure and defraud, and received and discounted a promissory note for a specified sum, for his use, benefit. and advantage, knowing that the note was wholly unsecured. whereby the proceeds of the discount were wholly lost to the bank. U. S. v. Heinze, (1910) 215 U. S. 592, 31 S. Ct. 98, 54 U. S. (L. ed.) 1139, 21 Ann. Cas. 884, followed in U. S. v. Heinze, (1910) 218 U. S. 547, 31 S. Ct. 102, 54 U. S. (L. ed.) 1145.

An indictment for the wilful misapplication of funds of a national bank by an officer, with intent to defraud, in violation of this section, by receiving and discounting with its money an absolutely unsecured promissory note of a named partner, whereby the proceeds of the discount were wholly lost to the bank, need not charge a conversion by the recipient of the proceeds of the discount; provided it does allege a conversion by such officer. U. S. v. Heinze, (1910) 218 U. S. 532, 31 S. Ct. 98, 54 U. S. (L. ed.) 1139, 21 Ann. Cas. 884, followed in U. S. v. Heinze, (1910) 218 U. S. 547, 31 S. Ct. 102, 54 U. S. (L. ed.) 1145.
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f. Fraud

An indictment under this section which charged that the defendant, while an officer of a national bank, with intent to injure or defraud the bank, unlawfully and willfully misappropriated and converted to his own use funds of the bank, by withdrawing money therefrom upon a charge ticket, pursuant to which the amount was charged to his account, was held to be insufficient to charge an offense, in the absence of averments showing that the bank was in fact defrauded, or a probability that it would be defrauded, thereby, as that defendant was insolvent, and that the overdraft was not paid. U. S. v. Norton, (E. D. Okla. 1911) 188 Fed. 296.

g. Felonious Intent

An indictment charging an officer of a national bank with misapplication of its funds, or with making false entries in its books, need not allege that the acts were done feloniously, where they are charged to have been done willfully and with intent to defraud the bank, and are such as are made misdemeanors by the statute. U. S. v. Eastman, (C. C. N. H. 1904) 132 Fed. 551.

h. Want of Authority

In an indictment under this section charging an officer of a national bank with a willful misapplication of its funds with intent to injure and defraud the association, it is not necessary to aver that the acts set out were done without authority from the directors. Flickinger v. U. S., (C. C. A. 4th Cir. 1908) 150 Fed. 1, 70 C. C. A. 515. Compare U. S. v. Martindale, (D. C. Kan. 1903) 146 Fed. 280.

10. Evidence

In a prosecution for misappropriation of the funds of a national bank, it was held that a letter written by certain of the directors of the bank to the Comptroller of the Currency, after the misappropriation, was inadmissible 'either as showing the state of mind of the directors after the offense, or a ratification of the misappropriation. Dickinson v. U. S., (C. C. A. 1st Cir. 1908) 159 Fed. 801, 86 C. C. A. 625.

In a trial for aiding a national bank cashier in misappropriating a stock certificate held by the bank as collateral for a loan, defendant having used the certificate as collateral on a note he discounted, defended on the ground that he did not know of the bank's interest in the certificate and was innocent of any purpose to aid and abet in abstracting it, the prosecution could show that the bank's minute book disclosed no record of the directors sanctioning the use of the certificate. Cook v. U. S., (C. C. A. 3d Cir. 1908) 159 Fed. 919, 87 C. C. A. 99.

In a prosecution of national bank officers and alleged aiders and abettors for misapplying the bank's funds, evidence of the taking of a mortgage to secure an indebtedness represented by overdrafts and the making of an additional loan secured by deposit of other collateral, the effect of which was to give the bank better security than before, was insufficient to sustain a conviction. Prettyman v. U. S., (C. C. A. 6th Cir. 1910) 189 Fed. 30, 103 C. C. A. 384.

In May v. U. S., (C. C. A. 9th Cir. 1907) 157 Fed. 1, 88 C. C. A. 575, it appeared that the defendant was charged with having made a false entry in a report made to the Comptroller of the Currency as president of a national bank, in that he omitted from the statement of deposits for which the bank was liable the amount of a deposit made several years before and which had not been withdrawn. The defendant denied that the depositor had authorized defendant to loan the money, which had been done, but the depositor denied such agreement. It was shown by the evidence that defendant, in fact, made loans which were charged to the depositor's account, and for which he took notes payable to the depositor. It was held that a statement made by him to a borrower at the time of making such a loan, which was several years before the making of the alleged false report, to the effect that it was made from money left by the depositor to be loaned, was not admissible as a part of the res gestae, but was properly excluded as a self-serving declaration.

11. Questions for Jury

In a prosecution of an officer of a national bank for misapplying its funds, where the transactions as shown by the books of the bank were legitimate and proper on their face, it was held that the question of intent was one for the jury under proper instructions. Walsh v. U. S., (C. C. A. 7th Cir. 1909) 174 Fed. 615, 98 C. C. A. 461.

12. Instructions

In a prosecution of an officer of a national bank under this section for misapplication of funds with intent to injure and defraud the association, general language used in the charge in explaining the section, stating that a misapplication of funds, in order to constitute an offense, must have been willful to injure or defraud the bank "or to deceive any officer of the bank or any agent appointed pursuant to law to examine the affairs of the bank," was not misleading, where the jury were subsequently charged specifically on the precise issue presented by the indictment and that an intent to defraud the bank must be shown. Morse v. U. S., (C. C. A. 2d Cir. 1909) 174 Fed. 539, 98 C. C. A. 321. See also U. S. v. Steinman, (C. C. A. 3d Cir. 1909) 172 Fed. 913, 97 C. C. A. 271.
V. Issuing Certificate of Deposit

In Simpson v. U. S., (C. C. A. 9th Cir. 1914) 229 Fed. 944, 144 C. C. A. 222, the indictment charged that, on the 27th day of March, 1913, at Caldwell, in the county of Canyon and state of Idaho, one S. D. Simpson, cashier of a national bank association known as the American National Bank of Caldwell, did wilfully, unlawfully, and feloniously, without authority from the directors of said association, and with intent to injure and defraud said association, issue and put forth a certain certificate of deposit drawn upon said association in the amount of $2,500, therein and thereby certifying that there had been deposited by one W. G. Simpson in and with said association the sum of $2,500, whereas in truth and in fact the said W. G. Simpson, to whom said certificate of deposit was so issued and put forth, did not have at the time said certificate of deposit was so issued and put forth, on deposit with said association an amount of money equal to the amount then and there specified in such certificate, or any amount or sum of money whatsoever, as he, the said W. G. Simpson, then and there well knew. It was then further charged that the said W. G. Simpson did, at the time and place aforesaid, unlawfully and feloniously and with the intent to injure and defraud the said association, and without authority from the directors, aid, abet, incite, counsel, and procure the said S. D. Simpson as such cashier to wilfully, unlawfully, and feloniously, and with the intent aforesaid issue and put forth the said certificate of deposit in manner and form aforesaid, he, the said W. G. Simpson, then and there well knowing that he did not have the said sum of $2,500 or any other sum on deposit with said association. This indictment was held good on demurrer. It was further held that the refusal of the court to admit testimony of a ratification by the directors of the issuance of the certificate of deposit was not error.

VI. Drawing Bills and Signing Notes

General authority conferred upon an officer of a bank to draw bills and sign notes is sufficient in the case of bills and notes relating to the business of the association, but will not justify drawing bills or signing notes which relate to the individual and private business of the officer. U. S. v. Johnson, (1879) 4 Cine. L. Bul. 361, 29 Fed. Cas. No. 15,452, in which case it was held that an intent to injure or defraud is not necessary to complete the crime of drawing bills of exchange or signing notes without authority of the directors. But in view of the general construction of the statute this may be considered doubtful law.

A cashier's check is a "bill of ex-

VII. False Entries

1. In General

This section expressly provides for the punishment of bank officials who make false entries with intent to injure or defraud.

The custom of other national bank officials in making their reports is no justification for making false entries, and therefore evidence of such custom is not admissible. U. S. v. Graves, (N. D. Ia. 1892) 53 Fed. 634.

2. Who LIABLE


The statute admits only of the construction that the false entry must be made by the officer of the bank in person, or, if by another, the latter must, in an affirmative way, be authorized or directed by the officer to make the particular entry. Familiar rules for the strict construction of criminal statutes demand this. By so proper construction of the language of section 5209 can the court hold that the mere concealment by the president of a national bank of information from a bookkeeper who in ignorance, but without any instructions from the president, makes an entry on his own motion, shall be equivalent to the president himself making the false entry within the meaning of the statute. U. S. v. McClarty, (W. D. Ky. 1911) 191 Fed. 523.

The statute prohibits making false entries. Neither false reports nor false verifications are within the statute. False entries in reports are untrue statements of items of account, by written words, figures, or marks made therein. Within the statute here involved they are the officers, him only who knowingly made them or caused them to be made. He who is not so responsible for a false entry is not guilty of making a false entry,

There is no penalty affixed to the association or its officers for making a false report, nor to the president or cashier for verifying such report. The penalty imposed by the statute is on the one who makes any false entry in any book, report, or statement of the association, and that penalty is applicable to any officer or agent of the bank who actually makes the entry with intent to injure or defraud or deceive any agent appointed to examine the affairs of any such association. Cochran v. U. S., (1895) 157 U. S. 286, 15 S. Ct. 628, 39 U. S. (L. ed.) 704, wherein an assistant cashier was held to be indictable as principal for making false entries in the report to the comptroller, though he did not verify the report, and the president was held to be indictable as accessory, though he only attested it as a director, it having been verified by the cashier in reliance upon the statements of such officers as to its truth and correctness. See also U. S. v. Potter, (C. C. Mass. 1892) 56 Fed. 83.

3. Intent to Injure, Defraud, or Deceive

a. In General


The intent with which false entries in the books or reports of a national bank are made is of the essence of the offense, and must be proved as laid. Richardson v. U. S., (C. C. A. 3d Cir. 1910) 181 Fed. 1, 104 C. C. A. 69.

A false entry in the report of the condition of the bank, or a false entry made in the books of the bank, is not punishable unless it was made by the officer or by his direction with the intent to injure or defraud the bank or some other corporation or some firm or person; or to deceive some officer of the bank; or to deceive some agent appointed or who may be appointed to examine the affairs of the bank. U. S. v. Allen, (E. D. Kan. 1893) 73 Fed. 165. See also McKnight v. U. S., (C. C. A. 6th Cir. 1899) 97 Fed. 208, 38 C. C. A. 115.

Intent to injure a bank by a false report to the comptroller of the currency is not negatived as matter of law by the fact that the report showed the bank to be in better condition than it really was. U. S. v. Corbett, (1909) 215 U. S. 233, 30 S. Ct. 81, 54 U. S. (L. ed.) 173, reversing (W. D. Wis. 1908) 162 Fed. 687.

Where false entries were made by the officers of a national bank to overcome complaints by the comptroller in order that the bank examiners and the comptroller might be deceived and misled thereby, proof of such false entries was sufficient to sustain a finding that they were made with intent to injure and defraud the bank, and this though they represented the condition of the bank to be more favorable than it was. Richardson v. U. S., (C. C. A. 3d Cir. 1910) 181 Fed. 1, 104 C. C. A. 69.

b. Mistake


A simple mistake by an officer of a national bank, in making an entry in one of the company's books, growing out of a clerical error, is not a violation of the section. U. S. v. Wilson, (S. D. Fla. 1910) 176 Fed. 806.

4. Mistake or Deception of Others

Where the officer verifying a report to the comptroller honestly and faithfully investigates the condition of the bank, and compares it with such report either alone or with the assistance of his clerks, and then verifies it in the belief that it is correct, when through mistake of his own or some deception practiced upon him by his clerks it is false, he is not guilty of the offense under the statute. But the officer verifying a report to the comptroller cannot keep himself in ignorance, wilfully shut his eyes to the truth, or refuse to examine into the true condition of the bank, and to learn whether his report is true or false when he makes it, and thus escape liability. U. S. v. Allis, (E. D. Kan. 1893) 73 Fed. 165.

A cashier cannot be held criminally liable for false entries in a report to the comptroller where he honestly acts upon the statements of the president and assistant cashier as to the truth and correctness of such report. His ignorance of the truth of such report might not, and probably would not, excuse him from liability in a civil action for negligence, but he can be held criminally liable only for an evil intent actually existing in his mind at least, unless his ignorance is wilful or his negligence in failing to inform himself is so gross as to characterize his conduct,
5. Entries Calculated to Deceive

The entries must be calculated to deceive and if a false entry is calculated to deceive or defraud the making or causing it to be made on the books with intent to deceive is all that is necessary to bring the act within the meaning of the statute. U. S. v. Britton, (1882) 107 U. S. 655, 2 S. Ct. 512, 27 U. S. (L. ed.) 629; U. S. v. Harper, (S. D. Ohio 1887) 33 Fed. 471.

The fact that the officers were not actually deceived is not material if the false entry was in fact made with intent to deceive. U. S. v. Means, (S. D. Ohio 1889) 42 Fed. 590.

Nor does the fact that the falsity may be exposed by an examination of other books of account make it any the less a false entry rendered with intent to deceive. U. S. v. Britton, (1882) 107 U. S. 665, 2 S. Ct. 612, 27 U. S. (L. ed.) 629.

6. What Are False Entries

In general—A false entry within this section is an entry made in the bank's books by an officer of the bank, that is intentionally and knowingly false when made, and made with intent to deceive the officers of the bank or defraud the association. U. S. v. Wilson, (S. D. Fla. 1910) 176 Fed. 806.


Officers of a national bank may not make a false entry in the bank's books with intent to deceive in violation of this section and escape criminal liability because they go through the idle and deceitful form of making a transaction to which the entry might nominally but not really relate. Billingsley v. U. S., (C. C. A. 8th Cir. 1910) 176 Fed. 635, 101 C. C. A. 445.

Erasure.—The language of the statute is sufficiently comprehensive to prohibit a falsification of the books in any manner, whether by an original false entry or by changing any entry already made, and the erasure of one or more figures constituting a number already written on the books of account of a bank and the writing of different figures in place of those erased constitutes "making an entry" within the meaning of the section. U. S. v. Creceillius, (E. D. Mo. 1888) 24 Fed. 30.

False deposit slip.—The entry of a deposit slip upon the books of the bank where the matter contained in the slip is not true is a false entry. Agnew v. U. S., (1887) 165 U. S. 36, 17 S. Ct. 235, 41 U. S. (L. ed.) 624.

Entry of indorsed note as paid.—The entry of a note as paid when it has only been indorsed by the bank and discounted is a false entry. Dorsey v. U. S., (C. C. A. 8th Cir. 1900) 101 Fed. 746, 41 C. C. A. 632.

Omission from report of stock held.—The fact that a national bank is prohibited by R. S. sec. 5201 (see supra, p. 762) from purchasing its own stock, does not make such a purchase a nullity, nor does the purchase extinguish the stock and, where a bank bought and held shares of its own stock, an entry in a report to the comptroller of the bonds, securities, etc., held by the bank from which such stock was omitted, constituted a false entry. Morse v. U. S., (C. C. A. 2d Cir. 1909) 174 Fed. 539, 90 C. C. A. 321.

Correct entries of unauthorized or fraudulent transactions.—Entries in the books of a national bank which correctly record actual transactions of the bank, although such transactions may have been unauthorized, or even fraudulent, are not false entries within the meaning of this section, and will not sustain an indictment thereunder for the making of false entries. Twinning v. U. S., (3d Cir. 1905) 141 Fed. 41, 72 C. C. A. 629; Dow v. C. S., (C. C. A. 8th Cir. 1897) 82 Fed. 904, 49 U. S. App. 605, 27 C. C. A. 140; U. S. v. Young; (M. D. Ala. 1904) 128 Fed. 111.

Thus the entry as a "cash item" of a check received by the bank on which the money was paid out, though known to be worthless, is not a false entry. U. S. v. Young; (M. D. Ala. 1904) 128 Fed. 111.

Special deposit entered as money deposited.—The entry as money deposited of a sum of money left with the bank in a sack as a special deposit is a false entry. U. S. v. Peters. (C. C. Wash. 1898) 51 Fed. 984.

Entry of worthless note as bona fide asset.—If the officer of a bank should procure a note to be given to it by an irresponsible person, with intent of apparently increasing the bank's assets, and should thereafter make an entry in a report required by law to be the Comptroller of the Currency, including such note as a bona fide asset of the bank, with either of the intents denounced by this section, such entry would be a false entry within this section, though the paper was in actual existence. Hayes v. U. S., (C. C. A. 8th Cir. 1909) 169 Fed. 101, 94 C. C. A. 449.

Entry of accommodation paper to officers as loan of bank.—In Hayes v. U. S., (C. C. A. 8th Cir. 1909) 169 Fed. 101, 94 C. C. A. 449, it appeared that a national bank of which the defendant was cashier, wrote in straitened circumstances, so that the president, cashier, and assistant cashier had not drawn their salaries for five months. Each of the officers having overdrawn his individual account with the bank to the amount of their unpaid salaries, the bank examiner required the
overdraft to be made good, and to accomplish this the officers induced F., who was solvent, to execute his note to the bank for their accommodation, and this was discredited and entered as a loan and discount; the proceeds being credited to the officers' individual accounts to make good the overdrafts. It was held that the note, while accommodation paper so far as the officers of the bank were concerned, was enforceable against the maker by the bank, and hence its inclusion in a report made by the cashier to the comptroller of the currency as a loan and discount of the bank did not constitute the making of a "false entry," in violation of this section.

Entries of purchases of stock as loans. — Entries in the books of a national bank showing loans to persons named on the security of stocks deposited as collateral, when in fact the transactions were purchases of the stock by the bank, the supposed borrowers being merely dummies wholly irresponsible for the amount of the notes which, without any intention of paying the same or any knowledge of the actual transactions, were false entries, and, when made by the direction of an officer of the bank who conducted the transactions, a jury was justified in finding that they were fraudulent and made with intent to deceive the bank examiner and his agents in violation of this section. Morse v. U. S., (C. C. A. 2d Cir. 1900) 174 Fed. 539, 98 C. C. A. 321.

8. Offset Entries

Where a false entry has been made with criminal intent the fact that the officer made another false entry to offset it with like intent is no defense. U. S. v. Allis, (E. D. Kan. 1893) 73 Fed. 165.

9. Officer or Agent Intended to Be Deceived

In general.—The question whether a person is an "officer" of the bank under the statute, or merely a clerk or employee, depends upon the circumstances connected with the bank itself, such as the appointment and treatment of the person by the directors or managers of the bank. U. S. v. Means (S. D. Ohio 1889) 42 Fed. 599.

Directors are "officers" within the statute, an intention to deceive whom is made punishable; and an intention to deceive any one director or officer of the bank is as criminal under the Act as an intention to deceive any number or all of them. U. S. v. Means, (S. D. Ohio 1890) 42 Fed. 599.

The Comptroller of the Currency is an agent within the provisions of this section, that every officer of a national bank who makes any false entry in a report to any agent appointed to examine the affairs of such association shall be guilty of a misdemeanor, and it is immaterial that R. S. sec. 5240 (see infra, p. 901), confers power upon him to appoint suitable agents to examine the affairs of such banks. U. S. v. Corbett, (1898) 215 U. S.
The statute covers the making of a false entry in the preparation of a report or in the process of completing it; it is not necessary that it be made at the time and in the course of the official drawing up the report. U. S. v. French, (C. C. Mass. 1893) 57 Fed. 382.

It is not material whether false entries were made with intent to deceive or whether an agent appointed to examine the affairs of the association were made before or after the appointment of such agent. U. S. v. Britton, (1892) 107 U. S. 655, 652 S. Ct. 512, 27 U. S. (L. ed.) 520.

11. Conspiracy

A conspiracy to violate this section by causing false entries to be made in the books of a national bank by an officer or agent thereof for the purpose of defrauding the bank or others, or deceiving an agent appointed to examine the affairs of the bank, is one to commit " an offense against the United States, " within the meaning of R. S. sec. 5440 (embodied in Penal Laws, sec. 37, and repealed by sec. 341 thereof; see Penal Laws), and is indictable hereunder. Scott v. U. S., (C. C. A. 8th Cir. 1904) 130 Fed. 429, 64 C. C. A. 631.

12. Indictment

Intent.—This section contemplates two separate intents, one to injure or defraud the association, and the other to deceive, either of which, when accompanying a forbidden act, constitutes an offense, and hence it is not necessary that an indictment alleging a false entry with intent to deceive should also charge an intent to injure or defraud the association or any other company or person. Billingsley v. U. S. (C. C. A. 8th Cir. 1910) 176 Fed. 653, 101 C. C. A. 465.

Definiteness.—Where an indictment against a national bank cashier for making false entries specified with great particularity and at length in the entries the falsification of which was charged, and these entries were fully described, it was held that the indictment was not defective for indefiniteness, because it did not specify the names of the clerks or employees by whose hand the entries were in fact made. Richardson v. U. S. (C. C. A. 3d Cir. 1910) 181 Fed. 1, 104 C. C. A. 69.

Duplicity.—The making of a false entry, accompanied by an intent either to " injure or defraud " or to " deceive," as defined by this section, constitutes an offense; and a count of an indictment was held to charge that such a false entry was made with intent to injure or defraud, and also with intent to deceive, charges two offenses, and is bad for duplicity. U. S. v. Norton, (E. D. Okla. 1911) 188 Fed. 256.

Doing business.—An allegation in an indictment that on a certain date a bank was a corporation duly organized and existing, with a qualified and acting president and cashier, and that on that date the cashier made a certain report to the comptroller of the currency, is a sufficient allegation that the bank was carrying on business at the time the report was made. Harper v. U. S., (1907) 7 Ind. Ter. 437, 104 S. W. 673.

Designation of officers intended to be deceived. An indictment charging a national officer with false entries " with the intent to deceive any agent appointed to examine the affairs of the bank " was held to sufficiently designate the person intended to be deceived. Billingsley v. U. S. (8th Cir. 1910) 178 Fed. 653, 101 C. C. A. 465.

Description of report.—An indictment under this section, which charges the defendant as cashier of a national bank with having made a false entry in a report with intent to deceive an officer of the association, need not describe the report with technical accuracy, and an averment of the date when made, and that it was a report made to the comptroller of the currency showing the resources and liabilities of the bank on a certain date, is sufficient to authorize the presumption that it was a report made by the association under section 5211, 5 Fed. Stat. Annot. 152; Harper v. U. S., (C. C. A. 8th Cir. 1908) 170 Fed. 385, 95 C. C. A. 555, reversing (1907) 7 Ind. Ter. 437, 104 S. W. 673.

Entries in book of association.—In a prosecution of a national bank officer for making false entries, an allegation that they were made " in a book of said bank known as " Journal K " sufficiently alleged that the book was a book of the association within this section. Billingsley v. U. S., (C. C. A. 8th Cir. 1910) 178 Fed. 653, 101 C. C. A. 465.

Lawful money revenue.—An indictment under this section alleging that the accused, while acting as president of a national bank, made a false entry in a report to the comptroller of the currency, that the lawful money reserve in the bank, consisting of gold coin, was $23,955, when in fact the bank only had $21,955 in gold coin as lawful money reserve, was not objectionable for want of an allegation that the lawful reserve exceeded the amount the bank actually had on hand, the gist of the offense being the making of false entries in the report. Clement v. U. S., (C. C. A. 8th Cir. 1908) 149 Fed. 305, 79 C. C. A. 243.
Indictment held sufficient.—In a prosecution under this section, making it a crime for an officer of a national banking association carrying on a banking business to make a false entry in a report or statement of the association with intent to injure or defraud it, or to deceive an agent appointed to examine its affairs, the indictment alleged that the accused was the duly elected, qualified, and acting cashier of a certain bank; that he made a false entry in a report, describing it; that the entry was made to deceive a certain person who was the duly elected, qualified, and acting president of that bank; that he made the false entry on a certain date in a report showing the resources and liabilities of the bank on a certain day to the Comptroller of the Currency. It was held that the indictment was sufficient. Harper v. U. S., (1907) 7 Ind. Ter. 437, 104 S. W. 673.

Aider by verdict.—Where the accused, a national bank cashier, was indicted under several counts for making false entries in the bank's books, in violation of this section, and on conviction on several counts was sentenced to imprisonment for a term less than the maximum provided for a single offense, and at least one of the counts on the indictment was sufficient, it was held that the sentence would be applied to such count, and the validity of the remaining counts regarded as immaterial. Harvey v. U. S., (C. C. A. 3d Cir. 1908) 159 Fed. 419, 86 C. C. A. 399.

13. Evidence

a. Admissibility


The bank's books are admissible without proof that they were properly kept as evidence against one who had general control and direction of the bank's affairs to show knowledge of false entries in the reports. Bacon v. U. S., (C. C. A. 8th Cir. 1899) 97 Fed. 35, 38 C. C. A. 37.

A report of the condition of the bank on a certain day, called for by the comptroller, is admissible to show the intent in making false entries in the bank's books on that day. U. S. v. Folsom, (1894) 7 N. M. 532, 38 Pac. 70.

Evidence of false entries at other times is admissible to show the intent in making false entries on the day charged. Allis v. U. S., (1894) 155 U. S. 117, 15 S. Ct. 36, 39 U. S. (L. Ed.) 91.


Periodical statements of other banks.—On the trial of a defendant charged as an officer or agent of a national bank, under this section, with having made false entries in its books in the accounts showing the indebtedness to it of other banks, periodic statements taken from the bank's files and purporting to have been rendered to it by such other banks, and which are shown to have been under the defendant's charge, are admissible in evidence, and they may also be identified by employees of such other banks as having been made under their direction and duly sent by them, and their correctness verified by reference to the books of such banks, which are in evidence and used in connection with such books for convenience of reference, as evidence of the true state of the account between the two banks. Goll v. U. S., (C. C. A. 7th Cir. 1907) 161 Fed. 412, 80 C. C. A. 642.

b. Sufficiency

Where a national bank cashier was indicted for making false entries, and also for indirectly participating in the making thereof, in that he caused and procured them to be made, it was held that proof of either of such charges was sufficient after verdict to sustain a conviction, even though the other was not proved. Richardson v. U. S., (C. C. A. 3d Cir. 1910) 181 Fed. 1, 104 C. C. A. 49. See also Billingsley v. U. S., (8th Cir. 1910) 178 Fed. 653, 101 C. C. A. 465.

14. Burden of Proof

In a prosecution of a national bank officer for making alleged false entries, a plea of not guilty places the government the burden of proving that defendant, within the district and within three years prior to the finding of the indictment, knowingly and intentionally made one or more false entries in the books of the bank with intent to deceive or to aid any agent of the government charged with the duty of supervising the transactions of the bank, or inspecting its books or accounts. U. S. v. Wilson, (S. D. Fla. 1910) 176 Fed. 806.

15. Questions for Jury

The question of the good faith of the defendant in failing to report overdrafts on the ground that they bore interest, and as such should not be reported as overdrafts, is one of fact for the jury. Dorey v. U. S., (C. C. A. 8th Cir. 1900) 101 Fed. 748, 41 C. C. A. 852; Potter v. U. S., (1894) 155 U. S. 428, 15 S. Ct. 144, 39 U. S. (L. Ed.) 214; affirming (C. C. Mass. 1892) 55 Fed. 83.

16. Presumptions

A bank officer who verifies reports to the comptroller is presumed to have knowledge of the contents of such reports, and the jury may presume from the mere making of a false entry therein, in the absence of any explanation or of any testimony on the subject, that the officer knew such entry to be false. U. S. v. Allis,
Persons who are not officers or agents of the bank may commit the offense of aiding and abetting. But there must be a surcease of aid or assistance of the bank, and where a violation of the statute is committed by an officer and an outsider the one must be prosecuted as the principal and the other as an aider and abettor. Coffin v. U. S., (1893) 156 U. S. 432, 15 S. Ct. 394, 39 C. C. L. 481, (1896) 162 U. S. 664, 16 S. Ct. 943, 40 U. S. (L. ed.) 1109.

3. Accessories Before the Fact

The section includes any act of aiding or abetting before the fact by counseling, procuring, or urging it in advance. U. S. v. French, (C. C. Mass. 1893) 87 Fed. 382.

4. Existence of Common Purpose

The existence of a common purpose between the officer and the aider and abettor to procure or subserve the joint interest of the wrongdoers in any enterprise in which they are mutually interested, is not an essential element of the offense of aiding and abetting. The statute is violated if one charged with aiding and abetting is shown to have acted and abetted the officer of the bank in the commission of the offense with intent to injure, defraud, or deceive, no matter whom the accused may have ultimately intended to benefit by his conduct. Coffin v. U. S., (1895) 156 U. S. 432, 15 S. Ct. 394, 39 U. S. (L. ed.) 481, (1896) 162 U. S. 664, 16 S. Ct. 943, 40 U. S. (L. ed.) 1109.

5. Venue


6. Evidence

Criminal intent.—On the prosecution of a defendant, charged under this section with aiding and abetting the cashier of a national bank to misapply the funds of the bank, the misapplication of such funds by the cashier with criminal intent is a material issue, and any competent evidence relevant to such issue is admissible. U. S. v. Hillegass, (E. D. Pa. 1910) 178 Fed. 444, affirmed (C. C. A. 3d Cir. 1910) 183 Fed. 199, 105 C. C. A. 631.

In a prosecution for aiding and abetting the officers of a national bank to wilfully abstract the funds of the bank by means of certain overdraws, evidence that prior to the making of such overdrafts it was agreed that the bank should furnish funds for the operation of certain corporations in which accused and the bank's president and cashier were officers, and that from time to time notes should be given by such corporations to take up the over...
drafts, and that at the time of the advances the value of the corporation’s property was more than $300,000, while the overdrafts aggregated only $30,872.24, was held to be admissible to show absence of criminal intent. U. S. v. Steinman, (C. C. A. 3d Cir. 1908) 172 Fed. 913, 97 C. C. A. 717.

The intent to injure, defraud, or deceive is presumed from the commission of the wrongful and fraudulent acts. A person who, without a balance to his credit or a sufficient balance, draws checks for considerable amounts without the knowledge or consent of the proper bank officials, and with a fraudulent intent that the moneys of the bank shall be applied to the payment of such checks, is guilty of aiding and abetting a criminal misapplication. U. S. v. Kenney, (C. C. Del. 1858) 90 Fed. 527.

Necessity to prove conspiracy or conviction of principal.—To authorize the conviction of a defendant of the statutory offense of aiding and abetting an officer of a national bank in the misapplication of the funds of the bank, in violation of this section, it is not necessary to aver or prove a conspiracy, nor that the principal offender had been convicted; the offenses of the principal and accessory both being misdemeanours of the same grade. U. S. v. Hillegass, (E. D. Pa. 1910) 176 Fed. 444, affirmed (C. C. A. 3d Cir. 1910) 183 Fed. 199, 105 C. C. A. 631.

7. Questions for Jury

The question whether the criminal intent averred in an indictment charging a person with aiding and abetting a cashier in misapplying the funds of a bank is properly inferable from the facts proved is for the jury. U. S. v. Hillegass, (E. D. Pa. 1910) 176 Fed. 444; Prettyman v. U. S., (C. C. A. 6th Cir. 1910) 180 Fed. 30, 103 C. C. A. 384.

Sec. 5210. [List of shareholders, etc., to be kept.] The President and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business-hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency. [R. S.]


Object of statute.—“One, if not the principal, object of this requirement was to give creditors of the association, as well as State authorities, information as to the shareholders upon whom, if the association becomes insolvent, will rest the individual liability for its contracts, debts and engagements.” Pauly v. State Loan, etc., Co., (1897) 165 U. S. 606, 17 S. Ct. 463, 41 U. S. (L. ed.) 844.

“The National Banking Act requires (Rev. Stat. sec. 5210) a list of the names and residences of all the shareholders, and the number of shares held by each to be kept in the banking house, subject to the inspection of all the shareholders and creditors of the association, and (sec. 3139), that every person becoming a shareholder by the transfer of shares to himself shall succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies or securities of the creditors of the association shall be impaired. The object of this legislation is evidently to apprise persons dealing with the bank of the names of the shareholders, upon whom the double liability shall be imposed in case of the insolvency of the bank. In the event of such insolvency it is only existing creditors who can claim to have been damaged by a fraudulent transfer of shares. As to them such transfer is voidable. Subsequent creditors are apprised by the published list of the names of the shareholders, to whom transfers have been made, and of the persons to whom they may have recourse for the double liability.” McDonald v. Dewey, (1908) 205 U. S. 510, 26 S. Ct. 731, 50 U. S. (L. ed.) 1128, 6 Ann. Cas. 419.

State laws.—This section was designed to furnish to the public dealing with a national bank a knowledge of the names of its corporators, and to what extent they might be relied on in giving safety to dealing with the bank. It does not invalidate a state statute requiring the cashier of each national bank to transmit yearly to clerks of towns in which any shareholders of such bank shall reside, a true list of the names of such
shareholders on the books of such bank, together with the amount of money actually paid in on each share. Waite v. Dowley, (1876) 94 U. S. 327, 24 U. S. (L. ed.) 181, affirming (1874) 46 Vt. 689.

Inspection of list by stockholders.—A stockholder in a bank is entitled to inspect the list of stockholders, and his motive for wishing to inspect the list is wholly immaterial. Murray v. Walker, (1913) 156 Ky. 536, 161 S. W. 512, Ann. Cas. 1915C 363.

Statutory right of inspection distinguished from common law right.—The distinction between the right of inspection and examination of corporate books existing at common law, and the statutory right is, that in the former case the power to compel an exercise of the right is discretionary while in a case brought within the term of the statute it is mandatory. People v. Consolidated Nat. Bank, (1905) 105 App. Div. 409, 94 N. Y. S. 173.

Presumption.—In an action by the receiver of an insolvent national bank against an acting cashier and alleged shareholder to recover an assessment of 100 per cent. on his stock it will be conclusively presumed that he performed his duty by keeping a list of the shareholders and was cognizant of its contents and knew that the books showed that he held shares in the bank. Finn v. Brown, (1891) 142 U. S. 66, 12 S. Ct. 356, 35 U. S. (L. ed.) 936.

Mandamus will lie in a state court to compel the officers of a national bank to exhibit to a county assessor a list of names and residences of all shareholders in the bank, with the number of their shares, as required by § 5210, Rev. St. U. S. And the absence of state legislation empowering some taxing officer to make demand upon national bank officers for a list of shares and shareholders does not render § 5210, Rev. St. U. S., inoperative. But where the officers of a national bank have furnished the county assessor a statement giving the amount of its paid-up capital stock, the amount of surplus or reserve fund and the amount of undivided profits, together with the amount invested in real estate, as required by § 21, Laws of 1891, p. 289, mandamus will not lie to compel such bank officers to furnish the assessor with a list of stockholders, and the number of their shares and par value thereof, directed to be exhibited by § 5210, Rev. St. U. S., as such lists are not necessary for making a proper assessment of the shares of capital stock. Paul v. McGraw, (1891) 3 Wash. 296, 28 Pac. 532.

Jurisdiction of federal courts.—On an application to a federal court by a shareholder in a national banking assocation for a writ of mandamus to compel the association to permit him to inspect a list of its shareholders, based on this section, the pleadings must show that the matter in dispute exceeds the statutory amount to give the court jurisdiction. Large v. Consolidated Nat. Bank, (S. D. N. Y. 1906) 137 Fed. 168.

Sec. 5211. [Reports to Comptroller of the Currency.] Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition. [R. S.]


This section was amended by Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 252, by inserting after the words "liabilities of the" the word "association" in place of the word "associations" appearing in the section as originally enacted.
The officer before whom the oath or affirmation required to be taken by this section was designated by the Act of Feb. 26, 1881, ch. 82, infra, p. 813.

By the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 9, infra, p. this section was made applicable to state banks becoming members of federal reserve banks.

This section was made applicable to savings and trust companies organized under authority of an Act of Congress by the Act of June 30, 1876, ch. 156, § 6, infra, p. 813.

Introductory.—"The only legislative provision requiring national banks to make reports are contained in sections 5211 and 5212 of the Revised Statutes." U. S. v. Booker, (D. C. N. D. 1897) 80 Fed. 376.

Purpose of reports.—The reports of the financial condition of the bank made under this section are not made solely for the information of the comptroller and the stockholders and depositors of the bank, but are intended also to afford public information to all persons having or contemplating business transactions into which the condition of the business banking as a material fact. Stuart v. Staplehurst Bank (1899) 57 Neb. 569, 78 N. W. 298; Gerner v. Yates, (1900) 61 Neb. 100, 84 N. W. 596; Gerner v. Mosher, (1899) 58 Neb. 105, 78 N. W. 384, 40 L. R. A. 244; Merchants' Nat. Bank v. Thomas (1892) 11 Ohio Dec. (Reprint) 632, 28 Cinc. L. Bul. 164; Barnes v. Swift, (1894) 3 Ohio Dec. 688.

The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks by this section. Guthrie v. Harkness, (1905) 199 U. S. 148, 26 S. Ct. 4, 50 U. S. (L. ed.) 150, 4 Ann. Cas. 453, affirming (1904) 27 Utah 248, 75 Pac. 624, 107 A. S. R. 864, 1 Ann. Cas. 129.

Power of comptroller to call for reports.—One view of this section is that it limits the power of the comptroller to compel reports concerning the financial condition of a particular association only, and that it is not broad enough to empower him to ask reports regarding general conditions which may have a bearing merely upon the expediency of amendments to the existing law. I think that too narrow a construction of the section, because section 333, Revised Statutes (see infra, p. 934) required the comptroller to make an annual report to Congress at the commencement of its session, showing, among other things, any amendment to the laws relating to banks by which the system may be improved and the security of the holders of its notes and other creditors may be increased, and the power given in section 5211 to call for special reports is, in my opinion, broad enough to authorize him to call for any reports which may be necessary to enable him to determine how, in his opinion, the banking system may be improved by new legislation and what legislation he should recommend to Congress for that purpose." (1912) 29 Op. Atty.-Gen. 555.

The comptroller cannot exercise his power to call for reports merely for the purpose of procuring information for a committee of one of the Houses of Congress on which that committee may base its conclusions at to what amendatory legislation is necessary or desirable. Such committee can not properly expect the Comptroller of the Currency, by a strained construction of the statutes, to exercise a power given to him for a definite purpose to procure information for another purpose, thus receiving directly to the committee information which the law does not authorize it to get directly. (1912) 29 Op. Atty.-Gen. 555.


While it is not expressly required that these reports should contain a true statement of the condition of the association yet by necessary implication, such is the character of the statement required to be made, and by the like implication the making and publishing of a false report is prohibited. Jones Nat. Bank v. Yates, (1916) 240 U. S. 541, 36 S. Ct. 429, 60 U. S. (L. ed.) 1788, reversing on another question (1913) 93 Neb. 121, 139 N. W. 944, 1136.

The report must contain a true statement of the bank's financial condition and not a mere transcript of the condition of the bank as shown by the bank's books. Macdonald v. De Fremery, (1914) 168 Cal. 189, 142 Pac. 73.

Contingent liabilities must be included in the statement of the bank's liabilities. The contingent liability of a bank on an unmatured note, the payment of which at maturity is guaranteed by the bank, is a liability which must under the statute be shown in the report to the comptroller. Cochran v. U. S., (1895) 157 U. S. 286, 15 S. Ct. 629, 39 U. S. (L. ed.) 704.

Overdrafts by customers cannot be entered as loans and discounts though covered by notes, unless the notes have been credited on a customer's account. Bacon v. U. S., (C. C. A. 8th Cir. 1899) 97 Fed. 35, 38 C. C. A. 37; U. S. v. Allis, (E. D. Kan. 1893) 73 Fed. 155; or prior arrangements have been made.

Special deposits made with the understanding that they are not to be mingled with funds of the bank, but are to be returned after being shown to the bank examiner, cannot lawfully be entered on the books of the bank or stated in the report of the bank's condition as deposits. Peters v. U. S., (C. C. A. 9th Cir. 1899) 94 Fed. 127, 36 C. C. A. 103, (C. C. Wash. 1898) 87 Fed. 984.

Verified by oath.—Where a report is verified by an oath taken before one having no authority to administer the oath, an indictment for perjury against the officer so verifying the report is bad. U. S. v. Curtis, (1882) 107 U. S. 671, 27 U. S. (L. ed.) 534.

The word "attest" as used in this section requiring that reports shall be attested by the signatures of at least three of the directors, is not used merely in the sense of witnessing the signature of the president or cashier, but rather in the sense of certifying to the correctness of the report. Gerner v. Mosher, (1899) 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.


Sec. 5212. [Reports as to dividends.] In addition to the reports required by the preceding section, each association shall report to the Comptroller of the Currency, within ten days after declaring any dividend, the amount of such dividend, and the amount of net earnings in excess of such dividend. Such reports shall be attested by the oath of the president or cashier of the association. [R. S.]


By the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 9, infra, p. 825, this section was made applicable to state banks becoming members of Federal reserve banks.

This section was made applicable to savings and trust companies organized under authority of an Act of Congress by the Act of June 30, 1876, ch. 156, § 6, infra p. 811.

Sec. 5213. [Penalty for failure to make reports.] Every association which fails to make and transmit any report required under either of the two preceding sections shall be subject to a penalty of one hundred dollars for each day after the periods, respectively, therein mentioned, that it delays to make and transmit its report. Whenever any association delays
or refuses to pay the penalty herein imposed, after it has been assessed by the Comptroller of the Currency, the amount thereof may be retained by the Treasurer of the United States, upon the order of the Comptroller of the Currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation. All sums of money collected for penalties under this section shall be paid into the Treasury of the United States. [R. S.]


By the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 9, infra, p. 825, this section was made applicable to state banks becoming members of federal reserve banks.

The provisions of this section were made applicable to savings and trust companies organized under authority of an Act of Congress by the Act of June 30, 1876, ch. 156, § 6, infra, p. 813.

Sec. 5214. [Duties payable to the United States.] In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half-year upon the average amount of its notes in circulation, and a duty of one-quarter of one per centum each half-year upon the average amount of its deposits, and a duty of one-quarter of one per centum each half-year on the average amount of its capital stock, beyond the amount invested in United States bonds.

National banking associations having circulating notes secured otherwise than by bonds of the United States, shall pay for the first three months a tax at the rate of three per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax rate of one-half of one per centum per annum for each month until a tax of six per centum per annum is reached, and thereafter such tax of six per centum per annum upon the average amount of such notes: Provided further, That whenever in his judgment he may deem it desirable, the Secretary of the Treasury shall have power to suspend the limitations imposed by section one and section three of the Act referred to in this section, which prescribe that such additional circulation secured otherwise than by bonds of the United States shall be issued only to National banks having circulating notes outstanding secured by the deposit of bonds of the United States to an amount not less than forty per centum of the capital stock of such banks, and to suspend also the conditions and limitations of section five of said Act except that no bank shall be permitted to issue circulating notes in excess of one hundred and twenty-five per centum of its unimpaired capital and surplus. He shall require each bank and currency association to maintain on deposit in the Treasury of the United States a sum in gold sufficient is his judgment for the redemption of such notes, but in no event less than five per centum. He may permit National banks, during the period for which such provisions are suspended, to issue additional circulation under the terms and conditions of the Act referred to as herein amended: Provided further, That the Secretary of the Treasury, in his discretion, is further authorized to extend the benefits of this Act to all qualified State banks and trust companies, which have joined the Federal reserve system, or which may contract to join within fifteen days after the passage of this Act. [R. S.]

This section, as originally enacted was drawn from the Act of June 3, 1864, ch. 106, 13 Stat. L. 111, and read as given in the first paragraph of the text, from the beginning,
thereof through the words "amount invested in United States bonds." By the Aldrich-Vreeland Act of May 30, 1908, ch. 229, § 9, 35 Stat. L. 550 it was amended to read as follows:

"SEC. 5214. National banking associations having on deposit bonds of the United States, bearing interest at the rate of two per centum per annum, including the bonds issued for the construction of the Panama Canal, under the provisions of section eight of "An Act to provide for the construction of a canal connecting the waters of the Atlantic and Pacific oceans," approved June twenty-eighth, nineteen hundred and two, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of such bonds; and such associations having on deposit bonds of the United States bearing interest at a rate higher than two per centum per annum shall pay a tax of one-half of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of such bonds. National banking associations having circulating notes secured otherwise than by bonds of the United States shall pay for the first month a tax at the rate of five per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax of one per centum per annum for each month until a tax of ten per centum per annum is reached, and thereafter such tax of ten per centum per annum upon the average amount of such notes. Every national banking association having outstanding circulating notes secured by a deposit of other securities than United States bonds shall make monthly returns, under oath of its president or cashier, to the Treasurer of the United States, in such form as the said Treasurer may prescribe, of the average monthly amount so secured in circulation; and it shall be the duty of the Comptroller of the Currency to cause such reports of notes in circulation to be verified by examination of the banks' records. The taxes received on circulating notes secured otherwise than by bonds of the United States shall be paid into the Division of Redemption of the Treasury and credited and added to the reserve fund held for the redemption of United States and other notes." And as so amended it superseded a provision of the Parity Act of March 14, 1900, ch. 41, § 13, 31 Stat. L. 49, which was as follows:

"Sec. 13. That every national banking association having on deposit, as provided by law, bonds of the United States bearing interest at the rate of two per centum per annum, issued under the provisions of this Act, to secure its circulating notes, shall pay to the Treasurer of the United States, in the months of January and July, a tax of one-fourth of one per centum each half year upon the average amount of such of its notes in circulation as are based upon the deposit of said two per centum bonds; and such taxes shall be in lieu of existing taxes on its notes in circulation imposed by section fifty-two hundred and fourteen of the Revised Statutes."

The previously cited Aldrich-Vreeland Act of May 30, 1908, ch. 229, expired by limitation of June 30, 1914, by virtue of section 22 thereof, and while it was extended to June 30, 1915, by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 27, infra, p. 843, the latter section expressly provided that this section 5214, and R. S. secs. 5153, 5172, and 5191 which had been amended by the Act of May 30, 1908, ch. 229, should be re-enacted to read as they read prior to the amendment by the last cited Act, subject only to such "amendments or modifications" as were prescribed in said Federal Reserve Act of Dec. 23, 1913, ch. 6.

Referring to section 9 of the Aldrich-Vreeland Act of May 30, 1908, ch. 229, which had amended R. S. sec. 5214, said Federal Reserve Act of Dec. 23, 1913, ch. 6, § 27, contained the following proviso:

"Provided, however, That section nine of the Act first referred to in this section is hereby amended so as to change the tax rates fixed in said Act by making the portion applicable thereto read as follows:

"National banking associations having circulating notes secured otherwise than by bonds of the United States, shall pay for the first three months a tax at the rate of three per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax rate of one-half of one per centum per annum for each month until a tax of six per centum per annum is reached, and thereafter such tax of six per centum per annum upon the average amount of such notes." [38 Stat. L. 274.]

Said Federal Reserve Act of Dec. 23, 1913, ch. 6, § 27, was amended by an Act of Aug. 4, 1914, ch. 225, 38 Stat. L. 662. The amendment consisted in the re-enactment without change of the first part of the section, and amending the proviso relating to emergency currency, which, as previously stated, had amended the Act of May 30, 1908, ch. 229, § 9, 35 Stat. L. 550, and the latter section having been covered by amended R. S. sec. 5214. This last amendment of Aug. 4, 1914, ch. 225 therefore is incorporated in said R. S. sec. 5214 as given in the text beginning with the words "National banking associations" to the end of the section.

In view of the conflicting legislation relating to this section it is difficult to state definitely its present status. The specific re-enactment of the section to read as it was
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prior to its amendment by the Aldrich-Vreeland Act of May 30, 1908, ch. 229, by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 27, infra, p. 843, would seem to restore the section to its original condition. In a proviso to the same section 27 however the Act of May 30, 1908, ch. 229, § 9, which had amended said R. S. sec. 5214 was specifically recognized and amended, as it was in the amending Act of Aug. 4, 1914, ch. 225. It may be that it was the intent of Congress to consider the proviso controlling and to retain so much of section 9 of the Act of May 30, 1908, as related to the taxation of circulating notes secured by United States bonds (i. e., from the beginning of the section down through the words "deposit of such bonds"), substituting the proviso for the remainder of said section 9. See the preliminary article on "Statutes and Statutory Construction," Vol. 1, p. 150, et seq.

The tax on the capital and deposits of banks, bankers, and national banking associations was repealed by the Act of March 3, 1883, ch. 121, 22 Stat. L. 488.

This section is not a revenue measure within the meaning of the constitutional provision "that all bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments as on other bills." Twin City Bank v. Nebeker, (1897), 167 U. S. 196, 17 S. Ct. 766, 42 U. S. (L. ed.) 134.

Solvent banks only are affected by this section. It can have no application to a bank which has passed into the hands of the Comptroller of the Currency. Jackson v. U. S., (1885) 20 Ct. CL. 298.

Banks whose outstanding circulating notes amount to less than five per cent. of capital.—A national bank whose outstanding circulating notes amount to less than five per cent. of its capital is not exempted from the payment of the half-yearly duty imposed by this section upon the average amount of its notes in circulation by the provision of R. S. sec. 3411 (in Internal Revenue, vol. 4, p. 222), that the outstanding circulation of any bank, association, corporation, company, or person shall be free from taxation when reduced to an amount not exceeding five per cent. of its capital, although the latter section is by R. S. sec. 3417, (in Internal Revenue, vol. 4, p. 225), expressly made applicable to national banking associations, since it was so made applicable, as clearly appears from the legislation from which its provisions were drawn, in order to give national banks representing state banks the benefit of the presumption of loss or liability to retire the circulation of the state bank when ninety-five per cent. thereof had been actually retired. Merchants' Nat. Bank v. U. S., (1900) 214 U. S. 33, 29 S. Ct. 593, 53 U. S. (L. ed.) 906, affirming (1898) 42 Ct. Cl. 8.

"Notes in circulation."—Bank notes signed and actually paid over the counter, or otherwise so dealt with as to become liabilities of the bank, are "notes in circulation." But notes merely held in the vaults of the bank, whether signed or unsigned, and notes so signed and held and carried on the books of the bank, are not its "notes in circulation." For the same reason notes that have been obligations of the bank, but cease to be so, and return and remain in the bank, for whatever period, are not, during such period, its "notes in circulation." Notes in Circulation, (1864) 20 Op. Atty.-Gen. 704.


"The amount invested in United States bonds" is to be ascertained by taking the price paid for such bonds and not their market value. Bank Taxation, (1878) 16 Op. Atty.-Gen. 187.

Sec. 5215. [Half-yearly return of circulation, deposits, and capital stock.] In order to enable the Treasurer to assess the duties imposed by the preceding section, each association shall, within ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, of the average amount of its notes in circulation, and of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding the most recent first day of January or July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States. [R. S.]

The tax on deposits and capital stock was repealed by the Act of March 3, 1883, ch. 121, § 1, 22 Stat. L. 488.

See the notes to the preceding R. S. sec. 5214.

Sec. 5216. [Penalty for failure to make return.] Whenever any association fails to make the half-yearly return required by the preceding section, the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the Comptroller of the Currency, and upon the highest amount of its deposits and capital stock, to be ascertained in such manner as the Treasurer may deem best. [R. S.]

The tax on deposits and capital stock was repealed by the Act of March 3, 1883, ch. 121, § 1, 22 Stat. L. 488.

Sec. 5217. [Penalty for failure to pay duties.] Whenever an association fails to pay the duties imposed by the three preceding sections, the sums due may be collected in the manner provided for the collection of United States taxes from other corporations; or the Treasurer may reserve the amount out of the interest, as it may become due, on the bonds deposited with him by such defaulting association. [R. S.]


Sec. 5218. [Refunding excessive duties.] In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the First Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury. [R. S.]


Sec. 5219. [State taxation.] Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of national banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other money capital in the hands of individual citizens of such State, and that the shares of any national banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed. [R. S.]

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I. POWER OF STATE TO TAX
   1. Rule Stated


National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court." Owensboro Nat. Bank v. Owensboro, (1889) 173 U. S. 664, 19 S. Ct. 537, 43 U. S. (L. ed.) 850.


II. FEDERAL DECISIONS AS CONTROLLING

The power of a state to tax national banks or the shares of stock in such banks is derived from Congress, and the decisions of the United States Supreme Court on questions touching the power of the state in this respect are controlling. Des Moines Nat. Bank v. Des Moines, (1911) 152 Ia. 356, 133 N. W. 747.

II. PROPERTY TAXABLE

1. Stock and Real Property


This section, then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property, or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any tax, therefor, which is in excess of, and not in conformity to, these requirements, is void." Owensboro Nat. Bank v. Owensboro, (1889) 173 U. S. 664, 19 S. Ct. 537, 43 U. S. (L. ed.) 860; National Commercial Bank v. Mobile, (1878)

A national bank is under no legal obligation to render and pay taxes on its stock. Lampasas First Nat. Bank v. Lampasas, (1917) 33 Tex. Civ. App. 530, 78 S. W. 42, wherein the court said:

"The only provision of the federal statutes which authorizes such taxation, is section 5219 of the Revised Statutes of the United States, and that permits such taxation as against such banks upon real estate only. It authorizes state taxation of the stock of such banks as against the owners of such stock, but not as against the banks."

This statute, in effect, provides that shares of stock in national banks may be taxed by the state, provided no discrimination is made against such shares in favor of shares of stock of other banks in competition with national banks. Des Moines Nat. Bank v. Des Moines, (1911) 153 Ia. 356, 133 N. W. 767.

A statute authorizing county authorities to levy taxes on the shares of a national bank is not a violation of the National Bank Act, inasmuch as such action on the part of the county authorities is the exercise of an authority delegated by the state. Com. v. Citizens' Nat. Bank, (1804) 117 Ky. 846, 80 S. W. 158.

2. Personal Property of Bank


This section alone furnishes the measure of the power of a state to tax national banks, their property, or their shares. By its unambiguous provisions, the power is confined to a taxation of the shares of its stock in the names of and against the shareholders, and to an assessment of the real estate in the name of and against the bank itself. The necessary effect is to forbid and prevent, of course, the state from assessing or taxing at all any of the personal property of such institutions.

But, in Redemption Bank v. Boston, (1885) 126 U. S. 60, 8 S. Ct. 772, 31 U. S. (L. ed.) 689, it was decided that section 5219 did not prevent the taxation of the shares of the shareholders of another national bank. And in California Bank, etc. v. Roberts, (1916) 173 Cal. 389, 160 Pac. 225, the court said:

"No different rule could be applied to the taxation of shares in a state bank owned by a national bank without violating the provisions of section 5219 requiring 'other moneyed capital' to be assessed at a rate equal to that imposed upon shares in national banks. If the section authorizes the taxation of shares owned by a national bank, it must necessarily contemplate a like taxation of shares in state banks similarly owned."

The personal assets and personal property of an insolvent national bank in the hands of a receiver appointed by the comptroller of the currency, in accordance with the provisions of section 5224 of the Revised Statutes (see infra, p. 850), are exempt from taxation under state laws. Rosenblatt v. Johnston, (1881) 104 U. S. 462, 26 U. S. (L. ed.) 832.

3. Depositors' Credits

Taxation by the state of credits belonging to depositors is permitted under this section provided the scheme of taxation adopted does not constitute an injurious discrimination. Clement Nat. Bank v. Vermont, (1913) 231 U. S. 120, 34 S. Ct. 31, 58 U. S. (L. ed.) 147, wherein the court said: "The object is to prevent hostile discrimination and for this purpose a standard is fixed. . . . With respect to the taxation of depositors' credits in the state banks, the state may prescribe a rule; and, the property being normally subject to the state's taxing power, there is no warrant for implying a restriction which would extend beyond the requirements of protection from the prejudicial effect of such exactions as would be unjustly discriminatory."

4. Franchise or Business


Business.—A tax upon the business done by a national bank is in conflict with the section. Pittsburg v. Pittsburg First Nat. Bank, (1867) 55 Pa. St. 45. See to the same effect Titusville Second
National banks and their operations were governed by various laws and regulations. In the case of Pittsburg First National Bank v. Mc Culloch, the court ruled that banks held in the state of Pennsylvania were not subject to taxation by the city, maintaining that the state could not tax the banks. This principle was extended in National Bank v. Osborn, where the court ruled that federal national banks were not taxable by the state of New York. These cases established the principle that banks had certain immunities from state taxation.

The provision of a state statute for the taxation of national banks was invalidated in a case where the state claimed to tax national banks on their capital stock. In this case, the court held that the state was violating its own constitutional provisions by taxing national banks.

5. Waiver
A national banking institution voluntarily surrendered its capital stock for taxation, and stated, in its answer, in an action to recover the taxes thereon, as increased in value on equalization, that it was willing to pay taxes thereon according to its rendition, it may be held liable for the taxes on the value of its stock as rendered, though taxation of such stock is unauthorized, but an equalization board could not, without its consent, augment its conveyed liability by adding other personal property to its rendition, or raising the value of that which had been rendered. Lampasas First National Bank v. Lampassas, (1903) 33 Tex. Civ. App. 530, 78 S. W. 42.

III. Place of Taxation
Shares of stock can be taxed only in the state where the bank is located. De Baun v. Smith, (1892) 55 N. J. L. 110, 25 Atl. 277.

But where a state taxes shares held in national banks therein it may authorize the assessment of such tax in the city or town, within the same state where the owner lives. Austin v. Boston, (1867) 14 Allen (Mass.) 359, affirmed (1868) 7 Wall. 694, 19 U. S. (L. ed.) 224.

The state may tax all the shares of a national bank within the state without regard to their ownership. The fact that some of such shares are owned by a national bank in another state does not affect the question. Redemption Bank v. Boston, (1888) 125 U. S. 69, 8 S. Ct. 772, 31 U. S. (L. ed.) 689.

IV. Mode of Collecting Tax
1. Rule Stated
While Congress intended to limit state taxation to the shares of the bank as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the states the mode in which the tax should be collected. Thus the appellate courts have held that the bank is liable for the tax on the whole amount of the shares of the stockholders, where the bank is made liable for the amount of the tax with the right to pay the same out of the individual profit account or to charge the same to the expense account or to the accounts of such shareholders in proportion to their ownership, does not violate the provisions of this section. Aberdeen First National Bank v. Chehalis County, (1897) 146 U. S. 440, 17 S. Ct. 629, 41 U. S. (L. ed.) 1069, affirming (1893) 6 Wash. 64, 32 Pac. 1051; Louisville First National Bank v. Kentucky, (1889) 9 Wall. 353, 19 U. S. (L. ed.) 701; Whitney National Bank v. Parker, (E. D. La. 1890) 41 Fed. 402; Batesville First National Bank v. Board of Equalization, (1900) 92 Ark. 335, 122 S. W. 988; Maguire v. Mobile County Board of Revenue, et al., Comrs, (1882) 71 Ala. 401.

Provisions of a state statute for the taxation of national bank stock, requiring the cashier of the bank to pay the taxes assessed against its stockholders, and making him and the bank liable therefor, and for a penalty in addition in case of default, are not illegal as applied to a bank which has in its possession dividends or other funds belonging to its stockholders sufficient to pay the taxes assessed against them. Charleston National Bank v. Melton, (S. D. W. Va. 1909) 171 Fed. 743.

A state statute which provides that shares of stock in national banks shall be subject to taxation for all state purposes and the purposes of each county and city in which the bank is located, and that the bank shall be liable for the taxes upon the shares of stock, is not violative of the National Bank Act, since a state may levy a tax on the shares of stock, and require the bank to pay the tax. Com. v. Citizens' National Bank, (1904) 117 Ky. 946, 80 S. W. 158.

But where a bank is insolvent and has passed into the hands of a receiver who has no assets in his hands belonging to the shareholders which can be applied to the payment of taxes assessed on shares, such tax cannot be collected from the receiver or from assets in his hands. Stappleton v. Thaggard, (C. C. A. 5th Cir. 1898) 91 Fed. 93, 62 L. S. App. 638, 33 C. C. A. 333.

A municipal taxation of the shares of a national bank in salido to the bank itself, on a value made up of the whole amount of the bank's capital and surplus fund, without regard to the residence of the stockholders and without allowing any deduction of the amount of their debts, is in conflict with the section. Richmond...
First Nat. Bank v. Richmond, (E. D. Va. 1889) 39 Fed. 309. And it has been held that a state law taxing the entire amount of the shares against the bank, after deducting the value of its real estate, and fixing a penalty against the bank for nonpayment of the taxes within a certain time, is in conflict with this section. Virginia Nat. Bank v. Richmond, (E. D. Va. 1890) 42 Fed. 877.

2. STATE BANK

It is no objection to a law taxing bank stock that it makes the national bank the agent to collect and does not compel the state bank to do the same. Merchants', etc., Bank v. Pennsylvania, (1897) 167 U. S. 461, 17 S. Ct. 828, 42 U. S. (L. ed.) 236. V. DISCRIMINATION

1. IN GENERAL

This section authorizes the assessment of shares of national banking associations located within a state, in such manner as the legislature of the state may provide, subject only to the restrictions that the taxation should not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state, and that the shares owned by non-residents shall be taxed in the city or town where the bank is located and not elsewhere. Crocker v. Scott, (1906) 149 Cal. 575, 87 Pac. 102.

The paramount question in every case is whether or not the taxing system of taxation complained of materially and injuriously discriminates against national bank shareholders in favor of other moneyed capitalists in a degree tending to discourage investments in the shares of the national banks. Richmond First Nat. Bank v. Richmond, (E. D. Va. 1889) 39 Fed. 309.


"Exact equality from a mathematical standpoint may not be attainable in the matter of taxation, but a system which of necessity, and not from accident or error of judgment, discriminates against the owners in national banks to a large extent, is in violation of the restriction imposed by Congress upon the privilege granted to the states to tax shares in national banks." McHenry v. Downer, (1897) 116 Cal. 29, 47 Pac. 779, 45 L. R. A. 737.


There is no discrimination so long as the state restricts the taxation of shares of national banks to the same kind and degree of taxation that it imposes upon similar capital belonging to its own citizens. Boyer's Appeal. (1883) 103 Pa. St. 387.

The rate need only be uniform in the locality where the shares are taxed. People v. Metz. (1875) 59 N. Y. 101.

The provision of a territorial statute that where the entire capital stock of any incorporated company should be invested in assessable property in the territory, such stock should not be taxed, was held

2. "Moneyed Capital"


The discrimination forbidden by this section does not have reference to the rate of taxation upon the holders of evidences of loans and securities if these securities belong to a class of investments which does not compete with the business of national banks. Aberdeen First Nat. Bank v. Chehalis County, (1897) 186 U. S. 410, 17 S. Ct. 629, 41 U. S. (L. ed.) 1009; Baltimore Nat. Bank v. Baltimore, (C. C. Md. 1899) 92 Fed. 239, (C. C. A. 4th Cir. 1900) 100 Fed. 24, 40 C. C. A. 253.

The terms of the Act of Congress therefore include shares of stock, or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of the business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans or in securities for the payment of money either as an investment of a permanent character or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known generally as personal property. "

The term 'moneyed capital' as used in the federal statute, does not include capital which does not come into competition with the business of national banks and that exemptions from taxation, however large, such as deposits in savings banks, or savings belonging to charitable institutions, which are exempted for reasons of public policy, and not as an unfriendly discrimination against the investments in national bank shares, cannot be forbidden by the federal statutes." Wellington First Nat. Bank v. Chapman, (1889) 173 U. S. 205, 19 S. Ct. 407, 43 U. S. (L. ed.) 669, here to the same effect Richards v. Rock Rapids, (N. D. Ia. 1887) 31 Fed. 510; Estherville First Nat. Bank v. Estherville, (1911) 150 Ia. 95, 129 N. W. 475.

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The term 'moneyed capital' as used in the federal statute, does not include capital which does not come into competition with the business of national banks and that exemptions from taxation, however large, such as deposits in savings banks, or savings belonging to charitable

Capital invested in savings banks and building associations is not regarded as "moneyard capital" is employed in a business, such as the field of insurance companies, express companies, telephone companies, and the like, and coming in competition with the national banks. Utica First Nat. Bank v. Waters, (N. D. N. Y. 1881) 7 Fed. 152; Albany City Nat. Bank v. Maher, (N. D. N. Y. 1881) 6 Fed. 417.

National banks are not protected against discriminatory taxation in favor of other "moneyard capital," unless such other "moneyard capital" is employed in a business which is competitive with that of national banks. Raton First Nat. Bank v. McBride, (1915) 20 N. M. 381, 149 Pac. 353.

By "other moneyard capital" is meant capital in a like enterprise rather than invested in corporations of some other character, such as insurance companies, express companies, telephone companies, and the like, and coming in competition with the national banks. Hall v. Board of Review, (1915) 170 Ia. 300, 152 N. W. 609.

Moneyard capital does not mean all capital the value of which is measured in terms of money, nor all forms of investments in which the interest of the owner is expressed in money, nor shares of stock in railroad, mining companies, manufacturing companies, or other corporations represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire capital and property of the corporation, nor personal property, such as ordinary chattels or commodities, nor investments in the various manufacturing and industrial enterprises; but does include shares of stock, or interest owned by individuals in enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by the use of money. Nelson First Nat. Bank v. Christiansen, (1915) 103 Utah 171, 73 Pac. 775. See to the same effect Des Moines Nat. Bank v. Des Moines. (1911) 153 Ia. 336, 133 N. W. 767.

3. Different System or Method of Taxation


In exercising the power conferred by this section the state is not required to change its system of taxation and assess the shares of stock of its own local banking corporations, directly to the holders thereof, so as to conform to the precise method which it follows in the assessment of shares of national banking associations. All that is required is that shares in national banking associations shall not be taxed by the state at a higher rate than other moneyard capital in the hands of individual citizens of the state, and a law which taxes the property of the local corporations and exempts its shares is not in conflict with Revised Statutes where, by its terms, all property which, if owned by a local banking corporation or citizen of the state, would be exempt from taxation under the state law, is, when owned by a national banking association, to be deducted from the total value of its shares in ascertaining the value of such shares for the purpose of assessment. Nevada Nat. Bank v. Dodge. (C. C. A. 9th Cir. 1902) 119 Fed. 57, 56 C. C. A. 145.

It is not sufficient to show merely that the state laws provide a different mode or manner of taxing moneyard capital invested in savings banks or other corporations from that applied to the taxation of money invested in national banks. Before the assessment of the shares in the national bank can be held invalid and void it must be shown that there is in fact a higher burden of taxation imposed upon the money thus invested than is imposed upon other moneyard capital. Richards v. Rock Rapids, (N. D. Ia. 1897) 31 Fed. 505.

The fact that under the laws of California shares of stock in state banks and
other state moneyed corporations are not permitted to be assessed and taxed is not sufficient to show that a California statute, providing for the taxation of shares in national banks, constitutes an invalid discrimination against national banks, where a different method has been adopted by the state for the assessment and taxation of all the shares of all the state corporations embraced in the assessment of shares of stock in national banks. Crocker v. Scott, (1906) 149 Cal. 575, 87 Pac. 102.

Taxing national bank shares in the hands of the owners while other banking institutions are taxed by a franchise tax is not necessarily a discrimination. Soboee v. Bean, (1906) 109 Ky. 528, 59 S. W. 860.

Taxing capital of state banks while shares of national banks are taxed, if the tax is equivalent, is not a discrimination. Van Slyke v. State, 23 Wis. (Appendix) 655.

Under the laws of Ohio unincorporated banks and bankers were taxed upon the amount of moneyed capital employed in the business after deducting debts existing in the business itself, whereas incorporated banks and national banks were taxed upon the actual value of their shares in money. This was held to be no discrimination against national banks, and all that was required under the section was equality so far as the different facts would permit in the taxation of moneyed capital. Wellington First Nat. Bank v. Chapman, (1899) 173 U. S. 205, 19 S. C. 207, 43 U. S. L. 7.


The retroactive features of the Kentucky Act of March 21, 1900, making it the duty of certain officers of each national bank to list its shares of stock for taxation, and requiring the bank to pay the tax and penalty for delinquency, subject to a deduction on account of taxes paid by the bank under other legislation, do not, so far as the shares of resident shareholders are concerned, operate to discriminate against the bank, contrary to this section, nor to deny due process of law, although the shareholders and the number of shares may not be the same as when the liability to taxation arose, because such statute is construed by the state courts as not imposing any new liability upon domestic shareholders or the bank, but as simply providing another method for the assessment of shares which have escaped assessment because not listed for taxation. Citizens' Nat. Bank v. Kentucky, (1910) 217 U. S. 443, 30 S. Ct. 532, 54 U. S. (L. ed.) 832.

But the retroactive provision of the above Act, relating solely to national banks, by which such banks are charged with a liability for taxes for past years on their capital stock, whether held within or without the state, and are subjected to a penalty in addition for delinquency, operates as a discrimination against such banks, prohibited by this section, where, until the passage of that Act, national banks were not required to return for taxation shares of their capital stock held outside of the state. Covington v. Covington First Nat. Bank, (1905) 195 U. S. 100, 25 S. Ct. 502, 49 U. S. (L. ed.) 963, affirming (C. C. Ky. 1901) 103 Fed. 523.

4. Taxation at Actual Value


But a state law allowing to all moneyed capital employed in any business in the state, not held in shares of stock in some incorporated company, an exemption of non-taxable property, but not allowing such exemption to moneyed capital held in shares, is in conflict with the section. Whitney Nat. Bank v. Parker, (E. D. La. 1890) 41 Fed. 402.

A discrimination against national banks, and in favor of state banks and other moneyed corporations, forbidden by this section, results from the taxation of shares of stock of national banks under a state statute at their market value, while the construction given by the highest state court to the provisions for the taxation of the "property" of state banks and other moneyed corporations does not require, although property is defined by the state constitution to include "franchises," that the assessing officers shall include in the assessment all the intangible elements of value which form part of the market and selling value of shares of stock. San Francisco Nat. Bank v. Dodge, (1905) 197 U. S. 70, 25 S. Ct. 384, 49 U. S. (L. ed.) 669.

5. Tax upon Par Value

This section does not forbid discrimination between national banks, but only as between such banks and state banks or
other moneied capital in the hands of private individuals, and a state statute giving all banks alike the privilege of discharging all tax obligations by collecting from their stockholders and paying eight mills on the dollar upon the par value of the stock in lieu of the ordinary state tax of four mills upon all bank shares is not in violation of the section because under the operation of the law one bank may pay at a less rate upon the actual value of its banking property than another bank. Merchants', etc., Bank v. Pennsylvania, (1897) 167 U. S. 461, 17 S. Ct. 529, 42 U. S. (L. ed.) 236.

The method pursued by a local board of assessors of assessing all shares of national bank stock at par after deducting the value of their real estate is not in violation of the section where it does not discriminate between national banks and one estimate of capital per share in the state, though because of the difference in the actual value of the stock it favors some banks. Stanley v. Albany County, (1887) 121 U. S. 535, 7 S. Ct. 1234, 30 U. S. (L. ed.) 1000, (N. D. N. Y. 1883) 14 Fed. 482; Exchange Bank Tax Cases, (N. D. N. Y. 1884) 21 Fed. 99.

6. Discrimination as to Percentage of Valuation


There is an unlawful discrimination against national bank shares where it is shown that the assessing officers assess in any considerable amount moneied capital at one-third or one-half of its actual cash value and national bank shares at two-thirds of their cash value. Shreveport First Nat. Bank v. Lindsay, (W. D. La. 1891) 45 Fed. 619.

Where the tax upon personal property including the moneied capital of private citizens in a certain county is made upon an estimate of sixty per centum of its cash value in all cases except with regard to bank stocks, the valuation of which latter is fixed upon the same basis at sixty-five per centum, it is a discrimination within the meaning of the section though such per centum was fixed by the state board of equalization for the purpose of making the capital stock of all incorporated banks in the state equal in valuation for the purposes of taxation so far as relates to their actual cash value. Whitbeck v. Mercantile Nat. Bank, (1888) 127 U. S. 193, 9 S. Ct. 1121, 32 U. S. (L. ed.) 118.

An increase in the value of shares in national banks made by the board of equalization, from sixty per cent, of their true value in money as fixed by the county auditor, to sixty-five per cent, as fixed by the board (other property being valued at sixty per cent.), amounts to such a discrimination in the taxation of the shareholders of such banks as is forbidden by the federal statute. Wellington First Nat. Bank v. Chapman, (1899) 173 U. S. 205, 19 S. Ct. 407, 43 U. S. (L. ed.) 069.

Where the law under which the taxes are assessed and levied is not itself in conflict with the section, but the officers charged with the administration of the law adopt a rule or system of valuation for purposes of taxation which discriminate against national banks, the appropriate mode of relief is to pay the amount of the tax which is equal to that assessed on other property and to sue to restrain the collection of the excess. Pelton v. Commercial Nat. Bank, (1880) 101 U. S. 143, 25 U. S. (L. ed.) 901; Cummings v. Merchants' Nat. Bank, (1880) 101 U. S. 153, 25 U. S. (L. ed.) 903.

7. Omission of Officers to Assess Other Property

Where it is shown that the assessing officers wrongfully or through gross negligence failed, refused, or omitted to subject moneied capital known by them to be in the hands of individual citizens of the taxing district in any large sum, or for any other cause subjected only a trifling amount of such value to taxation, the bank is entitled to relief to the extent of having the whole assessment against it annulled. Shreveport First Nat. Bank v. Lindsay, (W. D. La. 1891) 45 Fed. 619.

8. Shares Taxed to Owners

Though the shares of stock of the national banks are to be taxed to the owners of such shares, these may not be at a greater rate than is assessed on other moneied capital in the hands of individual citizens of the state. A rate may be greater, not only owing to a higher percentage of the levy, but in consequence of some method of assessment or taxation which would discriminate against national banks unfavorably. Head v. Board of Review, (1913) 170 la. 300, 152 N. W. 600.

9. Entire Process of Assessment

The words "at a greater rate than is assessed upon other moneied capital in the hands of individual citizens," refer to the entire process of assessment, which in the case of national bank shares includes both their valuation and the rate
of percentage on such valuation; consequently the Act of Congress is violated if, in connection with the fixed percentage applicable to the valuation of national bank shares and of other moneyed investments or capital, the state law establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than other moneyed capital. Boyer v. Boyer, (1885) 113 U. S. 689, 5 S. Ct. 708, 28 U. S. (L. ed.) 1089; Stanley v. Albany County, (1887) 121 U. S. 555, 7 S. Ct. 1254, 30 U. S. (L. ed.) 1006; People v. Weaver, (1879) 100 U. S. 559, 25 U. S. (L. ed.) 705; Richards v. Rock Rapids, (N. D. Ia. 1887) 31 Fed. 505; McHenry v. Downer, (1897) 116 Cal. 20, 47 Pac. 779, 45 L. R. A. 737.

Any system of assessment of taxes which exacts from the owner of the shares of a national bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner does tax them at a greater rate within the meaning of the Act of Congress. Pearl v. Commercial Nat. Bank, (1890) 101 U. S. 143, 25 U. S. (L. ed.) 901.

10. Intention to Discriminate

It must appear in the Act of legislature that it was the intention of the statute to tax the shares of the capital stock of the national banks at a higher rate than other moneyed capital in the hands of individuals, or there must be some agreement or combination or rule established by the assessors, the necessary effect of which is to produce the same result. Chicago First Nat. Bank v. Farwell, (C. C. Ill. 1881) 7 Fed. 518.

The fact that a special system of taxation of national banks may not be as favorable as the general system of taxation in an isolated case does not render the system unlawful as discriminating against those institutions, so long as there is no intentional discrimination and no equality in the effect upon their stockholders. People v. Feitner, (1908) 191 N. Y. 88, 83 N. E. 592. See also Estherville First Nat. Bank v. Esther- ville, (1907) 136 Ia. 203, 112 N. W. 829.

In German Nat. Bank v. Kimball, (1881) 103 U. S. 732, 26 U. S. (L. ed.) 469, it was held that no case for relief is made by averring that the assessments are unequal and partial, and that some other property is rated for taxable purposes at less than one-half of its cash value, unless it is further averred that the officers appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others and higher than the average rate. See also Exchange Nat. Bank v. Miller, (S. D. Ohio 1884) 19 Fed. 372; Wagoner v. Loomis, (1881) 37 Ohio St. 571.


If it does appear that either by the express provisions of the state statutes or by the mode in which the same are construed by the state officials, or by the manner in which the valuation of the property is arrived at, money invested in national banks is intentionally subjected to a greater burden of taxation than is imposed upon other moneyed capital, then the tax thus imposed will be invalid and the owner of the shares thus discriminated against will be entitled to protection and relief. Richards v. Rock Rapids, (N. D. Ia. 1887) 31 Fed. 505.

11. Proof of Discrimination

Where the state statute treats shares of stock in a national bank upon a perfect equality with shares of stock in a state bank for the purpose of assessment and taxation, the single fact that it permits some debts to be deducted from some moneyed capital termed "credits," but not from that which is invested in the shares of national banks, is not sufficient to show a violation of the section where there is no proof in the case as to the proportion which credits, from which such debts may be deducted, bear to the whole amount of the credits owned in the state, nor any proof as to what proportion the entire credits owned in the state bear to other moneyed capital owned therein. Garnett First Nat. Bank v. Ayers, (1896) 160 U. S. 660, 16 S. Ct. 412, 40 U. S. (L. ed.) 673.

A state law which limits the rate of taxes on bonds, certificates of indebtedness, and evidences of debt in whatever form, and upon all shares of stock owned in foreign companies owned by residents of the state, to thirty cents on each hundred dollars, while the rate of tax on shares of stock in all banks and corporations incorporated under the state laws is not limited, is not in conflict with this section, it not appearing that there is any material amount of moneyed capital which competes with the banks which thereunder pays a less rate of taxation. Baltimore Nat. Bank v. Baltimore, (C. C. Md. 1910) 99 Fed. 238, (C. C. A. 4th Cir. 1900) 100 Fed. 24, 40 C. C. A. 254.

VI. Exemptions and Deductions

1. Nontaxable Property Belonging to Bank

Property of a national bank is distinct and separate from the shares of stock in

In Louisville First Nat. Bank v. Kentucky, (1870) 9 Wall. 353, 19 U. S. (L. ed.) 701, a statute of the state of Kentucky which imposed a tax of fifty cents a share on bank stock, or stock in any moneved corporation, of loan or discounts, owned by individuals, corporations, or societies, was held to authorize a tax on the shares of the stockholders, as distinguished from the capital of the banks invested in federal securities; and this although the tax was collected from the bank instead of the individual stockholders. In the opinion of the court delivered by Mr. Justice Miller, a summary statement was made of the doctrine enunciated in the prior decisions recognizing the distinction between the property owned by an incorporated bank as a corporate entity and the property or interest of the stockholders in such bank, commonly called a "share."

2. Taxable Property Belonging to Bank
In general.—Shares in national banks are not understood as the individual property or choses of the stockholders, as contradistinguished from aliquot parts of the capital and property of the bank, and as such may be taxed at their full value without deduction for the franchise, or for real estate otherwise taxed. Frazer v. Siebern, (1886) 16 Ohio St. 614.

The fact that the bank owns stock in other corporations which are taxed by the state does not entitle the shareholder to any deduction from the value of his shares. Pacific Nat. Bank v. Pierce County, (1899) 20 Wash. 675, 56 Pac. 936.

3. Municipal, State and Federal Bonds
The exemption from municipal taxation under an ordinance of a city of its interest-bearing bonds does not operate to exempt from like taxation the shares in a national bank located in the same city. Adams v. Nashville, (1877) 95 U. S. 19, 24 U. S. (L. ed.) 389, wherein the court said: "The Act of Congress was not intended to curtail the state power on the subject of taxation. It simply required that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property in the legislature chose to do so." See to the same effect Marion Nat. Bank v. Burton, (1906) 121 Ky. 876, 90 S. W. 944, 10 L. R. A. (N. S.) 947.

"Bonds issued by the state or under its authority by its public municipal bodies are means for carrying on the work of the government, and are not taxable even by the United States, and it is not a part of the policy of the government which issues them to subject them to taxation for its own purposes. Such securities undoubtedly represent moneved capital, but as from their nature they are not ordinarily the subjects of taxation they are not within the reason of the rule established by Congress for the taxation of national bank shares. The same considerations apply to what is called an exemption from taxation of shares of stock of corporations created by other states and owned by citizens of the state." Mercantile Nat. Bank v. New York, (1897) 121 U. S. 138, 7 S. Ct. 828, 30 U. S. (L. ed.) 896.

In New York v. Tax, etc., Com'r, (1886) 4 Wall. 244, 18 U. S. (L. ed.) 344, a deduction or allowance was made under the laws of the state in assessments against individuals and insurance companies on account of investments in the securities of the United States, while none was made in assessing the owner of shares in a national bank, and the tax was sustained.

It is not a discrimination against shares in a national bank to permit the deduction, in the case of unincorporated banks and individual bankers, from the assessed value of their property, of United States bonds or other nontaxable securities owned by them, although no such deduction is made in the case of the assessment of the shares of national bank stock. Exchange Nat. Bank v. Miller, (S. D. Ohio 1884) 19 Fed. 372; National State Bank v. Burlington, (1903) 119 Ia. 696, 94 N. W. 234.
The statutory rule that the rate of taxation upon the shares in a national bank should be the same or not greater than upon the moneys of the individual citizen which is liable to taxation, was not intended to cut off the power of the legislature to exempt bonds of the state from taxation. And this exemption extends to shares of stock in a bank holding such bonds, and entitles the individual shareholders to deduct from the value of their shares that proportion of the value invested in the bonds. In re First Nat. Bank of Chickasha, (Okla. 1916) 160 Pac. 469.

The taxation of national bank shares of stock, without deducting therefrom the government bonds held by the bank issuing such stock, would create a discrimination against national banks in violation of section 5219. Des Moines Nat. Bank v. Des Moines, (1911) 153 Ia. 336, 133 N. W. 767.

4. Real Estate

The refusal to deduct from the value of shares in a national bank the value of real estate owned by the bank in another state does not constitute an unjust discrimination against the bank within the meaning of this section, where the shares of stock are taxed as other similar property in the state. Commercial Nat. Bank v. Chambers, (1901) 192 U. S. 556, 21 S. Ct. 883, 45 U. S. (L. ed.) 1227.

Taxing stock at full cash value to stockholder and real estate to bank is not double taxation or unjust discrimination. Illinois Nat. Bank v. Kinsella, (1903) 201 Ill. 51, 66 N. E. 338.

5. Mortgages, Judgments, etc.

In Gorgas's Appeal, (1872) 79 Pa. St. 149, the state law exempted all mortgages, judgments, recognizances, or moneys owing upon articles of agreement for the sale of real estate, and it was held that such exemption did not preclude the state from taxing national bank shares to the same extent that moneys of capital other than the character exempted were taxed, and this was followed in Hepburn v. Carlisle, (1875) 23 Wall. 480, 23 U. S. (L. ed.) 112.

6. Charter Exemptions

An exemption from taxation of shares of stock of all those corporations which by virtue of any contract in their charters or other contracts with the state are expressly exempted from taxation, and mutual life insurance companies specially taxed, does not make the taxation of the shares of national bank stock unfair. National Banking Co. v. Arkansas, (1887) 121 U. S. 163, 7 S. Ct. 839, 30 U. S. (L. ed.) 904; Richmond v. Scott, (1874) 48 Ind. 568; Stilz v. Tuttewiler, (1874) 48 Ind. 600.

A decree of the state court prohibiting the collection of taxes attempted to be collected from a national bank, on the ground that the bank had an irrevocable contract arising out of the acceptance of an act of the legislature, is not res adjudicata on the question of collection of similar taxes after the expiration of the bank's charter and its renewal under the Act of Congress. Louisville Third Nat. Bank v. Stone, (1890) 174 U. S. 432, 19 S. Ct. 759, 43 U. S. (L. ed.) 1055, reversing (C. C. Ky. 1888) 88 Fed. 409.

7. Indebtedness


But a state statute providing for a tax on bank shares including state and national is not in violation of this section, because not allowing any deductions for the owners' debts. Amoskeag Sav. Bank v. Purdy, (1913) 231 U. S. 373, 34 S. Ct. 807.
114, 58 U. S. (L. ed.) 274, wherein the court said: "It is not insisted that this tax law discriminates against national banks or the stockholders thereof as compared particularly with individual bankers, trust companies or savings banks. The ground of complaint is that § 24, in providing that owners of bank stock (state or national) shall not be entitled to deduction from the taxable value of their shares because of their personal indebtedness, is contrary to the restriction contained in § 5219, Rev. Stat., that the shares of national banks shall not be taxed 'at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state,' because under § 21 of the Tax Law all persons are permitted to deduct their debts from their other taxable personal property in general, including, in other words, other moneyed capital. Plaintiff in error relies chiefly upon the decision of this court in New York v. Weaver, (1850) 100 U. S. 539, 25 U. S. (L. ed.) 706. That case was in effect a review of the decision of the Court of Errors of New York in People v. Dolan, (1867) 36 N. Y. 59. The question was as to the validity of an assessment and taxation of national bank shares in the city of Albany under the state law of April 23, 1866 (N. Y. Laws 1866, p. 1847), without deduction because of the indebtedness of the taxpayer, in view of the fact that under other laws the owners of other kinds of personal property were entitled to have the amount of their debts deducted from the valuation for the purposes of taxation. The state court in the Dolan Case had justified the method adopted in taxing the bank shares, upon reasoning that assumed 'that while Congress limited the state authorities in reference to the ratio or percentage levied on the value of its shares, which could not be greater than 5%, it left the matter of the relative valuation of the shares and of other moneyed capital wholly to the control of state regulation.' This court held that the clause in § 5219, 'that the taxation shall not be at a greater rate than is assessed upon other moneyed capital,' etc., meant that the taxation upon shares should not be greater than on other moneyed capital, taking into consideration both the rate of assessment and the valuation of the shares of national, no deduction is allowed for the value of real estate owned by the banks, the law is not in conflict with the section because other taxpayers are allowed to deduct the amount of their individual indebtedness from the amount of bonds, notes, and other evidences of debts owned by them. People's Nat. Bank v. Marye, (E. D. Va. 1901) 107 Fed. 570.

A New York statute provided that the fiscal officer of every bank should report to the assessors the amount of the capital invested both state and national, no deduction is allowed for the value of real estate owned by the banks, the law is not in conflict with the section because other taxpayers are allowed to deduct the amount of their individual indebtedness from the amount of bonds, notes, and other evidences of debts owned by them. People's Nat. Bank v. Marye, (E. D. Va. 1901) 107 Fed. 570.

The mere fact that the owner of what are termed "credits" in a state statute is permitted to deduct certain classes of debts from the sum of such credits to arrive at their assessable value, while the national bank shareholder is not permitted to deduct his debts from the value of his credit for the purpose of taxation, does not constitute a case of discrimination against the latter which the court can consider in the absence of a finding as to the total amount of credits in the state, or what proportion of the credits consists of money capital in the hands of individuals which in fact enters into competition for business with national banks. Wellington First Nat. Bank v. Chapman, (1899) 1 7 3 U. S. 205, 19 S. Ct. 407, 43 U. S. (L. ed.) 669.

While a provision of a state revenue statute that stockholders in national banks shall not be entitled to any deduction from the assessed valuation of their shares because of debts owed by them, while owners of other "money, credits, or the assessors' the amount of such debt, authorized, is invalid as applied to a stockholder who owes debts and who has not sufficient other money, credits, or investments from which such debts may be deducted, as subjecting him to taxation "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens" of the state in violation of R. S. sec. 5219, it is not so invalid as to a stockholder who is not actually affected by it to his detriment, and a bill filed by a bank to enjoin the collection of taxes imposed on its stockholders because of such provision must allege facts showing the portion of the tax so rendered illegal, and that the valid portion has been paid or tendered, in order to entitle the complainant to equitable relief. Charleston Nat. Bank v. Melton, (S. D. W. Va. 1909) 171 Fed. 743.

The section contemplates that the tax on the real estate belonging to a national bank may be imposed independently of the tax upon its shares, and where in taxing the shares of national banks, in the state, it is not in the amount of the state taxable value, and the rate is assessed upon the assessed value, the value of the shares assessed, and the amount of the tax imposed, is on which the state tax is to be determined, and the amount of other moneyed capital held in the state, the matter of the relative valuation of the shares and of other moneyed capital wholly to the control of state regulation. The court held that the clause in § 5219, 'that the taxation shall not be at a greater rate than is assessed upon other moneyed capital,' etc., meant that the taxation upon shares should not be greater than on other moneyed capital, taking into consideration both the rate of assessment and the valuation of the shares of national, no deduction is allowed for the value of real estate owned by the banks, the law is not in conflict with the section because other taxpayers are allowed to deduct the amount of their individual indebtedness from the amount of bonds, notes, and other evidences of debts owned by them. People's Nat. Bank v. Marye, (E. D. Va. 1901) 107 Fed. 570.
greater than that assessed upon other moneied capital in the hands of individual citizens, and that the owners of the stock should be entitled to no deduction from the taxable value thereof because of their personal indebtedness. It was that an assessment based upon these statutes was not void as being a discrimination against national bank stock, within R. S. sec. 3219, because no deduction of debts was allowed, as was permitted in the case of other corporations and individuals. People v. Feitner, (1908) 191 N. Y. 88, 83 N. E. 592.

Allowing unincorporated state banks to deduct indebtedness from credits is not necessarily a discrimination, as, such banks having no capital stock, a different method of taxation must necessarily be adopted. Wayne County v. Bressler, (1891) 32 Neb. 818, 49 N. W. 782.

Where there is no deduction allowed for debts to owners of state and private banks, nor to owners of moneyed capital generally, it need not be allowed to owners of national bank shares. Chapman v. Wellington First Nat. Bank, (1897) 56 Ohio St. 310, 47 N. E. 54.

Allowing private banks to deduct deposits from value of assets is not a discrimination. Engelke v. Schlenker, (1890) 76 Ohio 559, 12 S. W. 996.

Before a state statute denying right in taxation to deduct debts from stock in national banks assessed with taxes, but allowing such deduction from other investments, can be held as in violation of this section, it must appear that other moneied capital exists and in such amount as to operate as a discrimination against such banks, and that it is of such character as to come in competition with national banks. West Virginia Nat. Bank v. Dunkle, (1909) 65 W. Va. 210, 64 S. E. 531.

8. Nonresident Shareholders
Nonresident shareholders of national banks are entitled to the same exemptions and deductions as against the value of their shares of stock, in ascertaining the taxes due from them, that are granted to resident shareholders, and it is shown that a case of discrimination against them by the state, which entitles them to relief in the federal Circuit Court, nonresident shareholders in the same bank who have taken the same necessary measures to protect the right of deduction will be entitled to the same relief, and a decree may be prepared accordingly. Mercantile Nat. Bank v. Shields, (N. D. Ohio 1894) 59 Fed. 932.

9. Partial Exemption
A partial exemption by a state for local purposes of moneied capital in the hands of individual citizens does not of itself, and without reference to the aggregate amount of moneied capital not so exempted, establish the right to a similar exemption in favor of national bank shares held by persons within the same jurisdiction. Hepburn v. Carlisle, (1875) 23 Wall. (U. S.) 486, 25 U. S. (L. ed.) 112, wherein the question was whether the exemption from taxation by statute of "all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate" made the taxation of shares in national banks unequal and invalid. This was decided in the negative on the two grounds: (1) That the exemption was founded on the just reason of preventing a double burden by the taxation both of property and of the debts secured upon it; and (2) because it was partial only, not operating as a discrimination against investments in national bank shares. The court said: "It could not have been the intention of Congress to exempt bank shares from taxation because some moneied capital was exempt." See further Utica First Nat. Bank v. Waters, (N. D. N. Y. 1881) 7 Fed. 152.

The moneied capital in the hands of individuals must be some considerable amount to make the exemption from taxation a discrimination. Washington Nat. Bank v. King County, (1894) 9 Wash. 607, 38 Pac. 219. But a state law which subjects to taxation the shares of national banks and exempts from like taxation a very material portion of other moneied capital in the hands of individual citizens and corporations is in conflict with this section. Boyer v. Boyer, (1885) 113 U. S. 689, 5 S. Ct. 706, 28 U. S. (L. ed.) 1099.

VII. JURISD ICTION OF CASES OF UNJUST DISCRIMINATION
1. State
Where the tax law of a state provides for a board of equalization with power to hear complaints respecting the justice of any assessment, and also prescribes the time and place when and where such complaints may be heard, and also provides that the assessor of national bank shares shall give written notice to each national bank of the assessment of its shares, it provides a sufficient notice of the proceedings for the assessment and taxation of the property. Nevada Nat. Bank v. Dodge, (C. C. A. 9th Cir. 1902) 119 Fed. 57, 56 C. C. A. 145.

While a state statute taxing the shares of a national bank is in conflict with this section in so far as it does not permit the stockholder to deduct the amount of his just debts from the assessed value of his stock while at the same time allowing the owner of all other personal taxable property to deduct such debts from its value, yet neither the statute nor the
assessment under it is for that reason void, and if the stockholder does not take the proper proceeding required by the state law to obtain a correction of the over assessment, if any there be, in his case he is estopped to recover back the taxes paid. Stanley v. Albany County, (1887) 121 U. S. 535, 7 S. Ct. 1234, 30 U. S. (L. ed.) 1000.

2. Federal

A national bank or stockholder therein has the right to go into a federal court of equity to test the validity, under this section, of a tax levied by state authority on the stock of the bank, where there is no adequate remedy at law in such court, notwithstanding a remedy provided by the state statute. Charleston Nat. Bank v. Melton, (S. D. W. Va. 1909) 171 Fed. 743.

VIII. INJUNCTION

1. In General


But where the entire tax is contested as having been imposed under a law which is invalid because it conflicts with this section, a bill in equity will lie to restrain collection of the entire tax. Covington First Nat. Bank v. Covington, (C. C. Ky. 1900) 103 Fed. 523.

If the state tax is in violation of the section, not because the tax is made without any authority, but because it discriminates against national bank shares, the whole tax will not be enjoined but only the excess. Whitney Nat. Bank v. Parker, (E. D. La. 1890) 41 Fed. 402.

Where the bank made a false return and did not apply to the board of equalization for correction, the collection of the tax will not be enjoined. Missoula First Nat. Bank v. Bailey, (1895) 15 Mont. 301, 39 Pac. 83.

2. Who May Sue

A bank which is authorized but not compelled by the state statute to pay the taxes assessed against its shareholders cannot maintain a suit in equity to enjoin the collection of the tax. People's Nat. Bank v. Marye, (E. D. Va. 1901) 107 Fed. 570.

But where the bank is compelled by the law to pay the taxes under certain penalties for its failure to do so the action may be maintained by it. People's Nat. Bank v. Marye, (E. D. Va. 1901) 107 Fed. 570; Whitney Nat. Bank v. Parker, (E. D. La. 1890) 41 Fed. 402.

A national bank may maintain a bill in equity on behalf of all its stockholders to enjoin the collection of taxes on its shares imposed under an invalid law. Covington First Nat. Bank v. Covington, (C. C. Ky. 1900) 103 Fed. 323.

Where the state law imposes upon the bank officers the duty to retain out of the dividends belonging to the respective shareholders a sum sufficient to meet the taxes assessed upon their shares, and further subjects the officer who pays dividends to a shareholder before the taxes upon his shares are satisfied to personal liability for such taxes, a suit to enjoin collection of taxes on the ground of discrimination may be brought in the name of the bank. Evansville Nat. Bank v. Britton, (C. C. Ind. 1881) 8 Fed. 367; National Albany Exch. Bank v. Hills, (N. D. N. Y. 1880) 5 Fed. 248.

3. Pleading

The bill in a suit by a national bank to enjoin threatened proceedings to enforce payment by the bank of state and local taxes upon its capital stock, which explicitly sets forth the fact and manner of discrimination against shareholders of national bank stock in the valuation thereof for assessment as compared with the assessment for the same year of other moneyed capital in the hands of individual citizens of the state and invested in the state, so as to make a profit from the use thereof as money, is sufficient on demurrer. Paget Sound Nat. Bank v. King County (C. C. Wash. 1893) 57 Fed. 433.

SEC. 2. [Lawful money reserve determined by amount of deposits.] That section thirty one of the [sic] "the national bank act" be so amended.
that the several associations therein provided for shall not hereafter be required to keep on hand any amount of money whatever, by reason of the amount of their respective circulations; but the moneys required by said section to be kept at all times on hand shall be determined by the amount of deposits in all respects, as provided for in the said section. [18 Stat. L. 123.]

The provisions of the foregoing section 2 and the following section 3 were from an Act of June 20, 1874, ch. 343. For reference to the entire Act see the notes to section 1 thereof, supra, p. 650.

Section 31 of the National Bank Act mentioned in the text is now R. S. secs. 5191, 5192, supra, pp. 741, 743. See the notes to said sections.

The Federal Reserve Act of Dec. 23, 1913, ch. 6, § 20, infra, p. 841, provided that so much of the foregoing section 2 and the following section 3 of this Act "as provides that the fund deposited by any national banking association with the Treasurer of the United States for the redemption of its notes shall be counted as a part of its lawful reserve as provided in the Act aforesaid, is hereby repealed. And from and after the passage of this Act such fund of five percentum shall in no case be counted by any National banking association as a part of its lawful reserve.

SEC. 3. [Reserve on deposit to redeem circulation — mutilated notes — cost of transportation.] That every association organized, or to be organized, under the provisions of the said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation; which sum shall be counted as a part of its lawful reserve, as provided in section two of this act; and when the circulating notes of any such associations, sorted or unsorted, shall be presented for redemption, in sums of one thousand dollars, or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes. All notes so redeemed shall be charged by the Treasurer of the United States to the respective associations issuing the same, and he shall notify them severally, on the first day of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of five hundred dollars, such association so notified shall forthwith deposit with the Treasurer of the United States a sum in United States notes equal to the amount of its circulating-notes so redeemed. And all notes of national banks worn, defaced, mutilated, or otherwise unfit for circulation shall, when received by any assistant treasurer or at any designated depository of the United States, be forwarded to the Treasurer of the United States for redemption as provided herein. And when such redemptions have been so reimbursed, the circulating-notes so redeemed shall be forwarded to the respective associations by which they were issued; but if any of such notes are worn, mutilated, defaced, or rendered otherwise unfit for use, they shall be forwarded to the Comptroller of the Currency and destroyed and replaced as now provided by law: Provided, That each of said associations shall re-imburse to the Treasury the charges for transportation, and the costs for assorting such notes; and the associations hereafter organized shall also severally re-imburse to the Treasury the cost of engraving such plates as shall be ordered by each association respectively; and the amount assessed upon each association shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the Treasurer: And provided further, That so much of section thirty-two of
said national-bank act requiring or permitting the redemption of its circulating notes elsewhere than at its own counter, except as provided for in this section, is hereby repealed. [18 Stat. L. 123.]

Sec the notes to the preceding section 2 of this Act, for provisions repealing this section in part.
Section 32 of the National Bank Act repealed in part by the text was embodied in R. S. sec. 5105, supra, p. 743.
See the notes to R. S. sec. 5191, supra, p. 741.
This section was amended by the Act of July 28, 1892, ch. 317, infra, p. 816.

Redemption of circulation.—A national banking association may under this section deposit coin in the treasury for the redemption of its circulation. The treasury, while privileged to redeem such circulation in United States notes has also the right to redeem the same circulation in coin. (1881) 17 Op. Atty-Gen. 144.

Effect of amendment of 1892.—"By the Act of June 20, 1874, 18 Stat. 123, every national bank was required to keep on deposit in the treasury of the United States a sum of money equal to 5 per cent. of its outstanding circulation as a special fund for the redemption of that circulation, and when any of its notes should be presented for redemption the same were paid by the treasurer, and the amount so paid charged to the banks issuing them. This provision of the law probably contemplated the redemption of only such notes as had been actually executed and issued by the national banks; but the amendment of 1892, [see infra, p. 816] for reasons satisfactory to Congress, obviously sought still further to protect circulation by requiring the treasurer to redeem all national bank notes once issued by the Comptroller of the Currency to a national bank, whether they had ever been signed by the president or vice president and cashier of that bank or not. Inasmuch as the redemption is made from funds deposited by the bank to which the notes were issued, the effect of the amendment is that an unsigned note of a national bank secures to the holder the same rights of redemption as if it had been signed by the proper officers of the bank in the usual way, and creates a valid obligation against the bank for its ultimate payment." Wiggains v. U. S., (C. C. A. 8th Cir. 1914) 214 Fed. 970, 131 C. C. A. 266.

In an early case it was held that the then circuit court had no jurisdiction to entertain a suit in equity, brought 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 the circulating notes of a national bank, under the Act of June 3, 1864. Van Antwerp v. Hulburt, (1870) 7 Blatchf. 426, 28 Fed. Cas. No. 16,826.

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SEC. 3. [Reimbursement of Treasury for cost of redemption, etc., of bank notes.] That to carry into effect the provisions of section three of the act entitled "An act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes," approved June twentieth, eighteen hundred and seventy-four, the Secretary of the Treasury is authorized to appoint the following force, to be employed under his direction, namely: In the Office of the Treasurer: • • •

In the Office of the Comptroller of the Currency: • • •

And at the end of each month, the Secretary of the Treasury shall reimburse the Treasury to the full amount paid out under the provisions of this section by transfer of said amount from the deposit at the national banking associations with the Treasury of the United States; and at the end of each fiscal year he shall transfer from said deposit to the Treasury of the United States such sum as may have been actually expended under his direction for stationery, rent, fuel, light, and other necessary incidental expenses which
have been incurred in carrying into effect the the [sic] provisions of the said section of the above-named act. [18 Stat. L. 399.]

This is from the Sundry Civil Appropriation Act of March 3, 1875, ch. 130.
The Act of June 20, 1874, ch. 343, § 3, here mentioned is given in the preceding paragraph of the text.

SEC. 6. [Reports of savings and trust companies.] That all savings-banks or savings and trust companies organized under authority of any act of Congress shall be, and are hereby, required to make, to the Comptroller of the Currency, and publish, all the reports which national banking-associations are required to make and publish under the provisions of sections fifty two hundred and eleven, fifty-two hundred and twelve and fifty-two hundred and thirteen, of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided; which penalty may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located. And all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks: Provided, That such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars. [19 Stat. L. 64.]

This is from the Act of June 30, 1878, ch. 156, "An Act authorizing the appointment of receivers of national banks." For reference to entire Act, see the notes to section 1 thereof, infra, p. 915.

Application to savings banks in District of Columbia.—The expression "so far as may be applicable to such savings banks" does not prevent the application to them of provisions in the Acts which are consistent with so much of their business as is not a savings business, although inapplicable to so much thereof as is. German-American Sav. Bank, (1877) 15 Op. Atty.-Gen. 605.

A savings bank in the city of Washington, D. C., incorporated under an Act of Congress and having a capital of over $100,000 and less than $200,000, is entitled to circulating notes. Ger-


Conversion to national banks.—Sav-

ings banks organized in the District of Columbia under an Act of Congress, and having a capital stock paid up in whole or in part, were entitled, after the pas-
sage of the Act of 1876, to become na-

An Act Defining the verification of returns of national banks.


[Verification of reports] That the oath of affirmation required by section fifty-two hundred and eleven of the Revised Statutes, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the
State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be a sufficient verification as contemplated by said section fifty-two hundred and eleven: Provided, That the officer administering the oath is not an officer of the bank. [21 Stat. L. 352.]

R. S. sec. 5211 mentioned in the text is given supra, p. 790.

Indictment for perjury.—Prior to this Act a state notary had no authority to administer the oath, and an indictment for perjury was held bad where the oath was taken before him. U. S. v. Curtis, (1883) 107 U. S. 671, 2 S. Ct. 507, 27 U. S. (L. ed.) 534.

SEC. 12. [Gold certificates and silver certificates as part of lawful reserve.] That the Secretary of the Treasury is authorized and directed to receive deposits of gold coin with the Treasurer or assistant treasurers of the United States, in sums not less than twenty dollars, and to issue certificates therefor in denominations of not less than twenty dollars each, corresponding with the denominations of United States notes. The coin deposited for or representing the certificates of deposits shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued; and such certificates, as also silver certificates, when held by any national-banking association, shall be counted as part of its lawful reserve; and no national-banking association shall be a member of any clearing-house in which such certificates shall not be receivable in the settlement of clearing-house balances: Provided, That the Secretary of the Treasury shall suspend the issue of such gold certificates whenever the amount of gold coin and gold bullion in the Treasury reserved for the redemption of United States notes falls below one hundred millions of dollars; and the provisions of section fifty-two hundred and seven of the Revised Statutes shall be applicable to the certificates herein authorized and directed to be issued. [22 Stat. L. 165.]

This and the following section 13 of the text are from an Act of July 12, 1882, ch. 290. For reference to the entire Act see the notes to section 1 thereof, supra, p. 716. The provisions of this section are affected by those of the Act of March 14, 1900, ch. 41, § 6, given as amended in COINAGE, MINTS AND ASSAY OFFICES, vol. 2, p. 349.

Certification.—Whether a check be a certification. (1882) 17 Op. Atty.-Gen. marked "accepted" or simply "good" 471. can make no difference; either constitutes

SEC. 13. [Punishment for falsely certifying checks, etc.] That any officer, clerk, or agent of any national-banking association who shall willfully violate the provisions of an act entitled "An act in reference to certifying checks by national banks," approved March third, eighteen hundred and sixty-nine, being section fifty-two hundred and eight of the Revised Statutes of the United States, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the
banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court. [22 Stat. L. 166.]

See the note to the preceding section 12 of this Act.
The penalty for falsely certifying checks was prescribed by R. S. sec. 5208, supra, p. 769.

Indictment.—An indictment against an officer of a national bank for unlawfully certifying checks was not fatally defective for failure to set out totidem verbis the written certifications, under the rule that in an indictment in federal courts it is not necessary to allege the tenor of an instrument unless it touches the gist of the crime. U. S. v. Heinze, (S. D. N. Y. 1908) 161 Fed. 425.

Proof.—Where an indictment against a national bank officer charged him personally with illegally certifying certain checks, it was necessary for the government, in order to sustain such charge, to prove that the individuals who actually executed the certification indorsement were but the physical instruments of the defendant and acted in accordance with his orders. U. S. v. Heinze, (S. D. N. Y. 1908) 161 Fed. 425.


An Act to amend sections five thousand one hundred and ninety-one and five thousand one hundred and ninety-two of the Revised Statutes of the United States, and for other purposes.


[Sec. 1.] [Additional reserve cities.] That whenever three-fourths in number of the national banks located in any city of the United States having a population of twenty-five thousand people shall make application to the Comptroller of the Currency, in writing, asking that the name of the city in which such banks are located shall be added to the cities named in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-two of the Revised Statutes, the Comptroller shall have authority to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of its deposits, as provided in sections fifty-one hundred and ninety-one and fifty-one hundred and ninety-five of the Revised Statutes. [24 Stat. L. 559, as amended by 32 Stat. L. 1223.]

The foregoing section was amended to read as given in the text by an Act of March 3, 1903, ch. 1014, 32 Stat. L. 1223. The amendment consisted in changing the words "fifty thousand" which appeared after the words "population of" in the section as originally enacted to "twenty-five thousand" as given in the text.

Section 2 of this Act is given in the following paragraph of the text.


R. S. secs. 5191 and 5192 mentioned in the text are given, supra, pp. 741, 743. See the notes to said sections.

Sec. 2. [Additional central reserve cities.] That whenever three-fourths in number of the national banks located in any city of the United States having a population of two hundred thousand people shall make application to the Comptroller of the Currency, in writing, asking that such city may be a central reserve city, like the city of New York, in which one-half of the lawful-money reserve of the national banks located in other reserve
cities may be deposited, as provided in section fifty-one hundred and ninety-five of the Revised Statutes, the Comptroller shall have authority, with the approval of the Secretary of the Treasury, to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, twenty-five per centum of its deposits, as provided in section fifty-one hundred and ninety-one of the Revised Statutes. [24 Stat. L. 560.]

See the note to the preceding section 1 of this Act.

SEC. 6. [Disposal of deposits for redemption of circulation.] That upon the passage of this act the balances standing with the Treasurer of the United States to the respective credits of national banks for deposits made to redeem the circulating notes of such banks, and all deposits thereafter received for like purpose, shall be covered into the Treasury as a miscellaneous receipt, and the Treasury [sic] of the United States shall redeem from the general cash in the Treasury the circulating notes of said banks which may come into his possession subject to redemption; and upon the certificate of the Comptroller of the Currency that such notes have been received by him and that they have been destroyed and that no new notes will be issued in their place, reimbursement of their amount shall be made to the Treasurer, under such regulations as the Secretary of the Treasury may prescribe from an appropriation hereby, created, to be known as "National bank notes: Redemption account, ["""] but the provisions of this act shall not apply to the deposits received under section three of the act of June twentieth, eighteen hundred and seventy-four, requiring every National bank to keep in lawful money with the Treasurer of the United States a sum equal to five per centum of its circulation, to be held and used for the redemption of its circulating notes; and the balance remaining of the deposits so covered shall, at the close of each month, be reported on the monthly public debt statement as debt of the United States bearing no interest. [26 Stat. L. 289.]

This is from the Act of July 14, 1890, ch. 708. For reference to entire Act, see COINAGE, MINTS, AND ASSAY OFFICES, vol. 2, p. 343.

The Act of June 20, 1874, ch. 343, § 3, mentioned in the text is given supra, p. 811.

An Act to amend the national bank act in providing for the redemption of national bank notes stolen from or lost by banks of issue.


[Redemption of national bank notes lost or stolen and without proper signatures.] That the provisions of the Revised Statutes of the United States, providing for the redemption of national bank notes, shall apply to all national bank notes that have been or may be issued to, or received by, any national bank, notwithstanding such notes may have been lost by or
stolen from the bank and put in circulation without the signature or upon
the forged signature of the president or vice-president and cashier. [27
Stat. L. 322.]

This Act was apparently intended as an amendment of the Act of June 20, 1874,
ch. 343, § 3, supra, p. 811.

IV. FEDERAL RESERVE BANKS

An Act to provide for the establishment of Federal reserve banks, to
furnish an elastic currency, to afford means of rediscounting commer-
cial paper, to establish a more effective supervision of banking in the
United States, and for other purposes.

[Act of Dec. 23, 1913, ch. 6, 38 Stat. L. 251.]

[Sec. 1. [Short title — definitions.] That the short title of this Act shall
be the "Federal Reserve Act." Wherever the word "bank" is used in
this Act, the word shall be held to include State bank, banking association,
and trust company, except where national banks or Federal reserve banks
are specifically referred to. The terms "national bank" and "national
banking association" used in this Act shall be held to be synonymous and
interchangeable. The term "member bank" shall be held to mean any
national bank, State bank, or bank or trust company which has become a
member of one of the reserve banks created by this Act. The term
"board" shall be held to mean Federal Reserve Board; the term "dis-
trict" shall be held to mean Federal reserve district; the term "reserve
bank" shall be held to mean Federal reserve bank. [38 Stat. L. 251.]

This is the first section of the Federal Reserve Act.
Section 8 of this Act amended R. S. sec. 6154, supra, p. 713.
Section 21 of the Act amended R. S. sec. 5240, infra, p. 901.
Section 22 of the Act, relating to loans, etc., to bank examiners is given, infra, p. 926.
Section 23 of the Act, relating to the individual liability of stockholders of national
banks is given, supra, p. 722.
Section 28 of the Act amended R. S. sec. 5143, supra, p. 702. The remaining sections of
the Act are given in the following pages of the text. See the notes to section 27,
infra, p. 843.

FEDERAL RESERVE DISTRICTS

Sec. 2. [Federal reserve districts — banks — stock.] As soon as prac-
ticable, the Secretary of the Treasury, the Secretary of Agriculture and the
Comptroller of the Currency, acting as "The Reserve Bank Organization
Committee," shall designate not less than eight nor more than twelve cities
to be known as Federal reserve cities, and shall divide the continental
United States, excluding Alaska, into districts, each district to contain only
one of such Federal reserve cities. The determination of said organization
committee shall not be subject to review except by the Federal Reserve
Board when organized: Provided, That the districts shall be apportioned
with due regard to the convenience and customary course of business and
shall not necessarily be coterminous with any State or States. The districts
thus created may be reallocated and new districts may from time to time
be created by the Federal Reserve Board, not to exceed twelve in all. Such
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districts shall be known as Federal reserve districts and may be designated by number. A majority of the organization committee shall constitute a quorum with authority to act.

Said organization committee shall be authorized to employ counsel and expert aid, to take testimony, to send for persons and papers, to administer oaths, and to make such investigation as may be deemed necessary by the said committee in determining the reserve districts and in designating the cities within such districts where such Federal reserve banks shall be severally located. The said committee shall supervise the organization in each of the cities designated of a Federal reserve bank, which shall include in its title the name of the city in which it is situated, as "Federal Reserve Bank of Chicago."

Under regulations to be prescribed by the organization committee, every national banking association in the United States and every national banking association in the United States is hereby required, and every eligible bank in the United States and every trust company within the District of Columbia, is hereby authorized to signify in writing, within sixty days after the passage of this Act, its acceptance of the terms and provisions hereof. When the organization committee shall have designated the cities in which Federal reserve banks are to be organized, and fixed the geographical limits of the Federal reserve districts, every national banking association within that district shall be required within thirty days after notice from the organization committee, to subscribe to the capital stock of such Federal reserve bank in a sum equal to six per centum of the paid-up capital stock and surplus of such bank, one-sixth of the subscription to be payable on call of the organization committee or of the Federal Reserve Board, one-sixth within three months and one-sixth within six months thereafter, and the remainder of the subscription, or any part thereof, shall be subject to call when deemed necessary by the Federal Reserve Board, said payments to be in gold or gold certificates.

The shareholders of every Federal reserve bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of their subscriptions to such stock at the par value thereof in addition to the amount subscribed, whether such subscriptions have been paid up in whole or in part, under the provisions of this Act.

Any national bank failing to signify its acceptance of the terms of this Act within the sixty days aforesaid, shall cease to act as a reserve agent, upon thirty days' notice, to be given within the discretion of the said organization committee or of the Federal Reserve Board.

Should any national banking association in the United States now organized fail within one year after the passage of this Act to become a member bank or fail to comply with any of the provisions of this Act applicable thereto, all of the rights, privileges, and franchises of such association granted to it under the national-bank Act, or under the provisions of this Act, shall be thereby forfeited. Any noncompliance with or violation of this Act shall, however, be determined and adjudged by any court of the United States of competent jurisdiction in a suit brought for that purpose in the district or territory in which such bank is located, under direction of the Federal Reserve Board, by the Comptroller of the Currency in his own name before the association shall be declared dissolved. In cases of such noncompliance
or violation, other than the failure to become a member bank under the provisions of this Act, every director who participated in or assented to the same shall be held liable in his personal or individual capacity for all damages which said bank, its shareholders, or any other person shall have sustained in consequence of such violation.

Such dissolution shall not take away or impair any remedy against such corporation, its stockholders or officers, for any liability or penalty which shall have been previously incurred.

Should the subscriptions by banks to the stock of said Federal reserve banks or any one or more of them be, in the judgment of the organization committee, insufficient to provide the amount of capital required therefor, then and in that event the said organization committee may, under conditions and regulations to be prescribed by it, offer to public subscription at par such an amount of stock in said Federal reserve banks, or any one or more of them, as said committee shall determine, subject to the same conditions as to payment and stock liability as provided for member banks.

No individual, copartnership, or corporation other than a member bank of its district shall be permitted to subscribe for or to hold at any time more than $25,000 par value of stock in any Federal reserve bank. Such stock shall be known as public stock and may be transferred on the books of the Federal reserve bank by the chairman of the board of directors of such bank.

Should the total subscriptions by banks and the public to the stock of said Federal reserve banks, or any one or more of them, be, in the judgment of the organization committee, insufficient to provide the amount of capital required therefor, then and in that event the said organization committee shall allot to the United States such an amount of said stock as said committee shall determine. Said United States stock shall be paid for at par out of any money in the Treasury not otherwise appropriated, and shall be held by the Secretary of the Treasury and disposed of for the benefit of the United States in such manner, at such times, and at such price, not less than par, as the Secretary of the Treasury shall determine.

Stock not held by member banks shall not be entitled to voting power.

The Federal Reserve Board is hereby empowered to adopt and promulgate rules and regulations governing the transfers of said stock.

No Federal reserve bank shall commence business with a subscribed capital less than $4,000,000. The organization of reserve districts and Federal reserve cities shall not be construed as changing the present status of reserve cities and central reserve cities, except in so far as this Act changes the amount of reserves that may be carried with approved reserve agents located therein. The organization committee shall have power to appoint such assistants and incur such expenses in carrying out the provisions of this Act as it shall deem necessary, and such expenses shall be payable by the Treasurer of the United States upon voucher approved by the Secretary of the Treasury, and the sum of $100,000, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, for the payment of such expenses. [38 Stat. L. 251.]

BRANCH OFFICES

Sec. 3. [Branch offices — directors.] Each Federal reserve bank shall establish branch banks within the Federal reserve district in which it is
located and may do so in the district of any Federal reserve bank which may have been suspended. Such branches shall be operated by a board of directors under rules and regulations approved by the Federal Reserve Board. Directors of branch banks shall possess the same qualifications as directors of the Federal reserve banks. Four of said directors shall be selected by the reserve bank and three by the Federal Reserve Board, and they shall hold office during the pleasure, respectively, of the parent bank and the Federal Reserve Board. The reserve bank shall designate one of the directors as manager. [38 Stat. L. 253.]

Amended.—This section was amended by the Act of June 21, 1917, ch. —, sec. —.

**FEDERAL RESERVE BANKS**

**SEC. 4. [Federal reserve banks — organization — powers — directors.]**

When the organization committee shall have established Federal reserve districts as provided in section two of this Act, a certificate shall be filed with the Comptroller of the Currency showing the geographical limits of such districts and the Federal reserve city designated in each of such districts. The Comptroller of the Currency shall thereupon cause to be forwarded to each national bank located in each district, and to such other banks declared to be eligible by the organization committee which may apply therefor, an application blank in form to be approved by the organization committee, which blank shall contain a resolution to be adopted by the board of directors of each bank executing such application, authorizing a subscription to the capital stock of the Federal reserve bank organizing in that district in accordance with the provisions of this Act.

When the minimum amount of capital stock prescribed by this Act for the organization of any Federal reserve bank shall have been subscribed and allotted, the organization committee shall designate any five banks of those whose applications have been received, to execute a certificate of organization, and thereupon the banks so designated shall, under their seals, make an organization certificate which shall specifically state the name of such Federal reserve bank, the territorial extent of the district over which the operations of such Federal reserve bank are to be carried on, the city and State in which said bank is to be located, the amount of capital stock and the number of shares into which the same is divided, the name and place of doing business of each bank executing such certificate, and of all banks which have subscribed to the capital stock of such Federal reserve bank and the number of shares subscribed by each, and the fact that the certificate is made to enable those banks executing same, and all banks which have subscribed or may thereafter subscribe to the capital stock of such Federal reserve bank, to avail themselves of the advantages of this Act.

The said organization certificate shall be acknowledged before a judge of some court of record or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall file, record and carefully preserve the same in his office.

Upon the filing of such certificate with the Comptroller of the Currency as aforesaid, the said Federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power —
First. To adopt and use a corporate seal.
Second. To have succession for a period of twenty years from its organization unless it is sooner dissolved by an Act of Congress, or unless its franchise becomes forfeited by some violation of law.
Third. To make contracts.
Fourth. To sue and be sued, complain and defend, in any court of law or equity.
Fifth. To appoint by its board of directors, such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees.
Sixth. To prescribe by its board of directors, by-laws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.
Seventh. To exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this Act and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this Act.
Eighth. Upon deposit with the Treasurer of the United States of any bonds of the United States in the manner provided by existing law relating to national banks, to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited, such notes to be issued under the same conditions and provisions of law as relate to the issue of circulating notes of national banks secured by bonds of the United States bearing the circulating privilege, except that the issue of such notes shall not be limited to the capital stock of such Federal reserve bank.
But no Federal reserve bank shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the Comptroller of the Currency to commence business under the provisions of this Act.
Every Federal reserve bank shall be conducted under the supervision and control of a board of directors.
The board of directors shall perform the duties usually appertaining to the office of directors of banking associations and all such duties as are prescribed by law.
Said board shall administer the affairs of said bank fairly and impartially and without discrimination in favor of or against any member bank or banks and shall, subject to the provisions of law and the orders of the Federal Reserve Board, extend to each member bank such discounts, advancements and accommodations as may be safely and reasonably made with due regard for the claim and demands of other member banks.
Such board of directors shall be selected as hereinafter specified and shall consist of nine members, holding office for three years, and divided into three classes, designated as classes A, B, and C.
Class A shall consist of three members, who shall be chosen by and be representative of the stock-holding banks.
Class B shall consist of three members, who at the time of their election shall be actively engaged in their district in commerce, agriculture or some other industrial pursuit.
Class C shall consist of three members who shall be designated by the Federal Reserve Board. When the necessary subscriptions to the capital stock have been obtained for the organization of any Federal reserve bank, the Federal Reserve Board shall appoint the class C directors and shall designate one of such directors as chairman of the board to be selected. Pending the designation of such chairman, the organization committee shall exercise the powers and duties appertaining to the office of chairman in the organization of such Federal reserve bank.

No Senator or Representative in Congress shall be a member of the Federal Reserve Board or an officer or a director of a Federal reserve bank.

No director of class B shall be an officer, director, or employee of any bank.

No director of class C shall be an officer, director, employee, or stockholder of any bank.

Directors of class A and class B shall be chosen in the following manner:

The chairman of the board of directors of the Federal reserve bank of the district in which the bank is situated or, pending the appointment of such chairman, the organization committee shall classify the member banks of the district into three general groups or divisions. Each group shall contain as nearly as may be one-third of the aggregate number of the member banks of the district and shall consist, as nearly as may be, of banks of similar capitalization. The groups shall be designated by number by the chairman.

At a regularly called meeting of the board of directors of each member bank in the district it shall elect by ballot a district reserve elector and shall certify his name to the chairman of the board of directors of the Federal reserve bank of the district. The chairman shall make lists of the district reserve electors thus named by banks in each of the aforesaid three groups and shall transmit one list to each elector in each group.

Each member bank shall be permitted to nominate to the chairman one candidate for director of class A and one candidate for director of class B. The candidates so nominated shall be listed by the chairman, indicating by whom nominated, and a copy of said list shall, within fifteen days after its completion, be furnished by the chairman to each elector.

Every elector shall, with [in] fifteen days after the receipt of the said list, certify to the chairman his first, second, and other choices of a director of class A and class B, respectively, upon a preferential ballot, on a form furnished by the chairman of the board of directors of the Federal reserve bank of the district. Each elector shall make a cross opposite the name of the first, second, and other choices for a director of class A and for a director of class B, but shall not vote more than one choice for any one candidate.

Any candidate having a majority of all votes cast in the column of first choice shall be declared elected. If no candidate have a majority of all the votes in the first column, then there shall be added together the votes cast by the electors for such candidates in the second column and the votes cast for the several candidates in the first column. If any candidate then have a majority of the electors voting, by adding together the first and second choices, he shall be declared elected. If no candidate have a majority of electors voting when the first and second choices shall have been added, then the votes cast in the third column for other choices shall be added
together in like manner, and the candidate then having the highest number of votes shall be declared elected. An immediate report of election shall be declared.

Class C directors shall be appointed by the Federal Reserve Board. They shall have been for at least two years residents of the district for which they are appointed, one of whom shall be designated by said board as chairman of the board of directors of the Federal reserve bank and as "Federal reserve agent." He shall be a person of tested banking experience; and in addition to his duties as chairman of the board of directors of the Federal reserve bank he shall be required to maintain under regulations to be established by the Federal Reserve Board a local office of said board on the premises of the Federal reserve bank. He shall make regular reports to the Federal Reserve Board, and shall act as its official representative for the performance of the functions conferred upon it by this Act. He shall receive an annual compensation to be fixed by the Federal Reserve Board and paid monthly by the Federal reserve bank to which he is designated. One of the directors of class C, who shall be a person of tested banking experience, shall be appointed by the Federal Reserve Board as deputy chairman and deputy Federal reserve agent to exercise the powers of the chairman of the board and Federal reserve agent in case of absence or disability of his principal.


Directors of Federal reserve banks shall receive, in addition to any compensation otherwise provided, a reasonable allowance for necessary expenses in attending meetings of their respective boards, which amount shall be paid by the respective Federal reserve banks. Any compensation that may be provided by boards of directors of Federal reserve banks for directors, officers or employees shall be subject to the approval of the Federal Reserve Board.

The Reserve Bank Organization Committee may, in organizing Federal reserve banks, call such meetings of bank directors in the several districts as may be necessary to carry out the purposes of this Act, and may exercise the functions herein conferred upon the chairman of the board of directors of each Federal reserve bank pending the complete organization of such bank.

At the first meeting of the full board of directors of each Federal reserve bank, it shall be the duty of the directors of classes A, B and C, respectively, to designate one of the members of each class whose term of office shall expire in one year from the first of January nearest to date of such meeting, one whose term of office shall expire at the end of two years from said date, and one whose term of office shall expire at the end of three years from said date. Thereafter every director of a Federal reserve bank chosen as hereinbefore provided shall hold office for a term of three years. Vacancies that may occur in the several classes of directors of Federal reserve banks may be filled in the manner provided for the original selection of such directors, such appointees to hold office for the unexpired terms of their predecessors. [38 Stat. L. 254.]
STOCK ISSUES; INCREASE AND DECREASE OF CAPITAL

SEC. 5. [Stock; increase and decrease of capital.] The capital stock of each Federal reserve bank shall be divided into shares of $100 each. The outstanding capital stock shall be increased from time to time as member banks increase their capital stock and surplus or as additional banks become members, and may be decreased as member banks reduce their capital stock or surplus or cease to be members. Shares of the capital stock of Federal reserve banks owned by member banks shall not be transferred or hypothecated. When a member bank increases its capital stock or surplus, it shall thereupon subscribe for an additional amount of capital stock of the Federal reserve bank of its district equal to six per centum of the said increase, one-half of said subscription to be paid in the manner hereinbefore provided for original subscription, and one-half subject to call of the Federal Reserve Board. A bank applying for stock in a Federal reserve bank at any time after the organization thereof must subscribe for an amount of the capital stock of the Federal reserve bank equal to six per centum of the paid-up capital stock and surplus of said applicant bank, paying therefor its par value plus one-half of one per centum a month from the period of the last dividend. When the capital stock of any Federal reserve bank shall have been increased either on account of the increase of capital stock of member banks or on account of the increase in the number of member banks, the board of directors shall cause to be executed a certificate to the Comptroller of the Currency showing the increase in capital stock, the amount paid in, and by whom paid. When a member bank reduces its capital stock it shall surrender a proportionate amount of its holdings in the capital of said Federal reserve bank, and when a member bank voluntarily liquidates it shall surrender all of its holdings of the capital stock of said Federal reserve bank and be released from its stock subscription not previously called. In either case the shares surrendered shall be canceled and the member bank shall receive in payment therefor, under regulations to be prescribed by the Federal Reserve Board, a sum equal to its cash-paid subscriptions on the shares surrendered and one-half of one per centum a month from the period of the last dividend, not to exceed the book value thereof, less any liability of such member bank to the Federal reserve bank. [38 Stat. L. 257.]

SEC. 6. [Insolvent members — cancellation of stock — certificate of reduction of capital stock.] If any member bank shall be declared insolvent and a receiver appointed therefor, the stock held by it in said Federal reserve bank shall be canceled, without impairment of its liability, and all cash-paid subscriptions on said stock, with one-half of one per centum per month from the period of last dividend, not to exceed the book value thereof, shall be first applied to all debts of the insolvent member bank to the Federal reserve bank, and the balance, if any, shall be paid to the receiver of the insolvent bank. Whenever the capital stock of a Federal reserve bank is reduced, either on account of a reduction in capital stock of any member bank or of the liquidation or insolvency of such bank, the board of directors shall cause to be executed a certificate to the Comptroller of the Currency showing such reduction of capital stock and the amount repaid to such bank. [38 Stat. L. 258.]
DIVISION OF EARNINGS

SEC. 7. [Division of earnings — exemption from taxation.] After all necessary expenses of a Federal reserve bank have been paid or provided for, the stockholders shall be entitled to receive an annual dividend of six per centum on the paid-in capital stock, which dividend shall be cumulative. After the aforesaid dividend claims have been fully met, all the net earnings shall be paid to the United States as a franchise tax, except that one-half of such net earnings shall be paid into a surplus fund until it shall amount to forty per centum of the paid-in capital stock of such bank.

The net earnings derived by the United States from Federal reserve banks shall, in the discretion of the Secretary, be used to supplement the gold reserve held against outstanding United States notes, or shall be applied to the reduction of the outstanding bonded indebtedness of the United States under regulations to be prescribed by the Secretary of the Treasury. Should a Federal reserve bank be dissolved or go into liquidation, any surplus remaining, after the payment of all debts, dividend requirements as hereinbefore provided, and the par value of the stock, shall be paid to and become the property of the United States and shall be similarly applied.

Federal reserve banks, including the capital stock and surplus therein, and the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes upon real estate. [38 Stat. L. 258.]

See the notes to section 1 of this Act, supra, p. 817.

STATE BANKS AS MEMBERS

SEC. 9. [State banks as members — stock — admission — laws applicable — cancellation of membership.] Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, may make application to the reserve bank organization committee, pending organization, and thereafter to the Federal Reserve Board for the right to subscribe to the stock of the Federal reserve bank organized or to be organized within the Federal reserve district where the applicant is located. The organization committee or the Federal Reserve Board, under such rules and regulations as it may prescribe, subject to the provisions of this section, may permit the applying bank to become a stockholder in the Federal reserve bank of the district in which the applying bank is located. Whenever the organization committee or the Federal Reserve Board shall permit the applying bank to become a stockholder in the Federal reserve bank of the district, stock shall be issued and paid for under the rules and regulations in this Act provided for national banks which become stockholders in Federal reserve banks.

The organization committee or the Federal Reserve Board shall establish by-laws for the general government of its conduct in acting upon applications made by the State banks and banking associations and trust companies for stock ownership in Federal reserve banks. Such by-laws shall require applying banks not organized under Federal law to comply with the reserve and capital requirements and to submit to the examination and regulations prescribed by the organization committee or by the Federal Reserve Board. No applying bank shall be admitted to membership in a Federal reserve bank unless it possesses a paid-up unimpaired capital sufficient to entitle it to become a national banking association in the place where it is situated, under the provisions of the national banking Act.
Any bank becoming a member of a Federal reserve bank under the provisions of this section shall, in addition to the regulations and restrictions hereinbefore provided, be required to conform to the provisions of law imposed on the national banks respecting the limitation of liability which may be incurred by any person, firm, or corporation to such banks, the prohibition against making purchase of or loans on stock of such banks, and the withdrawal or impairment of capital, or the payment of unearned dividends, and to such rules and regulations as the Federal Reserve Board may, in pursuance thereof, prescribe.

Such banks, and the officers, agents, and employees thereof, shall also be subject to the provisions of and to the penalties prescribed by sections fifty-one hundred and ninety-eight, fifty-two hundred, fifty-two hundred and one, and fifty-two hundred and eight, and fifty-two hundred and nine of the Revised Statutes. The member banks shall also be required to make reports of the conditions and of the payments of dividends to the Comptroller, as provided in sections fifty-two hundred and eleven and fifty-two hundred and twelve of the Revised Statutes, and shall be subject to the penalties prescribed by section fifty-two hundred and thirteen for the failure to make such report.

If at any time it shall appear to the Federal Reserve Board that a member bank has failed to comply with the provisions of this section or the regulations of the Federal Reserve Board, it shall be within the power of the said board, after hearing, to require such bank to surrender its stock in the Federal reserve bank; upon such surrender the Federal reserve bank shall pay the cash-paid subscriptions to the said stock with interest at the rate of one-half of one per centum per month, computed from the last dividend, if earned, not to exceed the book value thereof, less any liability to said Federal reserve bank, except the subscription liability not previously called, which shall be canceled, and said Federal reserve bank shall, upon notice from the Federal Reserve Board, be required to suspend said bank from further privileges of membership, and shall within thirty days of such notice cancel and retire its stock and make payment therefor in the manner herein provided. The Federal Reserve Board may restore membership upon due proof of compliance with the conditions imposed by this section.

[38 Stat. L. 259.]

For R. S. secs. 6198, 5200, 5201, 5208 and 5209 see supra, pp. 747, 761, 762, 789 and 770, respectively.

For R. S. secs. 5211, 5212 and 5213 see supra, pp. 790, 792.


FEDERAL RESERVE BOARD

SEC. 10. [Federal Reserve Board — appointment — salaries — vacancies — reports.] A Federal Reserve Board is hereby created which shall consist of seven members, including the Secretary of the Treasury and the Comptroller of the Currency, who shall be members ex officio, and five members appointed by the President of the United States, by and with the advice and consent of the Senate. In selecting the five appointive members of the Federal Reserve Board, not more than one of whom shall be selected from any one Federal reserve district, the President shall have due regard to a fair representation of the different commercial, industrial and geographical divisions of the country. The five members of the Federal Reserve Board appointed by the President and confirmed as aforesaid shall
devote their entire time to the business of the Federal Reserve Board and shall each receive an annual salary of $12,000, payable monthly together with actual necessary traveling expenses, and the Comptroller of the Currency, as ex officio member of the Federal Reserve Board, shall, in addition to the salary now paid him as Comptroller of the Currency, receive the sum of $7,000 annually for his services as a member of said Board.

The members of said board, the Secretary of the Treasury, the Assistant Secretaries of the Treasury, and the Comptroller of the Currency shall be ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any member bank. Of the five members thus appointed by the President at least two shall be persons experienced in banking or finance. One shall be designated by the President to serve for two, one for four, one for six, one for eight, and one for ten years, and thereafter each member so appointed shall serve for a term of ten years unless sooner removed for cause by the President. Of the five persons thus appointed, one shall be designated by the President as governor and one as vice governor of the Federal Reserve Board. The governor of the Federal Reserve Board, subject to its supervision, shall be the active executive officer. The Secretary of the Treasury may assign offices in the Department of the Treasury for the use of the Federal Reserve Board. Each member of the Federal Reserve Board shall within fifteen days after notice of appointment make and subscribe to the oath of office.

The Federal Reserve Board shall have power to levy semiannually upon the Federal reserve banks, in proportion to their capital stock and surplus, an assessment sufficient to pay its estimated expenses and the salaries of its members and employees for the half year succeeding the levying of such assessment, together with any deficit carried forward from the preceding half year.

The first meeting of the Federal Reserve Board shall be held in Washington, District of Columbia, as soon as may be after the passage of this Act, at a date to be fixed by the Reserve Bank Organization Committee. The Secretary of the Treasury shall be ex officio chairman of the Federal Reserve Board. No member of the Federal Reserve Board shall be an officer or director of any bank, banking institution, trust company, or Federal reserve bank nor hold stock in any bank, banking institution, or trust company; and before entering upon his duties as a member of the Federal Reserve Board he shall certify under oath to the Secretary of the Treasury that he has complied with this requirement. Whenever a vacancy shall occur, other than by expiration of term, among the five members of the Federal Reserve Board appointed by the President, as above provided, a successor shall be appointed by the President, with the advice and consent of the Senate, to fill such vacancy, and when appointed he shall hold office for the unexpired term of the member whose place he is selected to fill.

The President shall have power to fill all vacancies that may happen on the Federal Reserve Board during the recess of the Senate, by granting commissions which shall expire thirty days after the next session of the Senate convenes.

Nothing in this Act contained shall be construed as taking away any powers heretofore vested by law in the Secretary of the Treasury which relate to the supervision, management, and control of the Treasury Department and bureaus under such department, and wherever any power vested
by this Act in the Federal Reserve Board or the Federal reserve agent appears to conflict with the powers of the Secretary of the Treasury, such powers shall be exercised subject to the supervision and control of the Secretary.

The Federal Reserve Board shall annually make a full report of its operations to the Speaker of the House of Representatives, who shall cause the same to be printed for the information of the Congress. * * * [38 Stat. L. 360.]

A further provision of this section, omitted here, amended R. S. sec. 324, infra, p. 93L.

SEC. 11. [Powers of Federal Reserve Board.] The Federal Reserve Board shall be authorized and empowered:

(a) To examine at its discretion the accounts, books and affairs of each Federal reserve bank and of each member bank and to require such statements and reports as it may deem necessary. The said board shall publish once each week a statement showing the condition of each Federal reserve bank and a consolidated statement for all Federal reserve banks. Such statements shall show in detail the assets and liabilities of the Federal reserve banks, single and combined, and shall furnish full information regarding the character of the money held as reserve and the amount, nature and maturities of the paper and other investments owned or held by Federal reserve banks.

(b) To permit, or, on the affirmative vote of at least five members of the Reserve Board to require Federal reserve banks to rediscount the discounted paper of other Federal reserve banks at rates of interest to be fixed by the Federal Reserve Board.

(c) To suspend for a period not exceeding thirty days, and from time to time to renew such suspension for periods not exceeding fifteen days, any reserve requirement specified in this Act: Provided, That it shall establish a graduated tax upon the amounts by which the reserve requirements of this Act may be permitted to fall below the level hereinafter specified: And provided further, That when the gold reserve held against Federal reserve notes falls below forty per centum, the Federal Reserve Board shall establish a graduated tax of not more than one per centum per annum upon such deficiency until the reserves fall to thirty-two and one-half per centum, and when said reserve falls below thirty-two and one-half per centum, a tax at the rate increasingly of not less than one and one-half per centum per annum upon each two and one-half per centum or fraction thereof that such reserve falls below thirty-two and one-half per centum. The tax shall be paid by the reserve bank, but the reserve bank shall add an amount equal to said tax to the rates of interest and discount fixed by the Federal Reserve Board.

(d) To supervise and regulate through the bureau under the charge of the Comptroller of the Currency the issue and retirement of Federal reserve notes, and to prescribe rules and regulations under which such notes may be delivered by the Comptroller to the Federal reserve agents applying therefor.

(e) To add to the number of cities classified as reserve and central reserve cities under existing law in which national banking associations are subject to the reserve requirements set forth in section twenty of this Act;
or to reclassify existing reserve and central reserve cities or to terminate their designation as such.

(f) To suspend or remove any officer or director of any Federal reserve bank, the cause of such removal to be forthwith communicated in writing by the Federal Reserve Board to the removed officer or director and to said bank.

(g) To require the writing off of doubtful or worthless assets upon the books and balance sheets of Federal reserve banks.

(h) To suspend, for the violation of any of the provisions of this Act, the operations of any Federal reserve bank, to take possession thereof, administer the same during the period of suspension, and, when deemed advisable, to liquidate or reorganize such bank.

(i) To require bonds of Federal reserve agents, to make regulations for the safeguarding of all collateral, bonds, Federal reserve notes, money or property of any kind deposited in the hands of such agents, and said board shall perform the duties, functions, or services specified in this Act, and make all rules and regulations necessary to enable said board effectively to perform the same.

(j) To exercise general supervision over said Federal reserve banks.

(k) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe.

(l) To employ such attorneys, experts, assistants, clerks, or other employees as may be deemed necessary to conduct the business of the board. All salaries and fees shall be fixed in advance by said board and shall be paid in the same manner as the salaries of the members of said board. All such attorneys, experts, assistants, clerks, and other employees shall be appointed without regard to the provisions of the Act of January sixteenth, eighteen hundred and eighty-three (volume twenty-two, United States Statutes at Large, page four hundred and three), and amendments thereto, or any rule or regulation made in pursuance thereof: Provided, That nothing herein shall prevent the President from placing said employees in the classified service. [38 Stat. L. 261.]

For the Civil Service Act of Jan. 16, 1883, ch. 27, mentioned in the last paragraph of the text see Civil Service, vol. 2, p. 155.


Validity of paragraph (k).—In People v. Brady, (1915) 271 Ill. 100, 110 N. E. 864, Ann. Cas. 1917C 1095, it was held that paragraph (k) was unconstitutional. The court said: "If Congress had deemed the exercise of trust powers by national banks necessary to the accomplishment of the governmental purposes for which they were created it would seem such power would have been granted expressly to all national banks, as was the power to exercise certain banking functions granted by section 5136 of the Federal statutes. The right of a national bank to act as trustee, etc., as conferred by the Federal Reserve act, was made elective with the bank. This feature of the act would preclude the conclusion that Congress deemed it necessary, on any ground, that national banks possess the power to act as trustees, executors, administrators or registrars of stocks and bonds. If it had, it is evident it would not have made the act elective and permissive. National banks without the power to act as trustees, etc., have efficiently served the governmental purposes for which they were primarily created, and it not being shown such added powers are now necessary to the further success of such purposes, and we being of the opinion the powers attempted to be conferred by Congress belong strictly to the states, we think the act in so far as it attempted to confer such powers upon national banks, is unconstitutional and void."
In Farmers', etc., Nat. Bank v. Dearing, [1875] 91 U. S. 29, 23 U. S. (L. ed.) 106; Davis v. Elmira Sav. Bank, [1896] 161 U. S. 275, [16 S. Ct. 592, 40 U. S. (L. ed.) 700]; Easton v. Iowa, [1905] 188 U. S. 220, [23 L. Ct. 288, 47 U. S. (L. ed.) 474]; and many other cases, it has been held that national banks are instrumentalities of the Federal government in carrying out its governmental powers, and in the conduct of their affairs are not subject to the authority and control of states in conflict with the laws of the United States; that Congress is the judge of the extent of powers to be conferred upon such banks and has the sole authority to regulate and control the exercise of their operations, and the states have no authority, whether with hostile or friendly intentions, to interfere with national banks or their officers in the exercise of the powers bestowed upon them by the general government. We have before attempted to point out that the power to act as trustee, executor or administrator was not necessary to be conferred upon national banks to enable them to serve the purpose for which they were created nor necessary to the vitality or continued existence of the corporations. We are furthermore of opinion that those are subjects exclusively within the jurisdiction of the state. Certain powers of government belong exclusively to the states and certain powers exclusively to the national government. The power to regulate property within the limits of the state, the modes of acquiring and transferring it and the rules of descent and distribution of property are subjects belonging exclusively to the jurisdiction of the state. U. S. v. Fox, [(1877) 94 U. S. 315, 24 U. S. (L. ed.) 192]; Pennoyer v. Neff, [(1878) 95 U. S. 714, 24 U. S. (L. ed.) 565]; Overby v. Gordon, [(1900) 177 U. S. 214, 20 S. Ct. 605, 44 U. S. (L. ed.) 741]; Yonley v. Lavender, [(1875) 21 Wall. 276, 22 U. S. (L. ed.) 536]. Trustees, executors and administrators deal with private property. They are the instrumentalities through which estates are settled and the transfer of property effected, and through which private property is protected and guarded for the purpose of applying it to the uses for which it was intended. They are not subjects over which the Federal government has been given control, and any attempt to exercise such control would be in contravention of state or local law, which is forbidden by section 11k of the Federal Reserve act and would also be in violation of the constitution." See to the same effect Atty.-Gen. v. Bay City First Nat. Bank. [(1916) 192 Mich. 646, 150 N. W. 335. [Footnotes omitted.]

Validity of state statute affecting administrators, etc.—A state statute providing that "no trust company, loan and trust company, loan and banking company, bank or banking company, or similar corporation, shall hereafter be appointed administrator of an estate, executor under a will, or guardian or conservator of the person or property of another," is valid and effective notwithstanding paragraph k and notwithstanding the fact that it was enacted subsequently to the Federal Reserve Act. Woodbury's Appeal. (N. H. 1915) 90 Atl. 299.

FEDERAL ADVISORY COUNCIL

SEC. 12. [Federal Advisory Council — creation — powers.] There is hereby created a Federal Advisory Council, which shall consist of as many members as there are Federal reserve districts. Each Federal reserve bank by its board of directors shall annually select from its own Federal reserve district one member of said council, who shall receive such compensation and allowances as may be fixed by his board of directors subject to the approval of the Federal Reserve Board. The meetings of said advisory council shall be held at Washington, District of Columbia, at least four times each year, and oftener if called by the Federal Reserve Board. The council may in addition to the meetings above provided for hold such other meetings in Washington, District of Columbia, or elsewhere, as it may deem necessary, may select its own officers and adopt its own methods of procedure, and a majority of its members shall constitute a quorum for the transaction of business. Vacancies in the council shall be filled by the respective reserve banks, and members selected to fill vacancies, shall serve for the unexpired term.

The Federal Advisory Council shall have power, by itself or through its officers, (1) to confer directly with the Federal Reserve Board on general business conditions; (2) to make oral or written representations concerning
matters within the jurisdiction of said board; (3) to call for information and to make recommendations in regard to discount rates, rediscount business, note issues, reserve conditions in the various districts, the purchase and sale of gold or securities by reserve banks, open-market operations by said banks, and the general affairs of the reserve banking system. [38 Stat. L. 263.]

POWERS OF FEDERAL RESERVE BANKS

SEC. 13. [Powers of Federal reserve banks — deposits — discounts.] Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks and drafts upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks and drafts upon solvent member or other Federal reserve banks, payable upon presentation.

Upon the indorsement of any of its member banks, with a waiver of demand, notice and protest by such bank, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than ninety days: Provided, That notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months may be discounted in an amount to be limited to a percentage of the capital of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

Any Federal reserve bank may discount acceptances which are based on the importation or exportation of goods and which have a maturity at time of discount of not more than three months and indorsed by at least one member bank. The amount of acceptances so discounted shall at no time exceed one-half the paid up and unimpaired capital stock and surplus of the bank for which the rediscounts are made, except by authority of the Federal Reserve Board, under such general regulations as said board may prescribe, but not to exceed the capital stock and surplus of such bank. The aggregate of such notes and bills bearing the signature or indorsement of any one person, company, firm, or corporation rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.
Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months' sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up and unimpaired capital and surplus, except by authority of the Federal Reserve Board, under such general regulations as said board may prescribe, but not to exceed the capital stock and surplus of such bank, and such regulations shall apply to all banks alike regardless of the amount of capital stock and surplus.

The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board. [38 Stat. L. 263, as amended by 38 Stat. L. 958.]

Paragraphs three, four, and five of this section, beginning with the words "Any Federal reserve bank may discount acceptances" and concluding at the ellipsis, were amended by an Act of March 3, 1915, ch. 93, 38 Stat. L. 958, entitled "An Act Proposing an amendment to the Federal Reserve Act relative to acceptances, and for other purposes."

As originally enacted these paragraphs were as follows:

"Any Federal reserve bank may discount acceptances which are based on the importation or exportation of goods and which have a maturity at time of discount of not more than three months, and indorsed by at least one member bank. The amount of acceptances so discounted shall at no time exceed one-half the paid-up capital stock and surplus of the bank for which the rediscounts are made.

"The aggregate of such notes and bills bearing the signature or indorsement of any one person, company, firm, or corporation rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

"Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months' sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus."

The part of this section omitted here, which preceded the last paragraph of this section, amended R. S. sec. 5202, supra, p. 765.


OPEN MARKET OPERATIONS

SEC. 14. [Open-market operations—purchase or sale of bills of exchange.] Any Federal reserve bank may, under rules and regulations prescribed by the Federal Reserve Board, purchase and sell in the open market, at home or abroad, either from or to domestic or foreign banks, firms, corporations, or individuals, cable transfers and bankers' acceptances and bills of exchange of the kinds and maturities by this Act made eligible for rediscount, with or without the indorsement of a member bank.

Every Federal reserve bank shall have power:

(a) To deal in gold coin and bullion at home or abroad, to make loans thereon, exchange Federal reserve notes for gold, gold coin, or gold certificates, and to contract for loans of gold coin or bullion, giving therefor, when necessary, acceptable security, including the hypothecation of United States bonds or other securities which Federal reserve banks are authorized to hold;
(b) To buy and sell, at home or abroad, bonds and notes of the United States, and bills, notes, revenue bonds, and warrants with a maturity from date of purchase of not exceeding six months, issued in anticipation of the collection of taxes or in anticipation of the receipt of assured revenues by any State, county, district, political subdivision, or municipality in the continental United States, including irrigation, drainage and reclamation districts, such purchases to be made in accordance with rules and regulations prescribed by the Federal Reserve Board;

(c) To purchase from member banks and to sell, with or without its indorsement, bills of exchange arising out of commercial transactions, as hereinbefore defined;

(d) To establish from time to time, subject to review and determination of the Federal Reserve Board, rates of discount to be charged by the Federal reserve bank for each class of paper, which shall be fixed with a view of accommodating commerce and business;

(e) To establish accounts with other Federal reserve banks for exchange purposes and, with the consent of the Federal Reserve Board, to open and maintain banking accounts in foreign countries, appoint correspondents, and establish agencies in such countries wheresoever it may deem best for the purpose of purchasing, selling, and collecting bills of exchange, and to buy and sell with or without its indorsement, through such correspondents or agencies, bills of exchange arising out of actual commercial transactions which have not more than ninety days to run and which bear the signature of two or more responsible parties. [38 Stat. L. 264.]


GOVERNMENT DEPOSITS

SEC. 15. [Government deposits.] The moneys held in the general fund of the Treasury, except the five per centum fund for the redemption of outstanding national-bank notes and the funds provided in this Act for the redemption of Federal reserve notes may, upon the direction of the Secretary of the Treasury, be deposited in Federal reserve banks, which banks, when required by the Secretary of the Treasury, shall act as fiscal agents of the United States; and the revenues of the Government or any part thereof may be deposited in such banks, and disbursements may be made by checks drawn against such deposits.

No public funds of the Philippine Islands, or of the postal savings, or any Government funds, shall be deposited in the continental United States in any bank not belonging to the system established by this Act: Provided, however, That nothing in this Act shall be construed to deny the right of the Secretary of the Treasury to use member banks as depositaries. [38 Stat. L. 265.]

NOTE ISSUES

SEC. 16. [Note issues — regulations.] Federal reserve notes, to be issued at the discretion of the Federal Reserve Board for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are hereby authorized. The said notes shall be obligations of the United States and shall be receivable
by all national and member banks and Federal reserve banks and for all
taxes, customs, and other public dues. They shall be redeemed in gold on
demand at the Treasury Department of the United States, in the city of
Washington, District of Columbia, or in gold or lawful money at any
Federal reserve bank.

Any Federal reserve bank may make application to the local Federal
reserve agent for such amount of the Federal reserve notes hereinbefore
provided for as it may require. Such application shall be accompanied with
a tender to the local Federal reserve agent of collateral in amount equal to
the sum of the Federal reserve notes thus applied for and issued pursuant
to such application. The collateral security thus offered shall be notes and
bills, accepted for rediscount under the provisions of section thirteen of
this Act, and the Federal reserve agent shall each day notify the Federal
Reserve Board of all issues and withdrawals of Federal reserve notes to
and by the Federal reserve bank to which he is accredited. The said Fed-
eral Reserve Board may at any time call upon a Federal reserve bank for
additional security to protect the Federal reserve notes issued to it.

Every Federal reserve bank shall maintain reserves in gold or lawful
money of not less than thirty-five per centum against its deposits and
reserves in gold of not less than forty per centum against its Federal reserve
notes in actual circulation, and not offset by gold or lawful money deposited
with the Federal reserve agent. Notes so paid out shall bear upon their
faces a distinctive letter and serial number, which shall be assigned by the
Federal Reserve Board to each Federal reserve bank. Whenever Federal
reserve notes issued through one Federal reserve bank shall be received
by another Federal reserve bank they shall be promptly returned for credit
or redemption to the Federal reserve bank through which they were origi-
nally issued. No Federal reserve bank shall pay out notes issued through
another under penalty of a tax of ten per centum upon the face value of
notes so paid out. Notes presented for redemption at the Treasury of the
United States shall be paid out of the redemption fund and returned to
the Federal reserve banks through which they were originally issued, and
thereupon such Federal reserve bank shall, upon demand of the Secretary
of the Treasury, reimburse such redemption fund in lawful money or, if
such Federal reserve notes have been redeemed by the Treasurer in gold
or gold certificates, then such funds shall be reimbursed to the extent
deemed necessary by the Secretary of the Treasury in gold or gold certifi-
cates, and such Federal reserve bank shall, so long as any of its Federal
reserve notes remain outstanding, maintain with the Treasurer in gold an
amount sufficient in the judgment of the Secretary to provide for all
redemptions to be made by the Treasurer. Federal reserve notes received
by the Treasury, otherwise than for redemption, may be exchanged for gold
out of the redemption fund hereinafter provided and returned to the reserve
bank through which they were originally issued, or they may be returned
to such bank for the credit of the United States. Federal reserve notes
unfit for circulation shall be returned by the Federal reserve agents to the
Comptroller of the Currency for cancellation and destruction.

The Federal Reserve Board shall require each Federal reserve bank to
maintain on deposit in the Treasury of the United States a sum in gold
sufficient in the judgment of the Secretary of the Treasury for the redemp-
tion of the Federal reserve notes issued to such bank, but in no event le
than five per centum; but such deposit of gold shall be counted and included as part of the forty per centum reserve hereinbefore required. The board shall have the right, acting through the Federal reserve agent, to grant in whole or in part or to reject entirely the application of any Federal reserve bank for Federal reserve notes; but to the extent that such application may be granted the Federal Reserve Board shall, through its local Federal reserve agent, supply Federal reserve notes to the bank so applying, and such bank shall be charged with the amount of such notes and shall pay such rate of interest on said amount as may be established by the Federal Reserve Board, and the amount of such Federal reserve notes so issued to any such bank shall, upon delivery, together with such notes of such Federal reserve bank as may be issued under section eighteen of this Act upon security of United States two per centum Government bonds, become a first and paramount lien on all the assets of such bank.

Any Federal reserve bank may at any time reduce its liability for outstanding Federal reserve notes by depositing, with the Federal reserve agent, its Federal reserve notes, gold, gold certificates, or lawful money of the United States. Federal reserve notes so deposited shall not be reissued, except upon compliance with the conditions of an original issue.

The Federal reserve agent shall hold such gold, gold certificates, or lawful money available exclusively for exchange for the outstanding Federal reserve notes when offered by the reserve bank of which he is a director. Upon the request of the Secretary of the Treasury the Federal Reserve Board shall require the Federal reserve agent to transmit so much of said gold to the Treasury of the United States as may be required for the exclusive purpose of the redemption of such notes.

Any Federal reserve bank may at its discretion withdraw collateral deposited with the local Federal reserve agent for the protection of its Federal reserve notes deposited with it and shall at the same time substitute therefor other like collateral of equal amount with the approval of the Federal reserve agent under regulations to be prescribed by the Federal Reserve Board.

In order to furnish suitable notes for circulation as Federal reserve notes, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved in the best manner to guard against counterfeits and fraudulent alterations, and shall have printed therefrom and numbered such quantities of such notes of the denominations of $5, $10, $20, $50, $100, as may be required to supply the Federal reserve banks. Such notes shall be in form and tenor as directed by the Secretary of the Treasury under the provisions of this Act and shall bear the distinctive numbers of the several Federal reserve banks through which they are issued.

When such notes have been prepared, they shall be deposited in the Treasury, or in the subtreasury or mint of the United States nearest the place of business of each Federal reserve bank and shall be held for the use of such bank subject to the order of the Comptroller of the Currency for their delivery, as provided by this Act.

The plates and dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the laws relating to the procuring of such notes, and all other expenses incidental
to their issue and retirement, shall be paid by the Federal reserve banks, and the Federal Reserve Board shall include in its estimate of expenses levied against the Federal reserve banks a sufficient amount to cover the expenses herein provided for.

The examination of plates, dies, bed pieces, and so forth, and regulations relating to such examination of plates, dies and so forth, of national-bank notes provided for in section fifty-one hundred and seventy-four Revised Statutes, is hereby extended to include notes herein provided for.

Any appropriation heretofore made out of the general funds of the Treasury for engraving plates and dies, the purchase of distinctive paper, or to cover any other expense in connection with the printing of national-bank notes or notes provided for by the Act of May thirtieth, nineteen hundred and eight, and any distinctive paper that may be on hand at the time of the passage of this Act may be used in the discretion of the Secretary for the purposes of this Act, and should the appropriations heretofore made be insufficient to meet the requirements of this Act in addition to circulating notes provided for by existing law, the Secretary is hereby authorized to use so much of any funds in the Treasury not otherwise appropriated for the purpose of furnishing the notes aforesaid: Provided, however, That nothing in this section contained shall be construed as exempting national banks or Federal reserve banks from their liability to reimburse [sic] the United States for any expenses incurred in printing and issuing circulating notes.

Every Federal reserve bank shall receive on deposit at par from member banks or from Federal reserve banks checks and drafts drawn upon any of its depositors, and when remitted by a Federal reserve bank, checks and drafts drawn by any depositor in any other Federal reserve bank or member bank upon funds to the credit of said depositor in said reserve bank or member bank. Nothing herein contained shall be construed as prohibiting a member bank from charging its actual expense incurred in collecting and remitting funds, or for exchange sold to its patrons. The Federal Reserve Board shall, by rule, fix the charges to be collected by the member banks from its patrons whose checks are cleared through the Federal reserve bank and the charge which may be imposed for the service of clearing or collection rendered by the Federal reserve bank.

The Federal Reserve Board shall make and promulgate from time to time regulations governing the transfer of funds and charges therefor among Federal reserve banks and their branches, and may at its discretion exercise the functions of a clearing house for such Federal reserve banks, or may designate a Federal reserve bank to exercise such functions, and may also require each such bank to exercise the functions of a clearing house for its member banks. [38 Stat. L. 265.]

For R.S. sec. 5174 mentioned in the text see supra, p. 732. For a discussion of the Act of May 30, 1908, ch. 229, also mentioned in the text see the notes to section 27 of this Act. infra, p. 843.


Sec. 17. [Registered bonds — repeal of provisions requiring.] So much of the provisions of section fifty-one hundred and fifty-nine of the Revised
Statutes of the United States, and section four of the Act of June twentieth, eighteen hundred and seventy-four, and section eight of the Act of July twelfth, eighteen hundred and eighty-two, and of any other provisions of existing statutes as require that before any national banking associations [sic] shall be authorized to commence banking business it shall transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds is hereby repealed. [38 Stat. L. 268.]

R. S. sec. 5150 partly repealed by the text is given supra, p. 725.
The Act of June 20, 1874, ch. 343, sec. 4, partly repealed by the text, is given supra, p. 735.
The Act of July 12, 1882, ch. 290, § 8, also partly repealed, is given supra, p. 737.
Amended.—This section was amended by the Act of June 21, 1917, ch. ———, sec. 9.

REFUNDING BONDS

SEC. 18. [Refunding bonds — retiring notes — issue of circulating notes — gold notes.] After two years from the passage of this Act, and at any time during a period of twenty years thereafter, any member bank desiring to retire the whole or any part of its circulating notes, may file with the Treasurer of the United States an application to sell for its account, at par and accrued interest, United States bonds securing circulation to be retired.

The Treasurer shall, at the end of each quarterly period, furnish the Federal Reserve Board with a list of such applications, and the Federal Reserve Board may, in its discretion, require the Federal reserve banks to purchase such bonds from the banks whose applications have been filed with the Treasurer at least ten days before the end of any quarterly period at which the Federal Reserve Board may direct the purchase to be made: Provided, That Federal reserve banks shall not be permitted to purchase an amount to exceed $25,000,000 of such bonds in any one year, and which amount shall include bonds acquired under section four of this Act by the Federal reserve bank.

Provided further, That the Federal Reserve Board shall allot to each Federal reserve bank such proportion of such bonds as the capital and surplus of such bank shall bear to the aggregate capital and surplus of all the Federal reserve banks.

Upon notice from the Treasurer of the amount of bonds so sold for its account, each member bank shall duly assign and transfer, in writing, such bonds to the Federal reserve bank purchasing the same, and such Federal reserve bank shall, thereupon, deposit lawful money with the Treasurer of the United States for the purchase price of such bonds, and the Treasurer shall pay to the member bank selling such bonds any balance due after deducting a sufficient sum to redeem its outstanding notes secured by such bonds, which notes shall be canceled and permanently retired when redeemed.

The Federal reserve banks purchasing such bonds shall be permitted to take out an amount of circulating notes equal to the par value of such bonds.

Upon the deposit with the Treasurer of the United States of bonds so purchased, or any bonds with the circulating privilege acquired under section four of this Act, any Federal reserve bank making such deposit in the manner provided by existing law, shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds.
so deposited. Such notes shall be the obligations of the Federal reserve bank procuring the same, and shall be in form prescribed by the Secretary of the Treasury, and to the same tenor and effect as national-bank notes now provided by law. They shall be issued and redeemed under the same terms and conditions as national-bank notes except that they shall not be limited to the amount of the capital stock of the Federal reserve bank issuing them.

Upon application of any Federal reserve bank, approved by the Federal Reserve Board, the Secretary of the Treasury may issue, in exchange for United States two per centum gold bonds bearing the circulation privilege, but against which no circulation is outstanding, one-year gold notes of the United States without the circulation privilege, to an amount not to exceed one-half of the two per centum bonds so tendered for exchange, and thirty-three per centum gold bonds without the circulation privilege for the remainder of the two per centum bonds so tendered: Provided, That at the time of such exchange the Federal reserve bank obtaining such one-year gold notes shall enter into an obligation with the Secretary of the Treasury binding itself to purchase from the United States for gold at the maturity of such one-year notes, an amount equal to those delivered in exchange for such bonds, if so requested by the Secretary, and at each maturity of one-year notes so purchased by such Federal reserve bank, to purchase from the United States such an amount of one-year notes as the Secretary may tender to such bank, not to exceed the amount issued to such bank in the first instance, in exchange for the two per centum United States gold bonds; said obligation to purchase at maturity such notes shall continue in force for a period not to exceed thirty years.

For the purpose of making the exchange herein provided for, the Secretary of the Treasury is authorized to issue at par Treasury notes in coupon or registered form as he may prescribe in denominations of one hundred dollars, or any multiple thereof, bearing interest at the rate of three per centum per annum, payable quarterly, such Treasury notes to be payable not more than one year from the date of their issue in gold coin of the present standard value, and to be exempt as to principal and interest from the payment of all taxes and duties of the United States except as provided by this Act, as well as from taxes in any form by or under State, municipal, or local authorities. And for the same purpose, the Secretary is authorized and empowered to issue United States gold bonds at par, bearing three per centum interest payable thirty years from date of issue, such bonds to be of the same general tenor and effect and to be issued under the same general terms and conditions as the United States three per centum bonds without the circulation privilege now issued and outstanding.

Upon application of any Federal reserve bank, approved by the Federal Reserve Board, the Secretary may issue at par such three per centum bonds in exchange for the one-year gold notes herein provided for. [38 Stat. L. 268.]

**BANK RESERVES**

Sec. 19. [Demand deposits—reserves required.] Demand deposits within the meaning of this Act shall comprise all deposits payable within thirty days, and time deposits shall comprise all deposits payable after thirty days, and all savings accounts and certificates of deposit which are subject to not less than thirty days' notice before payment.
When the Secretary of the Treasury shall have officially announced, in such manner as he may elect, the establishment of a Federal reserve bank in any district, every subscribing member bank shall establish and maintain reserves as follows:

(a) A bank not in a reserve or central reserve city as now or hereafter defined shall hold and maintain reserves equal to twelve per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

In its vaults for a period of thirty-six months after said date five-twelfths thereof and permanently thereafter four-twelfths.

In the Federal reserve bank of its district, for a period of twelve months after said date, two-twelfths, and for each succeeding six months an additional one-twelfth, until five-twelfths have been so deposited, which shall be the amount permanently required.

For a period of thirty-six months after said date the balance of the reserves may be held in its own vaults, or in the Federal reserve bank, or in national banks in reserve or central reserve cities as now defined by law.

After said thirty-six months’ period said reserves, other than those hereinbefore required to be held in the vaults of the member bank and in the Federal reserve bank, shall be held in the vaults of the member bank or in the Federal reserve bank, or in both, at the option of the member bank.

(b) A bank in a reserve city, as now or hereafter defined, shall hold and maintain reserves equal to fifteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

In its vaults for a period of thirty-six months after said date, six-fifteenths thereof, and permanently thereafter five-fifteenths.

In the Federal reserve bank of its district for a period of twelve months after the date aforesaid, at least three-fifteenths, and for each succeeding six months an additional one-fifteenth, until six-fifteenths have been so deposited, which shall be the amount permanently required.

For a period of thirty-six months after said date the balance of the reserves may be held in its own vaults, or in the Federal reserve bank, or in national banks in central reserve cities, as now defined by law.

After said thirty-six months’ period all of said reserves, except those hereinbefore required to be held permanently in the vaults of the member bank and in the Federal reserve bank, shall be held in its vaults or in the Federal reserve bank or in both, at the option of the member bank.

(c) A bank in a central reserve city, as now or hereafter defined, shall hold and maintain a reserve equal to eighteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

In its vaults, six-eighteenths thereof.

In the Federal reserve bank, seven-eighteenths.

The balance of said reserves shall be held in its own vaults or in the Federal reserve bank, at its option.

Any Federal reserve bank may receive from the member banks as reserves not exceeding one-half of each installment, eligible paper as described in section thirteen properly indorsed and acceptable to the said reserve bank.

If a State bank or trust company is required or permitted by the law of its State to keep its reserves either in its own vaults or with another State bank or trust company or with a national bank, such reserve deposits so kept
in such State bank, trust company, or national bank shall be construed within the meaning of this section as if they were reserve deposits in a national bank in a reserve or central reserve city for a period of three years after the Secretary of the Treasury shall have officially announced the establishment of a Federal reserve bank in the district in which such State bank or trust company is situate. Except as thus provided, no member bank shall keep on deposit with any nonmember bank a sum in excess of ten per centum of its own paid-up capital and surplus. No member bank shall act as the medium or agent of a nonmember bank in applying for or receiving discounts from a Federal reserve bank under the provisions of this Act except by permission of the Federal Reserve Board.

The reserve carried by a member bank with a Federal reserve bank may, under the regulations and subject to such penalties as may be prescribed by the Federal Reserve Board, be checked against and withdrawn by such member bank for the purpose of meeting existing liabilities: Provided, however, That no bank shall at any time make new loans or shall pay any dividends unless and until the total reserve required by law is fully restored.

In estimating the reserves required by this Act, the net balance of amounts due to and from other banks shall be taken as the basis for ascertaining the bank deposits against which reserves shall be determined. Balances in reserve banks due to member banks shall, to the extent herein provided, be counted as reserves.

National banks located in Alaska or outside the continental United States may remain nonmember banks, and shall in that event maintain reserves and comply with all the conditions now provided by law regulating them; or said banks, except in the Philippine Islands, may, with the consent of the Reserve Board, become member banks of any one of the reserve districts, and shall, in that event, take stock, maintain reserves, and be subject to all the other provisions of this Act. [36 Stat. L. 270, as amended by 38 Stat. L. 691.]

Subsections (b) and (c) of this section were amended to read as given in the text by an Act of Aug. 15, 1914, ch. 252, 38 Stat. L. 691 entitled “An Act Proposing an amendment to section nineteen of the Federal reserve Act relating to reserves, and for other purposes.”

As originally enacted those sections were as follows:

“(b) A bank in a reserve city, as now or hereafter defined, shall hold and maintain reserves equal to fifteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

“in its vaults for a period of thirty-six months after said date six-fifteenths thereof, and permanently thereafter five-fifteenths.

“in the Federal reserve bank of its district for a period of twelve months after the date aforesaid at least three-fifteenths, and for each succeeding six months an additional one-fifteenth, until six-fifteenths have been so deposited, which shall be the amount permanently required.

“for a period of thirty-six months after said date the balance of the reserves may be held in its own vaults, or in the Federal reserve bank, or in national banks in reserve or central reserve cities as now defined by law.

“after said thirty-six months’ period all of said reserves, except those hereinafter required to be held permanently in the vaults of the member bank and in the Federal reserve bank, shall be held in its vaults or in the Federal reserve bank, or in both, at the option of the member bank.

“(c) A bank in a central reserve city, as now or hereafter defined, shall hold and maintain a reserve equal to eighteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

“in its vaults six-eighteenths thereof.

“in the Federal reserve bank seven-eighteenths.
"The balance of said reserves shall be held in its own vaults or in the Federal reserve bank, at its option.

"Any Federal reserve bank may receive from the member banks as reserves, not exceeding one-half of each installment, eligible paper as described in section fourteen properly indorsed and acceptable to the said reserve bank.

"If a State bank or trust company is required by the law of its State to keep its reserves either in its own vaults or with another State bank or trust company, such reserve deposits so kept in such State bank or trust company shall be construed, within the meaning of this section, as if they were reserve deposits in a national bank in a reserve or central reserve city for a period of three years after the Secretary of the Treasury shall have officially announced the establishment of a Federal reserve bank in the district in which such State bank or trust company is situated. Except as thus provided, no member bank shall keep on deposit with any nonmember bank a sum in excess of ten per centum of its own paid-up capital and surplus. No member bank shall act as the medium or agent of a nonmember bank in applying for or receiving discounts from a Federal reserve bank under the provisions of this Act except by permission of the Federal Reserve Board.

"The reserve carried by a member bank with a Federal reserve bank may, under the regulations and subject to such penalties as may be prescribed by the Federal Reserve Board, be checked against and withdrawn by such member bank for the purpose of meeting existing liabilities: Provided, however, That no bank shall at any time make new loans or shall pay any dividends unless and until the total reserve required by law is fully restored.

"In estimating the reserves required by this Act, the net balance of amounts due to and from other banks shall be taken as the basis for ascertaining the deposits against which reserves shall be determined. Balances in reserve banks due to member banks shall, to the extent herein provided, be counted as reserves.

"National banks located in Alaska or outside the continental United States may remain nonmember banks, and shall in that event maintain reserves and comply with all the conditions now provided by law regulating them; or said banks, except in the Philippine Islands, may, with the consent of the Reserve Board, become member banks of any one of the reserve districts, and shall, in that event, take stock, maintain reserves, and be subject to all the other provisions of this Act." [38 Stat. L. 270.]


SEC. 20. [Bank redemption fund as part of lawful reserve—repeal.] So much of sections two and three of the Act of June twentieth, eighteen hundred and seventy-four, entitled "An Act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes," as provides that the fund deposited by any national banking association with the Treasurer of the United States for the redemption of its notes shall be counted as a part of its lawful reserve as provided in the Act aforesaid, is hereby repealed. And from and after the passage of this Act such fund of five per centum shall in no case be counted by any national banking association as a part of its lawful reserve. [38 Stat. L. 277.]

See the notes to section 1 of this Act, supra, p. 817.

The Act of June 20, 1874, ch. 343, §§ 2 and 3, in part repealed, are given supra, p. 810.

LOANS ON FARM LANDS

SEC. 24. [Loans on farm lands.] Any national banking association not situated in a central reserve city may make loans secured by improved and uncumbered farm land, situated within its Federal reserve district, but no such loan shall be made for a longer time than five years, nor for an amount exceeding fifty per centum of the actual value of the property offered as security. Any such bank may make such loans in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits and such banks may continue hereafter as heretofore to receive time deposits and to pay interest on the same.
The Federal Reserve Board shall have power from time to time to add to the list of cities in which national banks shall not be permitted to make loans secured upon real estate in the manner described in this section. [38 Stat. L. 275.]


FOREIGN BRANCHES

SEC. 25. [Foreign branches.] Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board, upon such conditions and under such regulations as may be prescribed by the said board, for the purpose of securing authority to establish branches in foreign countries or dependencies of the United States for the furtherance of the foreign commerce of the United States, and to act, if required to do so, as fiscal agents of the United States. Such application shall specify, in addition to the name and capital of the banking association filing it, the place or places where the banking operations proposed are to be carried on, and the amount of capital set aside for the conduct of its foreign business. The Federal Reserve Board shall have power to approve or to reject such application if, in its judgment, the amount of capital proposed to be set aside for the conduct of foreign business is inadequate, or if for other reasons the granting of such application is deemed inexpedient.

Every national banking association which shall receive authority to establish foreign branches shall be required at all times to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and the Federal Reserve Board may order special examinations of the said foreign branches at such time or times as it may deem best. Every such national banking association shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accruing at each branch as a separate item. [38 Stat. L. 273.]


SEC. 26. [Inconsistent acts — repeals.] All provisions of law inconsistent with or superseded by any of the provisions of this Act are to that extent and to that extent only hereby repealed: Provided, Nothing in this Act contained shall be construed to repeal the parity provision or provisions contained in an Act approved March fourteenth, nineteen hundred entitled "An Act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes," and the Secretary of the Treasury may for the purpose of maintaining such parity and to strengthen the gold reserve, borrow gold on the security of the United States bonds authorized by section two of the Act last referred to or for one-year gold notes bearing interest at a rate of not to exceed three per centum per annum, or sell the same if necessary to obtain gold. When the funds of the Treasury
on hand justify, he may purchase and retire such outstanding bonds and
notes. [38 Stat. L. 274.]

The Parity Act of March 14, 1900, ch. 41, mentioned in the text is given under
COINAGE, MINTS, AND ASSAY OFFICES, VOI. 2, p. 348.

SEC. 27. [National currency associations — national monetary commis-
Ssion — Revised Statutes sections reenacted.] The provisions of the Act of
May thirtieth, nineteen hundred and eight, authorizing national currency
associations, the issue of additional national-bank circulation, and creating
a National Monetary Commission, which expires by limitation under the
terms of such Act on the thirtieth day of June, nineteen hundred and four-
teen, are hereby extended to June thirtieth, nineteen hundred and fifteen,
and sections fifty-one hundred and fifty-three, fifty-one hundred and
seventy-two, fifty-one hundred and ninety-one, and fifty-two hundred and
fourteen of the Revised Statutes of the United States, which were amended
by the Act of May thirtieth, nineteen hundred and eight, are hereby
reenacted to read as such sections read prior to May thirtieth, nineteen
hundred and eight, subject to such amendments or modifications as are pre-
scribed in this Act. * * *

[38 Stat. L. 274, as amended by 38 Stat. L. 682.]

See the notes to section 1 of this Act, supra, p. 817.

This section was amended by an Act of Aug. 4, 1914, ch. 225, 38 Stat. L. 682 entitled:
"An Act To amend section twenty-seven of an Act approved December twenty-third,
nineteen hundred and thirteen, and known as the Federal Reserve Act."

The amendment made no change in the part of this section here given, but changed
a proviso thereof which had amended section 9 of the Aldrich-Vreeland Act of May 30,
1908, ch. 229, which had amended R. S. sec. 5214 and is incorporated therein, supra,
p. 793. See the notes to said section.

The Act of May 30, 1908, mentioned in the text was the Aldrich-Vreeland Act of May
30, 1908, ch. 229, 35 Stat. L. 548 and consisted of twenty sections. Of these section 9
amended R. S. sec. 5214, supra, p. 793, re-enacted by the text. Section 10 amended the
Act of July 12, 1882, ch. 290, § 9, which was not specifically re-enacted by the provisions
given in the text. Section 11 amended R. S. sec. 5172, supra, p. 731, mentioned in the
text.

R. S. secs. 5153 and 5191, supra, pp. 711, 741, mentioned in the text as having been
amended by the Act of May 30, 1908, ch. 229, were not specifically amended by said
Act. See the notes to said sections.

SEC. 29. [Invalidity of part of Act — effect.] If any clause, sentence,
paragraph, or part of this Act shall for any reason be adjudged by any
court of competent jurisdiction to be invalid, such judgment shall not
affect, impair, or invalidate the remainder of this Act, but shall be confined
in its operation to the clause, sentence, paragraph, or part thereof directly
involved in the controversy in which such judgment shall have been
rendered. [38 Stat. L. 275.]

SEC. 30. [Right to amend or repeal.] The right to amend, alter, or
repeal this Act is hereby expressly reserved. [38 Stat. L. 275.]

V. DISSOLUTION AND RECEIVERSHIP

Sec. 5220. [Voluntary dissolution of associations.] Any association
may go into liquidation and be closed by the vote of its shareholders own-
ing two-thirds of its stock. [R. S.]

Sections 5220-5243 constitute chapter 4 of title 62 of the Revised Statutes, entitled "Dissolution and Receivership."

Provisions for the enforcement of the individual liability of shareholders on liquidation of national banks were made by the Act of June 30, 1876, ch. 156.

Necessity for insolvency.—This section is not limited to insolvent banks, nor to cases where the interest of all of the shareholders, including the minority, may be best served thereby. In re Bennett, (Tex. Civ. App. 1908) 110 S. W. 108.


The right to go into voluntary liquidation may be exercised by the requisite number of stockholders although it may be contrary to the wishes and against the interests of the owners of the majority of the stock. Watkins v. National Bank, (1893) 51 Kan. 254, 32 Pac. 914.

Right of majority stockholders who are also officers.—The owners of two-thirds of the stock of a national bank may vote to liquidate the bank, though they are the directors and the executive officers thereof, since they, as directors and officers, owe no duty to dissenting minority stockholders to continue the bank, where they do not desire so to do. Green v. Bennett, (Tex. Civ. App. 1908) 110 S. W. 108.

Estoppel to deny validity of proceedings.—While the proceedings for liquidation are fixed by statute, yet a stockholder who with full knowledge of all the steps taken to put the bank into liquidation accepts and retains a dividend paid by the liquidating agents is estopped to deny the validity of the liquidation. Watkins v. National Bank, (1893) 51 Kan. 254, 32 Pac. 914.


"It is conceded and authoritatively decided that the adoption of a resolution for voluntary liquidation does not effect a dissolution of the corporation but merely suspends its ordinary functions, and that it continues in existence for the purpose of liquidating its affairs and that its directors are not ousted from office, but that, at least in the absence of other action by the stockholders, the duty to liquidate the business devolves upon them." Planten v. National Nassau Bank, (1916) 93 Misc. 344, 157 N. Y. S. 31, 174 App. Div. 254, 160 N. Y. S. 297.

A bank in process of liquidation is subject to like proceedings as other corporations or natural persons, for example, to a creditor's suit to reach a trust fund held by its officer. Merchants', etc., Nat. Bank v. Masonic Hall, (1880) 45 Ga. 603.

After a bank has gone into voluntary liquidation there is "no authority on the part of officers of the bank to transact any business in the name of the bank so as to bind its shareholders, except that which is implied in the duty of liquidation, unless such authority had been expressly conferred by the shareholders. The powers of the president or other officer of the bank to bind it by transactions after it was put into liquidation is that which results by implication from the duty to wind up and close its affairs. That duty consists in the collection and reduction to money of the assets of the bank, and the payment of creditors equally and ratably so far as the assets prove sufficient. Payments, of course, may be made in the bills receivable and other assets of the bank in specie, and the title to such paper may be transferred by the president or cashier by an indorsement suitable to the purpose in the name of the bank; but such indorsement and use of the name of the bank is in liquidation and merely for the purpose of transferring title. It can have no other effect as against the shareholders by creating a new obligation. It does not constitute a
liberty, contract or engagement of the bank for which they can be held to be individually responsible." Schrader v. Manufacturers' Nat. Bank, (1890) 133 U. S. 67, 10 S. Ct. 258, 33 U. S. (L. ed.) 584.

An action would not be maintainable on a renewal note executed in the name of the bank by its president after it had gone into liquidation. Merkel First Nat. Bank v. Armstrong, (Tex. Civ. App. 1914) 185 S. W. 873.

Where a national bank went into voluntary liquidation, it thereby ceased to do business as a going concern, and was not thereafter required to register a subsequent transfer of its stock and to issue new stock to the transferee. Muir v. Citizens' Nat. Bank, (1905) 39 Wash. 57, 80 Pac. 1007.

Since a national bank which has gone into voluntary liquidation has not terminated its existence or ceased to be a corporate entity, an action by a creditor against a national bank in liquidation is not controlled by a state statute of limitations limiting the right to sue a corporation to three years after its dissolution. Standard Trust Co. v. Commercial Nat. Bank, (C. C. A. 4th Cir. 1917) 240 Fed. 303, 153 C. C. A. 220, where the court said: "True, it may not longer engage in the banking business or otherwise exercise its customary functions, but it remains nevertheless a corporation capable of suing and being sued.

Methods of dissolution.—A national bank can be dissolved only in the manner provided by the National Bank Act. Union Gold Min. Co. v. Rocky Mountain Nat. Bank, (1872) 1 Colo. 331.

The dissolution of a national banking association is not complete until the necessary action has been had for the redemption of its circulating notes, either by actually redeeming them and surrendering them to the Comptroller of the Currency or by depositing an amount of treasury notes with him adequate to their redemption. (1869) 13 Op. Atty.-Gen. 56.

Abandonment of business.—The fact that the bank has transferred all its assets to another bank in consideration of the assumption by the latter of all its liabilities and thereafter transacted no business and maintained no organization will not prevent its being sued. Pritchard v. Barnes, (1898) 101 Wis. 86, 76 N. W. 1106.


Liquidating agents are charged with a duty of collecting the assets of the bank and paying its debts, and for that purpose they may bring suit against a stockholder on his unpaid notes held by the bank. Norwood v. Inter-State Nat. Bank (1898) 92 Tex. 268, 48 S. W. 3.

Where the insolvency of a national bank was accompanied by a conveyance of its assets to a trustee, and a pledge thereof for the benefit of creditors, and this was followed by affirmative proceedings in liquidation, authorized by law, and the selection by the shareholders of the same trustee as their liquidating agent, such agent held the assets under an express trust for the benefit of creditors. George v. Wallace, (C. C. A. 8th Cir. 1904) 135 Fed. 286, 68 C. C. A. 40.

The owners of two-thirds of the stock of a national bank, who are its directors and executive officers, must, on voting to liquidate the bank, make such disposition of the assets as will be to the best interests of all the stockholders, including minority dissenting stockholders, and this may be done by the directors or by means of a liquidating committee. Green v. Bennett, (Tex. Civ. App. 1908) 110 S. W. 108.

In Green v. Bennett, (Tex. Civ. App. 1908) 110 S. W. 108, it appeared that the owners of two-thirds of the stock of a national bank voted to liquidate it. They were the officers of the bank, and became the liquidating committee. It was held that dissenting minority stockholders had a remedy against the liquidating committee for injuries resulting from the failure of the committee to properly dispose of the assets of the bank.

The good will of the business of the bank is a negligible quantity, and the agents need not attempt to sell it, for a bank which has gone into voluntary liquidation has no good will to dispose of, except perhaps such as arises from the unexpired term of a lease of the bank building. Centralia First Nat. Bank v. Marshall, (1887) 26 Ill. App. 440; Watkins v. National Bank, (1893) 51 Kan. 254, 32 Pac. 914.

Minority stockholders of a solvent national bank cannot obtain relief from the majority stockholders for injuries resulting from the destruction of the good will of the bank, by a liquidation thereof by a vote of the owners of two-thirds of the stock thereof, the act of liquidation destroying the value of such good will, as a value separate from the value of tangible assets, and the loss falling proportionately on all the stockholders. Green v. Bennett, (Tex. Civ. App. 1908) 110 S. W. 108.

Rights of creditors.—The tangible assets and the liability of stockholders of an insolvent national bank in process of voluntary liquidation in the hands of the liquidating agents constitute a trust fund for the primary benefit of creditors. George v. Wallace, (C. C. A. 8th Cir. 1904) 135 Fed. 286, 68 C. C. A. 40.
The duty of liquidating agent and the rights of creditors are analogous to those of a receiver appointed by the comptroller of the currency. By R. S. sec. 5236, infra, p. 865, the comptroller is required to make a ratable dividend of the money paid to him, after providing for the redemption of the notes of the bank, on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, etc. So where a bank went into liquidation under the text R. S. sec. 5220, and in an action in a state court against the bank by a creditor, with service of summons on the liquidator, the creditor recovered judgment, and docked the same as a lien under the state statute, and on a subsequent creditor's bill in the federal court by another creditor a receiver was appointed to whom the liquidator, pursuant to an order of said federal court, turned over all the property of the bank in his hands, it was held that the judgment creditor in the first mentioned action had acquired no lien upon such property by the prior docketing of his judgment, and that "the only effect of the judgment was to fix the amount of the debt." Merchants' Nat. Bank v. Lillington Nat. Bank, (E. D. N. C. 1916) 231 Fed. 556.

Creditors of a national bank who, after it suspends payment and goes into voluntary liquidation, receive in settlement of their claims bills receivable, indorsed or guaranteed in the name of the bank by its president, cannot claim as creditors, and the stockholders, in the absence of an express authorization, are not liable on the contract of indorsement or guaranty made by an officer after the bank's suspension. Richmond v. Irons, (1867) 121 U. S. 27, 7 S. Ct. 788, 30 U. S. (L. ed.) 864, reversing (N. D. Ill. 1866) 27 Fed. 591.

The cases apparently make no distinction between the rights of creditors in the case of voluntary liquidation and those of creditors where a receiver is appointed by the comptroller to wind up the affairs of the bank, and such cases are placed together under the treatment of the latter subject in notes to R. S. sec. 5234, infra, p. 860.

A cause of action was shown by plaintiff's averment that, after he had deposited money in a national bank, the latter went into liquidation, and that the defendant banking corporation came into possession of, and received as the successor of said national bank the amount so deposited, and for which the plaintiff sued as money had and received to his use. Eans v. Jefferson City Exch. Bank, (1895) 78 Mo. 152.

Appointment of receiver by court.—Where the bank is in voluntary liquidation a receiver will not ordinarily be appointed at the request of creditors or minority stockholders. At least the danger of loss or injury to them must be clear and the necessity for the appointment free from reasonable doubt. Watkins v. National Bank, (1893) 51 Kan. 254, 32 Pac. 914.

But where the bank is clearly insolvent and its affairs are badly managed by the liquidating officers, some of its creditors or stockholders being secured to the injury of others, and its assets being distributed to stockholders before payment of its debts, a receiver may be appointed by the court at the instance of the injured creditor or stockholder. Elwood v. Greenleaf First Nat. Bank, (1899) 41 Kan. 475, 21 Pac. 673.

In the case of a national bank in voluntary liquidation where a judgment creditor is unable to collect his debt and the assets are being distributed to the stockholders, a receiver will be appointed by the state court on the application of such creditor to take charge of the assets, notwithstanding a pending bill by such stockholders in the federal court for the appointment of a receiver, the judgment creditor not being a party thereto. Merchants', etc., Nat. Bank v. Masonic Hall, (1879) 63 Ga. 549.

Appointment of receiver by comptroller.—Though a national bank be in process of liquidation under this section and R. S. sec. 5221 following the comptroller of the currency cannot be restrained from appointing a receiver pursuant to the Act of June 30, 1876, infra, p. 915. Washington Nat. Bank v. Eckels, (C. C. Wash. 1883) 57 Fed. 870.

Action by stockholder against directors.—Where a liquidating committee has been appointed to liquidate the affairs of a solvent bank, the jurisdiction of such committee, with respect to bringing or defending actions at least, is subject to the supervision and control of the board of directors. So in an action by a stockholder of the bank, in the right of the corporation, for an accounting by directors for losses resulting from their mismanagement, wrongful acts, and negligence, it was not necessary for the plaintiff, in order to maintain the action, to show a demand and refusal by the liquidating committee to bring the action; nor was it necessary for the plaintiff to show that such a demand had been made on the stockholders. Plante v. National Nassau Bank, (1916) 174 App. Div. 254, 160 N. Y. Supp. 291, (affirming 53 Misc. 364, 167 N. Y. S. 31), where the court said: "We are not bound by the rule suggested in Hawes v. Oakland, [1882] 104 U. S. 450, 26 U. S. (L. ed.) 827, which is contrary to the well established law of this state that the business of a corporation must be conducted by its board of directors, and that the stockholders cannot control their action."
Sec. 5221. [Notice of intent to dissolve.] Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the Comptroller of the Currency, and publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against the association for payment. [R. S.]


Sec. 5222. [Deposit of lawful money to redeem outstanding circulation.] Within six months from the date of the vote to go into liquidation, the association shall deposit with the Treasurer of the United States, lawful money of the United States sufficient to redeem all its outstanding circulation. The Treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it has been received; and the money shall be paid into the Treasury of the United States, and placed to the credit of such association upon redemption account. [R. S.]


Sec. 5223. [Exemption as to an association consolidating with another.] An association which is in good faith winding up its business for the purpose of consolidating with another association shall not be required to deposit lawful money for its outstanding circulation; but its assets and liabilities shall be reported by the association with which it is in process of consolidation. [R. S.]


Effect of consolidation.—On the consolidation of national banks, by one taking all the assets and assuming all the liabilities of the other, the former becomes a new corporation whose stockholders were the stockholders of each of the old corporations before consolidation. Bonnet v. Eagle Pass First Nat. Bank, (1900) 24 Tex. Civ. App. 613, 60 S. W. 325.

Sale of bank organized by liquidating committee.—A sale of the assets of a national bank in process of liquidation, by the liquidating committee, composed of the directors of the bank owning two-thirds of its stock, to a bank organized by themselves, is not void, but only subject to the closest scrutiny on the part of a court of equity, and subject to be set aside on its being shown that it was not conducted with the utmost fairness, to the end that full value, and the best price obtainable, was realized. Such a transaction does not amount to a consolidation of the two banks, and the minority stockholders are not entitled to a proportionate share of the stock of the new bank. Green v. Bennett, (Tex. Civ. App. 1908) 110 S. W. 108.

Sec. 5224. [Re-assignment of bonds and redemption of notes, etc.] Whenever a sufficient deposit of lawful money to redeem the outstanding circulation of an association proposing to close its business has been made, the bonds deposited by the association to secure payment of its notes shall be re-assigned to it, in the manner prescribed by section fifty-one hundred and sixty-two. And thereafter the association and its shareholders shall
stand discharged from all liabilities upon the circulating notes, and those notes shall be redeemed at the Treasury of the United States. And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank, at public auction in New York City, and, after providing for the redemption and cancellation of said circulation and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representative. [R. S.]

This section was amended by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 320, by adding thereto the last sentence, beginning with the words "And if any such bank," etc.
R. S. sec. 5162 mentioned in the text is given supra, p. 728.

Sec. 5225. [Destruction of redeemed notes.] Whenever the Treasurer has redeemed any of the notes of an association which has commenced to close its affairs under the five preceding sections, he shall cause the notes to be mutilated and charged to the redemption account of the association; and all notes so redeemed by the Treasurer shall, every three months, be certified to and burned in the manner prescribed in section fifty-one hundred and eighty-four. [R. S.]

This section was amended by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 252, by inserting after the words "to close its affairs under the" the word "five" in place of the word "six" appearing in the section as originally enacted.
Provisions allowing national bank notes to be destroyed by maceration instead of by burning were made by the Act of June 23, 1874, ch. 455, given in Currency, vol. 2. p. 707.

Sec. 5226. [Mode of protesting notes.] Whenever any national banking association fails to redeem in the lawful money of the United States any of its circulating notes, upon demand of payment duly made during the usual hours of business, at the office of such association, or at its designated place of redemption, the holder may cause the same to be protested, in one package, by a notary public, unless the president or cashier of the association whose notes are presented for payment, or the president or cashier of the association at the place at which they are redeemable offers to waive demand and notice of the protest, and, in pursuance of such offer, makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-payment thereof. The notary public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the Comptroller of the Currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest. [R. S.]

As to the place of redemption of notes, see R. S. sec. 5195, supra, p. 743, and the notes thereto.

Sec. 5227. [Examination by special agent.] On receiving notice that any national banking association has failed to redeem any of its circulating
notes, as specified in the preceding section, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States, when demanded, and shall report to the Comptroller the fact so ascertained. If, from such protest, and the report so made, the Comptroller is satisfied that such association has refused to pay its circulating notes and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited. [R. S.]


Sec. 5228. [Continuing business after default.] After a default on the part of an association to pay any of its circulating notes has been ascertained by the Comptroller, and notice thereof has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits. [R. S.]


This section was amended by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 320, by striking out, after the words “and notice,” the words “of forfeiture of the bonds,” and inserting in place thereof the word “thereof,” so as to make the section read as above given.


Sec. 5229. [Notice to holders — redemption at Treasury — cancellation of bonds.] Immediately upon declaring the bonds of an association forfeited for non-payment of its notes, the Comptroller shall give notice, in such manner as the Secretary of the Treasury shall, by general rules or otherwise, direct, to the holders of the circulating notes of such association, to present them for payment at the Treasury of the United States; and the same shall be paid as presented in lawful money of the United States; whereupon the Comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid. [R. S.]


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Sec. 5230. [Sale of bonds at auction.] Whenever the Comptroller has become satisfied, by the protest or the waiver and admission specified in section fifty-two hundred and twenty-six, or by the report provided for in section fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes, he may, instead of canceling its bonds, cause so much of them as may be necessary to redeem its outstanding notes to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to the association. For any deficiency in the proceeds of all the bonds of an association, when thus sold, to reimburse to the United States the amount expended in paying the circulating notes of the association, the United States shall have a paramount lien upon all its assets; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same. [R. S.]


Sec. 5231. [Sale of bonds at private sale.] The Comptroller may, if he deems it for the interest of the United States, sell at private sale any of the bonds of an association shown to have made default in paying its notes, and receive therefor either money or the circulating notes of the association. But no such bonds shall be sold by private sale for less than par, nor for less than the market-value thereof at the time of sale; and no sales of any such bonds, either public or private, shall be complete until the transfer of the bonds shall have been made with the formalities prescribed by sections fifty-one hundred and sixty-two, fifty-one hundred and sixty-three, and fifty-one hundred and sixty-four. [R. S.]

For R. S. secs. 5162, 5163, 5164, to which this section refers, see supra, pp. 726, 727.

Sec. 5232. [Disposal of protested notes.] The Secretary of the Treasury may, from time to time, make such regulations respecting the disposition to be made of circulating notes after presentation at the Treasury of the United States for payment, and respecting the perpetuation of the evidence of the payment thereof, as may seem to him proper. [R. S.]


Sec. 5233. [Cancellation of national-bank notes.] All notes of national banking associations presented at the Treasury of the United States for payment shall, on being paid, be canceled. [R. S.]


Sec. 5234. [Appointment of receivers.] On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction,
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may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver, shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings. [R.S.]


“Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depository, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depository to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than two per centum per annum upon the average monthly amount of such deposits.”

Other provisions authorizing the appointment of receivers and relating to their powers and duties were made by the Act of June 30, 1876, ch. 156, given as amended in 1882, p. 915, and the Act of March 29, 1868, ch. 28, infra, p. 925.

A receiver may also be appointed under the provisions of the above section for the following offenses:

Where the capital stock of a national bank has not been fully paid in and it is thus reduced below the legal minimum and remains so for thirty days. R. S. sec. 5141, supra, p. 698.

The failure to make good the lawful money reserve within thirty days after notice. R. S. sec. 5191, supra, p. 741.

Where a bank has purchased or acquired its own stock, to prevent loss on a debt previously contracted in good faith, and has not sold or disposed of said stock within six months from the time of its purchase. R. S. sec. 5201, supra, p. 762.

For failure to make good any impairment of its capital stock and refusing to go into liquidation within three months after receiving notice. R. S. sec. 5205, supra, p. 767.

For the false certification of checks by any officer, clerk or agent. R. S. sec. 5208, supra, p. 769.

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I. APPOINTMENT, POWERS, DUTIES, AND LIABILITIES OF RECEIVER

1. Appointment and Effect of Appointment

Conclusiveness of comptroller's findings.
—The power vested in the comptroller is discretionary, and his conclusions are final and not reviewable by the courts.
mitting its officers to loan the bank's assets in violation of such Act, constituting a breach of the bank's implied contract with such depositors, inherent in the contract of deposit, that the bank would use such deposits and its other assets in conformity with the safeguards provided by law. Boyd v. Schneider, (C. C. A. 7th Cir. 1904) 131 Fed. 223, 65 C. C. A. 209.


After the insolvency of the bank and the appointment of a receiver, the bank is still liable on an unexpired lease, the same as a natural person. Chemical Nat. Bank v. Hartford Deposit Co., (1896) 161 U. S. 1, 16 S. Ct. 439, 40 U. S. (L. ed.) 685, affirming (1895) 156 Ill. 522, 41 N. E. 225.

In Sioux Falls Nat. Bank v. Sioux Falls First Nat. Bank, (1888) 6 Dak. 113, 50 N. W. 229, it was held that a national bank has no authority, after the appointment of a receiver, to appeal from an order refusing to dissolve an attachment made before the receiver's appointment.

Effect on rights of shareholders against directors.—The provisions of this Act for the administration of the affairs of an insolvent national bank by a receiver appointed by the comptroller of the currency does not prevent a depositary as an insolvent bank from maintaining a suit against its directors for negligently per-
The receiver can do no act which will impair the obligation of a contract entered into with the bank before its insolvency. Wolf v. National Bank, (1899) 178 Ill. 85, 52 N. E. 806, reversing McKee v. Wolf, (1898) 77 Ill. App. Div. 826.

The receivership is not by the comptroller does not in any sense represent the government, and he cannot subject the United States to the jurisdiction of the court and submit their rights to litigation in any court. Case v. Terrell, (1871) 11 Wall. 190. 20 U. S. (L. ed.) 134.


In Brown v. Schleier, (C. C. A. 8th Cir. 1902) 118 Fed. 981, 56 C. C. A. 475, it was said by Thayer, J., delivering the opinion of the court, that the receiver appointed by the comptroller "is vested with all the rights of creditors and the rights of the corporation itself, and may doubtless challenge any wrongful act which creditors could challenge, and maintain such suits against third parties, including actions against directors and stockholders of the bank on account of wrongful and fraudulent acts, as the corporation might maintain. The fact that in virtue of his office as receiver he is not authorized to challenge or impeach an executed transaction between the bank and a third party, like the one now in hand, that was simply ultra vires, and which, though known to the United States through its proper officials at the time it was undertaken and consummated, and while the excessive investment of its funds was being made, was neither arrested nor complained of by the United States or any creditor of the stockholder of the bank." 476; National Bank v. Kennedy, (1879) 17 Wall. 21, 21 U. S. (L. ed.) 554; Wallace v. Hood, (C. C. Kan. 1891) 89 Fed. 11; Ellis v. Little, (1882) 27 Kan. 707, 41 Am. Rep. 434. He is not an officer of any court. In re Chetwood, (1897) 166 U. S. 443, 17 S. Ct. 885, 41 U. S. (L. ed.) 782; Price v. Abbott, (C. C. Mass.) 17 Fed. 506; Armstrong v. Trautman, (S. D. Ohio 1888) 36 Fed. 275. And the assets of the bank are not brought under the control or protection of the federal courts by being taken into his custody. Snohomish County v. Puget Sound Nat. Bank, (C. C. Wash. 1897) 81 Fed. 518. Nor does the filing by him of a petition to sell personal property operate to place the assets of the bank within the control of the court in the sense in which control is acquired, where a receiver is appointed by the court. In re Chetwood, (1897) 165 U. S. 443, 17 S. Ct. 386, 41 U. S. (L. ed.) 782.


**Information regarding collateral.—** Where a receiver, on taking possession of the assets of a national bank, found its affairs in confusion and found stock pledged to it as collateral with no definite and certain agreement as to the particulars of the pledge, it was his duty to ascertain and assert fully the obligations and liabilities of the pledgor to the bank and the purpose and extent of the pledge. Wise v. Williams, (S. D. N. Y. 1908) 162 Fed. 161.

**Action against receiver.—** A right of action cannot be maintained against a receiver of a national bank by a person in behalf of himself and in the interest of all the creditors, without alleging a demand on the comptroller of the currency and the bank, and the refusal of each to bring suit. Moss v. Goodhart, (D. C. Mont. 1913) 200 Fed. 102, wherein it appeared that a stockholder owning ninety per cent. of the stock brought suit against the receiver alleging that he wrongfully, willfully and negligently sold certain assets of the bank for less than fifty per cent. of their value. The court held that the right of action did not reside in the stockholder but in the bank; that the party involved was the bank's; the alleged wrong was against the bank, and that a recovery in an action would enure to the bank. The court said: "In the matter of a national banking association in
charge of the comptroller for liquidation. It is believed that, before a stockholder's suit can be maintained, demand as aforesaid must have been made upon the receiver, the comptroller, and the association in turn. Ex p. Chetwood, [1897] 165 U. S. [433], 156, 17 S. Ct. 385, 41 U. S. (L. ed.) 782, seems to indicate that such demand is necessary. Then and then only all means within the stockholder's reach to procure action by those having capacity to sue or to compel suit have been exhausted. The comptroller is in the management and administration of the bank's affairs, mainly through his receiver; his instrument, whom he appoints, directs, and controls. This does not mean that at any time the bank can interfere with the Comptroller's and receiver's possession of the assets and their management and administration — in other words, bring suit on its causes of action — but means only that if the receiver unreasonably refuses to bring such action, and if the comptroller likewise refuses to compel the receiver to sue, the association may treat their refusal as an abandonment of the cause to it, and yet having both capacity to sue and title to its causes of action, may sue thereon. If it does or will do so, there is no necessity for a stockholder to resort to a suit in equity in behalf of the association for the protection of his equitable interest in the cause of action, the corporate property, and so he has no power to do so. If the association likewise refuses, and cannot be compelled to bring the action, a stockholder may have his action, making the receiver a party defendant, so that, if the suit fails, the receiver and through him the association will be bound by the decree and disabled from renewing the litigation. It would seem that the impropriety of a stockholder's suit under any other circumstances is obvious."

Collections after insolvency. — Where the proceeds of a draft sent to a national bank for collection and remittance were paid to the receiver of the bank on its insolvency, the owner of the draft was entitled to recover the amount thereof. American Can Co. v. Williams, (W. D. N. Y. 1908) 176 Fed. 816.

II. SALE OR COMPROMISE OF BAD OR DOUBTFUL DEBTS

An order of the court is prerequisite to a valid compromise by the receiver. Ward v. Hood, (C. C. Kan. 1898) 89 Ore. 1, 194 P. 511. And this rule has been extended to hold that a receiver who, without any order of the court, allowed an unlawful set-off against the claim of the bank was not estopped to sue on the claim thus set off, though in reliance on such set-off the debtor, and not the receiver, was foreclosed. Beckman v. Shackelford, (1894) 8 Tex. Civ. App. 660, 29 S. W. 200.

Court of competent jurisdiction. — The Federal District Court is a court of competent jurisdiction within the statute providing that a receiver may compromise bad or doubtful debts on the order of a court of record of competent jurisdiction. Matter of Platt, [1867] 1 Ben. 534, 19 Fed. Cas. No. 11,211.

Suits by or against the bank may be compromised under the power to sell or compound all bad or doubtful debts. Henderson v. Myers, (1876) 11 Phila. (Pa.) 616, 33 Leg. Int. (Pa.) 56.

Liability of stockholders. — The compromise of debts authorized by this section does not include a claim against a stockholder upon his individual liability for debts of the bank, even after it is in judgment. Price v. Yates, (1879) 7 Rep. 562, 19 Fed. Cas. No. 11,418; In re Earle, (E. D. Pa. 1889) 96 Fed. 678.

In re California Nat. Bank, (S. D. Cal. 1892) 53 Fed. 38, the court, while doubting whether it had the power to authorize the compounding of the statutory liability of the stockholder, refused to sanction the compounding of the liability of shareholders who had fraudulently assigned their property for the purpose of avoiding liability as stockholders, even though an acceptance of their offer would result in realizing a much larger sum than could be collected by proceedings against them.

Liability of directors. — The comptroller of the currency has no authority to compound or settle claims against the directors of a national bank, though he may direct the discontinuance of actions to enforce the claim by the receiver. Case v. Small, (E. D. La. 1881) 10 Fed. 722.

The receiver has no power to settle with directors so as to release them from liability for damages to third persons for fraud or deceit, as, for instance, to one who loaned money on the stock of the bank in reliance on their false and fraudulent report of the bank's financial condition. Merchants Nat. Bank v. Thomas, (1892) 11 Ohio Dec. (Reprint) 632, 28 Cinc. L. Bul. 164.

III. SALE OF REAL OR PERSONAL PROPERTY

Power of courts in general. — The courts have no general advisory or directing powers, and cannot make an order directing the receiver to sell property which does not belong to the bank, such as property held to secure a debt. In re Earle, (E. D. Pa. 1889) 92 Fed. 22.

Order of court essential. — The receiver cannot sell the real or personal property of the bank without an order of the court, and a sale or an agreement to sell which is not authorized by an order of the court, or which is in conflict with such order, is void as to the bank. Doc. C. K. Bank, (1891) 89 Fed. 11; Schofeld v. Baker, (W. D. Wash. 1914) 212 Fed. 504, decree affirmed.
under the order of a court of competent jurisdiction is a judicial sale, and is subject to the principles governing such sales. Schaberg v. McDonald, (1900) 60 Neb. 493, 83 N. W. 737; In re Illinois Third Nat. Bank, (N. D. Ill. 1880) 4 Fed. 775.

Fraudulent as this is, the only provision of the bank, under an order of court, and secretly purchases it himself through the instrumentality of a third person, the sale is voidable and may be set aside at the suit of his successor in the receivership. Baker v. Schoefield, (C. C. A. 9th Cir. 1915) 221 Fed. 322, 136 C. C. A. 320, affirming (W. D. Wash. 1914) 212 Fed. 504.

IV. COLLECTION OF DEBTS, DUES, AND CLAIMS; ACTIONS BY RECEIVERS

1. Power of Receiver, in General

"The receiver is the only person authorized by the act to collect due and claims belonging to the bank. . . . No person but the receiver is empowered by the Act, or can be directed by the comptroller to collect claims belonging to the bank." Brinkerhoff v. Bostwick, (1832) 88 N. Y. 62, holding that R. S. sec. 6229, infra, p. 873, "is the only provision of the act which authorizes the comptroller to institute any action in relation to the affairs of a national bank"; and that the receiver, and not the comptroller, was authorized to enforce by suit the liability of the directors of the bank negligently suffering the property of the bank to be wasted and squandered, but that for the wrongs complained of a stockholder's suit could be brought where the receiver was one of the parties charged with such misconduct; that a state court had jurisdiction to entertain such stockholders' suit, and that the bank and the receiver were necessary parties defendant.

The receiver has power to do all things necessary to collect and secure the assets of the bank, as, for instance, to extend the time of payment of a debt due the bank where by so doing he can in his judgment strengthen the security he holds for the payment. People's State Bank v. Francis, (1899) 8 N. D. 369, 79 N. W. 865.

"The language of the statute authorizing the appointment of a receiver to act under the direction of the comptroller means no more than that the receiver shall be subject to the direction of the comptroller. It does not mean that he shall do no act without special instructions. His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts no special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do." Turner v. Richardson, (1901) 180 U. S. 87, 21 S.

The federal jurisdiction in such cases is not based on the diversity of citizenship of the parties, or on the ground that the case is one arising under the laws of the United States. Schoefield v. Palmer, (W. D. Va. 1904) 134 Fed. 753; Murray v. Chambers, (W. D. Pa. 1907) 151 Fed. 142.

Jurisdiction of state courts "has been repeatedly exercised in actions by receivers (of national banks) to collect claims due to such banks." Brinckerhoff v. Bostwick, (1882) 88 N. Y. 52.

"The objection that the receiver cannot maintain actions in this court for the recovery of the demands he may in that capacity have acquired title to, has no substantial foundation for its support." Platt v. Crawford, (1868) 8 Abb. Pr. N. S. (N. Y.) 297.

A state court has jurisdiction of a suit by a national bank receiver to foreclose a mortgage given to the bank. Witters v. Bowles, (1889) 61 Vt. 366, 18 Atl. 194, where the court said: "In the collection of debts we think he may invoke the aid of any court having jurisdiction in other respects. The administration of the law relating to the settlement or the affairs of insolvent national banks is in no manner involved. Suits for the collection of such debts are not within any of the classes of cases in which the courts of the United States have exclusive jurisdiction, and, if the latter have jurisdiction, it is concurrent with the state courts."

2. Jurisdiction of Federal and State Courts

Federal jurisdiction.—Judicial Code, § 24, par. First, in title JUDICIARY, vol. 4, p. 839, gives jurisdiction to the federal District Court "of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue," without limitation as to the amount in controversy. Within the meaning of that provision, a suit by a receiver under the text R. S. sec. 5234, is a suit by an "officer" of the United States "authorized by law to sue, and may be maintained in the federal court regardless of the amount in controversy. Schoefield v. Palmer, (W. D. Va. 1904) 134 Fed. 753, where the court said: "That he [the receiver] is an officer of the United States has been doubted (Thompson v. Pool [C. C. Neb. 1895]) 70 Fed. 725, but the language used by the Supreme Court in In re Chetwood, (1897) 165 U. S. 443, 17 S. Ct. 385, 41 U. S. (L. ed.) 782, and in Auten v. U. S. Nat. Bank, (1899) 174 U. S. 125, and United States v. Northern Securities Co., (1904) 193 U. S. 173, 24 S. Ct. 162, 16 L. Ed. 678, see United States v. Missouri Pacific R. R., (1915) 240 U. S. 30, 36 S. Ct. 306, 54 L. Ed. 104, 6 Ann. Cas. 741, where it was said: "That the United States is an "officer" of the United States has been recognized more than once in our decisions. United States v. Missouri Pacific R. R., (1915) 240 U. S. 30, 36 S. Ct. 306, 54 L. Ed. 104, 6 Ann. Cas. 741."

3. Parties


The receiver of a national bank has the legal title to the property covered by his appointment, entitling him to maintain an action at law in his own name in the state
courts. Fish v. Olin, (1903) 76 Vt. 120, 56 Atl. 533, 1 Ann. Cas. 296.

4. Security for Costs in Federal Court Action

"To require security for costs from non-residents has been the practice of the United States courts from the foundation of the federal judiciary." Miller v. Norfolk, etc., Co., (W. D. Va. 1891) 47 Fed. 264. See note (v, 10, b) to R. S. sec. 914, in Title JUDICIARY, etc., at p. 36.

In Platt v. Adriance, (S. D. N. Y. 1898) 90 Fed. 772, a receiver of a Colorado national bank, who resided in Colorado, brought an action against delinquent stockholders apparently without any specific direction of the comptroller of the currency. Upon motion to require the plaintiff to file security for costs, the court said that if the suit were brought "by direction of any department of the government", the case would be within the express language of R. S. sec. 1001 (title JUDICIARY, etc., p. 192), and no security for costs should be required, and, in the event of defendant's success, he might be paid his costs out of the contingent fund of the Treasury Department. The court further said: "It must be assumed that it [Congress] did not intend to relieve receivers of national banks from the ordinary obligations of non-resident litigants when they do not act under such direction as will make the Treasury Department contingent fund liable for costs. It is conceded that the right of the court to require security for costs from receivers is discretionary, but there can surely be no doubt as to how such discretion should be exercised. It would be most unjust if a defendant who succeeds in a suit brought here by the receiver could recover his costs only by going to Colorado, and himself suing there upon the judgment in his favor. Unless, therefore, within 20 days, plaintiff shall file a certificate of the comptroller of the currency, saying that in this action is taken out by express direction of the Treasury Department, he will be required to file security (or deposit) for costs."

In Schofield v. Palmer, (W. D. Va. 1904) 134 Fed. 753, actions by a national bank receiver to recover debts due the bank, the defendants suggested the non-residence of the plaintiff, and moved for security for costs, the court said: "Under section 3559, Code 1887, and section 914, Rev. St. U. S., I think these motions should be granted in those cases in which final judgment is not now to be entered * * * while I doubt if such certificate can be made, I shall adopt the suggestion made in Platt v. Adriance, (S. D. N. Y. 1895) 90 Fed. 772 [quoted in the last paragraph]. If the plaintiff, in lieu of security for costs, to file a certificate bringing the cases under the operation of section 1001 Rev. St. U. S."

5. Pleading

In an action by a national bank receiver to recover a debt due the bank, it is not necessary that the plaintiff's declaration should show his appointment and authority as receiver. "It is well settled that a debtor of a national bank in the hands of a receiver cannot question the receiver's authority. That can be done only by the bank." Jacobson v. Berry, (1907) 135 Ill. App. 415, citing National Bank of Metropolis v. Kennedy, (1872) 17 Wall. 19, 21 U. S. (L ed.) 554; Bethel Bank v. Pahiquioque Bank, (1871) 14 Wall. 383, 20 U. S. (L ed.) 840, and Cadle v. Baker, (1874) 20 Wall. 650, 22 U. S. (L ed.) 448.

In a complaint by a national bank receiver against a debtor of the bank, the plaintiff's right to maintain the action was sufficiently shown by an averment that on a day named the comptroller of the currency duly appointed him a receiver of the bank, in accordance with the provisions of the Act of Congress, and with the concurrence of the secretary of the treasury, and that in accordance with the provisions of the acts of Congress the plaintiff thereupon took possession of the books, records and assets of the bank of every description, including the claim in suit. Platt v. Crawford, (1865) 8 Abb. Pr. N. S. (N. Y.) 297, where the court said: "The complaints in these actions would have been more artistic and complete if they had contained a direct averment showing the precise cause ascertained by the comptroller, on account of which the appointment of the receiver was made. Argumentatively they do show that it was for one or more of the causes provided for by the statute. For it is averred that the appointment was made in accordance with the provisions contained in the Act of Congress, which would not be true, unless it were for one or more of such causes. The latter statement is certainly an informal one, but as long as it affirms the fact, though informally, the demurrer cannot be maintained because the fact has not been alleged. As the complaint should be construed, therefore, it does in substance allege that the appointment itself was made by the comptroller, under the provisions of the Act of Congress, for one or more of the causes empowering him to make it, and that the association which was affected by it has so far acquiesced in its legal propriety as to allow the appointee under it to acquire the possession of all its assets. Under these circumstances no injustice can be done to the defendants; and no embarrassments will be occasioned to the practice of the courts by holding that the receiver has shown a sufficient title to the demands in controversy to enable him to maintain these actions for the recovery of
the amounts due upon them. The defendants will be clearly exonerated from their liability upon the payment of the amounts they are justly liable for to the plaintiff, and that is all that they have any legal right to demand. And as that is found to be the case they should not be permitted to defeat the purposes the law designed to accomplish the appointment of the receiver, by the mere extension of a technical rule of practice."

6. Evidence

Where the plaintiff, a national bank receiver suing to recover a debt due the bank, gave in evidence a certificate of the comptroller of the currency approved and concurred in by the secretary of the treasury, reciting the existence of all the facts necessary to authorize him to appoint a receiver, and that thereupon, with the concurrence of the secretary of the treasury the plaintiff was appointed receiver, this constituted sufficient evidence of the facts authorizing his appointment. Platt v. Street (1874) 37 N. Y. 339. See also Platt v. Crawford, (1888) 8 Abb. Pr. N. S. (N. Y.) 297.

7. Defenses in General

In a suit by a national bank receiver on a note and mortgage to the bank, it was held that they were "subject to the same defenses that applied to the bank itself." Hatch v. Johnson Loan, etc., Co., (C. C. Kan. 1895) 79 Fed. 828.

8. Recoupment and Set-off

Recoupment.—In an action at law by a national bank receiver to collect a debt due the bank, the defendant may have the benefit of such defenses as the state statute and practice allows him to recover within the doctrine of recoupment, and need not resort to a court of equity for such relief. Skud v. Tillinghaat, (C. C. A. 6th Cir. 1912) 195 Fed. 1, 115 C. C. A. 82.

Set-off.—In an action by a national bank receiver against the indorser of notes discounted by the bank for the defendant before the date of its insolvency, but which did not mature until afterward, it was held that the defendant had a right to set off so much of his deposit in the bank at the time of failure as would be sufficient to pay the notes. Yardley v. Clothier, (C. C. A. 3d Cir. 1892) 51 Fed. 506, 3 U. S. App. 207, 2 O. C. A. 349, 17 L. R. A. 462, affirming (E. D. Pa. 1892) 49 Fed. 337, where the court said: "It is not strenuously denied that if the notes in suit had matured before the date of the bank's insolvency the right to set off a portion of the deposit equal to their amount would have been perfect." The same ruling was made in Adams v. Spokane Drug Co., (C. C. Wash. 1893) 57 Fed. 888, an action by a receiver upon a note given to and owned by the bank, where Hanford, J., said: "In the case of Scott v. Armstrong, (1892) 146 U. S. 499, 13 S. Ct. 148, 36 U. S. (L. ed.) 1059, the Supreme Court held that the receiver of a national bank took the assets of a mere trustee, and not as a purchaser for value; that, in the absence of a statute to the contrary, demands and choses in action which belonged to the bank were in his hands subject to all claims and defenses that might have been interposed as against the bank before the liquidation of the United States and the general creditors attached; and that there is nothing in the statutes relating to national banks to deprive a customer of an insolvent national bank of the right to set off a debt, or obligation of the bank to him, existing at the time of its failure, against a promissory note which did not become due until after the failure, according to the ordinary rule in equity applicable to cases wherein the reciprocal liabilities of insolvent entities and others have to be adjusted, and the judgment of the United States circuit court for the southern district of Ohio was reversed for error in sustaining a demurrer to a defense similar to the one pleaded in this case." In Curtis v. Davidson, (1914) 164 App. Div. 597, 160 N. Y. S. 305, a national bank receiver sued the defendant as indorser upon notes which had been discounted by the bank, none of which notes matured prior to the insolvency of the bank. Holding that the defendant was entitled to set off the amount of his deposit in the bank at the time when the latter became insolvent and the plaintiff was appointed receiver, the court said: "The appellant [plaintiff] admits that if the notes were set off against the makers of the notes, they would be entitled to set off their deposit balances in reduction, pro tanto, of the claims asserted against them, but he claims the allowance of such set-off to an indorser, in the absence of an allegation of the maker's insolvency, would result in an unlawful preference in favor of the indorser; in other words, that an indorser should not be allowed to set off his deposit balance against his liability on a note, without alleging and proving the inability of the maker to pay. I have, however, been unable to find any authority which holds that, when the indorser alone is sued, his right to set off a balance standing to his credit when the bank became insolvent is dependent upon his alleging and proving the insolvency of the maker, and I can see no good reason why such set-off should not be allowed. The receiver acquires the assets of the bank, subject to all defenses and set-offs which might have been interposed in an action brought by it. Scott v. Armstrong, (1892) 146 U. S. 499, 13 S. Ct. 148, 36 U. S. (L. ed.) 1059. Had the bank brought this action, instead of the
receiver clearly the defendant would have had a right to offset against the plaintiff’s claim whatever deposit balance the bank held standing to his credit. Van Wonen v. Paterson Gaslight Co., (1852) 23 N. J. L. 283. The bank of which plaintiff is receiver was organized under the National Banking Act, and, in determining whether this would be a proper set-off under that Act, the rule prevailing in the federal courts should be followed. Frank v. Mercantile Nat. Bank, (1905) 182 N. Y. 264, 74 N. E. 841, 108 Am. St. Rep. 805. The right of a depositor in an insolvent national bank to set-off his deposit against the amount of a note upon which he was sued as indorser was settled in Yardley v. Clothier, (E. D. Pa. 1892) 49 Fed. 337. This decision was subsequently affirmed by the Circuit Court of Appeals [(C. C. A. 3d Cir. 1892) 51 Fed. 506.] 3 U. S. App. 351, 17 L. R. A. 462 (Sup.) and approved by the Supreme Court of the United States in Scott v. Armstrong, [(1892) 146 U. S. 499, 13 S. Ct. 148, 36 U. S. (L. ed.) 1059.] The same rule was applied in Re Shults, (W. D. N. Y. 1904) 132 Fed. 673. See, also, Arnold v. Niess, 1 Walk. (Pa.) 115.

"But, obviously, the right to set-off as recognized in Scott v. Armstrong, (1892) 146 U. S. 499, [13 S. Ct. 148, 36 U. S. (L. ed.) 1059] is to be governed by the state of things existing at the moment of insolvency, and not by conditions there after created." Yardley v. Philler, (1897) 107 U. S. 344, 17 S. Ct. 835, 42 U. S. (L. ed.) 192, reversing decree in (C. C. A. 3d Cir. 1894) 62 Fed. 645, 17 S. U. App. 647, 10 C. C. A. 562, 25 L. R. A. 824. See also Stephens v. Schuckmann. (1888) 32 Mo. App. 333, distinguished however in Yardley v. Clothier, (E. D. Pa. 1892) 49 Fed. 337. A defendant sued by the receiver on a note to the bank cannot set-off claims against the bank that were asserted in the suit in insolvency for the failure of the bank and the appointment of the receiver. Davis v. Knipp, (1895) 92 Hun 297, 36 N. Y. S. 705, where the court said: "The question involved upon this appeal was considered in Venango Nat. Bank v. Teener, (1897) 58 Pa. St. 14; and it was there held that the defendant, a debtor of the bank, could not use as an offset a claim of a depositor purchased the day after the bank, being insolvent, closed its doors, and before the appointment of a receiver. The doctrine of that case was approved in Scott v. Armstrong, (1892) 146 U. S. 499, 13 S. Ct. 148, 36 U. S. (L. ed.) 1059."

9. Costs in Federal Court Action

A suit in a federal court by a national bank receiver to recover from the bank is not governed by R. S. sec. 968 (in Costs, vol. 2, p. 636), denying costs when less than $500 is recovered; said section applying in terms only where jurisdiction depends on the amount in controversy. Murray v. Chambers, (W. D. Pa. 1907) 151 Fed. 142.

V. ENFORCEMENT OF INDIVIDUAL LIABILITY OF STOCKHOLDERS


1. Determination and Assessment by Comptroller


A letter by the comptroller of the currency to the receiver directing the latter to institute legal proceedings to enforce against every stockholder of the bank owning stock at the time the bank suspended, his or her personal liability, as such stockholder, was sufficient proof that the comptroller had decided, before such suit was brought by the receiver, that it was necessary to enforce the personal liability of the stockholders. Bowden v. Johnson, (1882) 107 U. S. 251, 2 S. Ct. 246, 27 U. S. (L. ed.) 386. But see Bowden v. Morris, (1876) 1 Hughes 378, 3 Fed. Cas. No. 1,715.


A second assessment may be made where the first assessment does not produce the amount required to satisfy the debts of the bank, provided a greater amount in all than the par value of the stock is not assessed. Aldrich v. Yates, (C. C. Ky. 1890) 95 Fed. 78; Aldrich v. Campbell, (C. C. A. 9th Cir. 1899) 97 Fed. 663, 38 C. C. A. 347; Studebaker v. Perry, (C. C. A. 7th Cir. 1900) 102 Fed. 947, 43 C. C. A. 69; Dewees v. Smith, (C. C. A. 8th Cir. 1901) 106 Fed. 438, 45 C. C. A. 408, 66 L. R. A. 971.

And a second action will lie to recover the second assessment where such assessment was not made until after the first action was commenced. Dewees v. Smith, (C. C. A. 8th Cir. 1901) 106 Fed. 439, 45 C. C. A. 408, 66 L. R. A. 971. See also Studebaker v. Perry, (C. C. A. 7th Cir. 1900) 102 Fed. 947, 43 C. C. A. 69.

2. Limitations


An action at law in a federal court by a receiver to recover a deficiency to enforce the statutory liability of a shareholder for an assessment by the comptroller of the currency is concededly governed by the statute of limitations of the state in which such federal court is sitting. McClaine v. Rankin, (1905) 107 U. S. 197, 23 S. Ct. 110, 49 L. ed. 712, 3 Ann. Cas. 500 (reversing (C. C. A. 9th Cir. 1902) 119 Fed. 110, 56 C. C. A. 180), citing R. S. sec. 721, in title JUDICIARY, vol. 5, p. 1123, and holding that the action in the federal court for the district of Washington, having been brought within three years, but not within two years, after the assessment became due and payable, was barred by the limitation of the years prescribed by Ball. (Wash.) Code, § 4805, for an "action for relief not herebefore provided for," and was not within the three years limitation in Ball. (Wash.) Code, § 4800, subd. 3, for an "action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument." The court (three justices dissenting) held that the liability was "one of the liabilities described in the statute last above quoted was restricted to contract liabilities, in view of other provisions in the Washington Code, and that it had so been construed by the Supreme Court of that State; that the order of the comptroller was the basis of the action, that the statute of limitations did not commence to run until assessment made, and that it ran as against an action to enforce the statutory liability, and not an action for breach of contract. The case of McDonald v. Thompson, (1902) 104 U. S. 71, 22 S. Ct. 297, 45 U. S. (L. ed.) 437, was considered, and it was pointed out that the court, in view of the Nebraska statute controlling the case, there found it "immaterial to inquire whether the liability was on an implied contract, not in writing, or on a liability created by statute."

In the absence of any provision in this act creating the double liability of stockholders of national banks fixing a period of limitation within which actions for its enforcement must be brought, the statute of limitations of the state where suit is brought governs, so far as applicable. But the period of limitation will commence to run only from the time the cause of action has fully matured through the making of an assessment and the arrival of the day when it becomes payable. Rankin v. Miller, (D. C. Del. 1913) 207 Fed. 602.

A state statute of limitations does not begin to run against the right to enforce the individual liability of stockholders in a national bank until the amount of such liability has been assessed and ascertained by the Comptroller of the Currency. Rankin v. Barton, (1908) 190 U. S. 225, 26 S. Ct. 29, 50 U. S. (L. ed.) 163, reversing (1904) 69 Kan. 829, 77 Pac. 631. See also King v. Armstrong, (1908) 9 Cal. App. 597. The liability of the shareholder for the assessment is contractual, not statutory.


The acts of putting the bank in liquidation and making an assessment on the capital stock are not the equivalent of filing a creditor’s bill, and will not stop the running of the state statute of limitations. Thompson v. German Ins. Co., (C. C. Neb. 1896) 76 Fed. 892, holding, therefore, that the ruling in Richmond v. Irons, (1887) 121 U. S. 27, 7 S. Ct. 788, 30 U. S. (L. ed.) 864, was not applicable; that “when the assessment became due and payable the receiver possessed the right to enforce payment thereof by the appropriate proceedings in court,” and that “as soon as this right of action accrued to the receiver the statute of limitations began to run in favor of the stockholders.”

The date of the decision of the comptroller as to the personal liability of the stockholders is shown by his letter to the receiver directing him to bring suit to enforce such liability. Bowden v. Johnson, (1882) 107 U. S. 251, 2 S. Ct. 246, 27 U. S. (L. ed.) 386.

The right of action against a stockholder who has made a fraudulent transfer of his stock is based upon the liability imposed by the statute, and does not arise from the fraudulent transfer; and therefore it begins to run when the assessment is due and not on discovery of the fraud. Thompson v. German Ins. Co., (C. C. Neb. 1896) 77 Fed. 258.

The fact that the time for filing claims against the estate of a deceased shareholder has expired is no bar to an action to fix the liability of the estate. Zimmerman v. Carpenter, (C. C. S. D. 1898) 84 Fed. 747.

Where a bill by a receiver of a national bank to enforce the individual liability of stockholders alleged that the Comptroller of the Currency made an order in which he declared that he had made an assessment and requisition upon the shareholders, “and that he did thereby make demand upon each and every share of the capital stock of the said association,” and directed the receiver to take proceedings by suit to enforce the individual liability, it was not open to the plaintiff to contend that no demand was made so as to start the running of the state statute of limitations. McDonald v. Thompson, (1902) 184 U. S. 71, 22 S. Ct. 297, 46 U. S. (L. ed.) 437, affirming, (C. C. A. 8th Cir. 1900) 101 Fed. 183, 41 C. C. A. 290.

3. Conditions Precedent to Maintenance of Suit

a. Determination by Comptroller

The determination of the comptroller as to the necessity to institute proceedings against the stockholders to enforce their personal liability and as to the amount to be collected is indispensable, and must precede the institution of the suit by the receiver. Kennedy v. Gibson, (1899) 8 Wall. 498, 19 U. S. (L. ed.) 476.

b. Demand or Notice

A demand or notice to stockholders by the comptroller or receiver is not a prerequisite to the maintenance of a suit by the receiver to enforce the double liability. Rankin v. Miller, (D. C. Del. 1913) 207 Fed. 602. The order alone of the comptroller is sufficient. Brown v. Ellis, (D. C. Vt. 1900) 103 Fed. 834.

4. Form of Remedy

Stockholders’ bills, see Act of June 30, 1876, ch. 186, § 2, infra, p. 915.

The liability of the stockholders is several and not joint; and where the assessment is for less than the full amount of the stockholder’s liability the suit may be either at law or in equity. Kennedy v. Gibson, (1899) 8 Wall. 498, 19 U. S. (L. ed.) 476; Bundy v. Cocke, (1888) 128 U. S. 185, 9 S. Ct. 242, 32 U. S. (L. ed.) 397; Bailey v. Sawyer, (1877) 4 Dill. 463, 2 Fed. Cas. No. 744; Stanton v. Wilkeson, (1876) 8 Ben. 357, 22 Fed. Cas. No. 13,299; Young v. Wempe, (N. D. Cal. 1891) 46 Fed. 354; Bailey v. Tillinghast, (C. C. A. 6th Cir. 1900) 99 Fed. 801, 40 C. C. A. 93, affirming (S. D. Ohio 1897) 88 Fed. 46. But when the order of the comptroller is to collect the full amount of the par value of the stock the suit against the stockholder must be at law. Parker v. Robinson, (C. C. A. 1st Cir. 1905) 71 Fed. 256, 33 U. S. App. 365, 18 C. C. A. 36;


In case of a transfer made to avoid liability a bill in equity will lie by the receiver against both the transferrer and the transferee where it is for discovery as well as relief, the transfer in such case being good between the parties and only avoidable at the election of the complainant. Bowden v. Johnson, (1882) 107 U. S. 251, 2 S. Ct. 246, 27 U. S. (L. ed.) 386; Bowden v. Santos, (1877) 1 Hughes 158, 3 Fed. Cas. No. 1,716.

Where the proceeding is in equity an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted. Kennedy v. Gibson, (1869) 8 Wall. 498, 10 U. S. (L. ed.) 476.

5. Pleading

Since an assessment against stockholders by the comptroller of the currency cannot be collaterally attacked, a plea in an action by a receiver to enforce such assessment, which has to go behind the order of assessment and denies the appointment of a receiver and the existence of grounds for appointing him, and alleges that the bank was closed without lawful authority, and that an effort was being made for the purpose of collecting funds with which to pay commissions for alleged receivers, which constituted no part of the indebtedness of the bank, is insufficient to set forth any defense, and those parts of the plea are properly stricken by the court. Simmons v. Freeman, (1910) 146 Ga. 118, 90 S. E. 965.

Where a bill by a national bank receiver against a defendant described as a married woman alleged that she was the owner of certain shares, this constituted an allegation that she was then the lawful owner of those shares; for it was inconsistent with this allegation that she owned the stock before she became married, or that after marriage she had the right to become such owner by virtue of the laws of the state where the bank was located, in connection with the provisions of the federal statutes in regard to national banks. Bundy v. Coke, (1888) 128 U. S. 185, 9 S. Ct. 242, 32 U. S. (L. ed.) 397.

6. Defenses

In general,—The various provisions of the National Bank Act are a part of the contract of the charter of a national bank, and when a party becomes a stockholder therein he necessarily submits himself to the provisions of the law under which the bank is authorized to transact business. Young v. Wenpe, (N. D. Cal. 1891) 46 Fed. 354.

Burdens of proof.—One who relies upon a sale of shares of stock in a national bank, made with knowledge of its insolvency, to escape his liability as a shareholder under R. S. sec. 5151, supra, p. 705, for the debts of the bank, has the burden of proving that the vendee was financially responsible to the extent of the assessment. McDonald v. Dewey, (1906) 292 U. S. 510, 26 S. Ct. 731, 50 U. S. (L. ed.) 1128, 6 Ann. Cas. 413, reversing (C. C. A. 17th Cir. 1905) 134 Fed. 528, 67 C. C. A. 408.

One who is sued as a stockholder individually liable is presumed to be the owner of the stock when his name appears upon the books of the bank as such owner, and the burden of proof is upon him to show that he is not in fact the owner, and that, for instance, the stock was transferred to him without his knowledge and consent. Finn v. Brown, (1911) 142 U. S. 56, 12 S. Ct. 136, 35 U. S. (L. ed.) 938.


Stock not paid in.—The stockholder cannot defend on the ground that the required fifty per cent. of the original stock was not paid in. Wallace v. Hood, (C. C. Kan. 1898) 89 Fed. 11.

Charges assigned.—Nor is it good defense that the claim has been assigned pending the action. Schuabeg v. McDonald, (1900) 60 Neb. 493, 83 N. W. 737. For a satis-
fied judgment in such case would release the stockholder from further liability.


But it seems that defendants may file a cross bill in equity setting up the invalidity of a claim which is the basis of the assessment, on which the court will stay the suit at law by the receiver until the termination of the proceedings in equity. Moss r. Whittel, (W. D. Mo. 1901) 108 Fed. 579.

Purchase of stock induced by fraud.—It seems that the stockholder cannot defend upon the ground that the purchase of his stock was induced by fraud on the part of the officers of the bank, where he has allowed his name to be borne upon the books as a shareholder and accepted dividends in that capacity. Scott v. Dewese, (1901) 181 U. S. 202, 21 S. Ct. 385, 45 U. S. (L. ed.) 822, affirming Scott v. Latimer, (C. C. A. 8th Cir. 1898) 89 Fed. 843, 60 U. S. App. 720, 33 C. C. A. 1; Newton Nat. Bank v. Newbegin, (C. C. A. 8th Cir. 1896) 74 Fed. 135, 40 U. S. App. 1, 20 C. C. A. 539, 33 L. R. A. 727; Randrose v. Richland Nat. Bank. (C. C. A. 8th Cir. 1899) 94 Fed. 349, 36 C. C. A. 292; except where the creditor for the payment of whose debts the assessment was levied has become such after the transfer of the stock to defendant; but in any case he must not have been guilty at the time of want of reasonable caution and judgment, or of laches in discovering the fraud or in repudiating the contract and offering to rescind after discovering the fraud. Stufflebeam v. De Lashmutt, (C. C. Ore. 1897) 23 Fed. 449; Wallace v. Bacon, (S. D. Cal. 1898) 86 Fed. 553; Scott v. Latimer, (C. C. A. 8th Cir. 1898) 89 Fed. 843, 60 U. S. App. 720, 33 C. C. A. 1. And whatever may be the defendant's rights where he was induced to purchase stock by the fraudulent representations of the officers of the bank, such rights can be asserted only in equity, and they form no defense in an action at law by the receiver to recover an assessment. Launty v. Wallace, (1901) 182 U. S. 536, 21 S. Ct. 878, 45 U. S. (L. ed.) 1218, affirming (C. C. A. 8th Cir. 1899) 97 Fed. 865, 38 C. C. A. 510.

In Langtry v. Wallace, (1901) 182 U. S. 536, 21 S. Ct. 878, 45 U. S. (L. ed.) 1218, affirming (C. C. A. 8th Cir. 1899) 97 Fed. 865, 38 C. C. A. 510, and holding that the defendant became a shareholder in consequence of the fraudulent representations of the bank's officers, as set forth in the answer and cross petition or counterclaim, two principal questions are presented for determination: 1. Whether such representations, relied upon by the defendant, constituted a defense in the present action brought by the receiver only for the purpose of enforcing the individual liability imposed by § 5161 of the Revised Statutes upon the shareholders of national banking associations. 2. Can the defendant, because of the frauds of the bank whereby he was induced to become a purchaser of its stock, have a judgment against the receiver on the counterclaim in this action for the money paid by him for stock, to be satisfied out of the bank's assets and funds in his control and possession? . . . He claims exemption from the responsibility attaching to him, under the statute as a shareholder, upon the ground that in consequence of the frauds practiced upon him he was entitled to disaffirm, and that he had upon due notice to the receiver disaffirmed the contract under which he purchased the stock in question. He seeks to have the certificate received by him treated as cancelled. Clearly such a defense is of an equitable nature, and could not be recognized and sustained except in some proceeding to which the bank, at least, was a party. If the defendant was entitled, under the facts stated, to a rescission of his contract of purchase, and to a cancellation of his stock certificate, and consequently to be relieved from all responsibility as a shareholder of the bank, he could obtain
such a relief only by a suit in equity to which the bank and the receiver were parties. The defendant alleges that he tendered to the receiver the certificate of stock received by him for cancellation, notifying and informing the latter that, because of the fraud and deceit practiced upon him by which he was induced to purchase, or attempt to purchase, the stock represented by the certificate, he disaffirmed the contract of purchase, or pretended purchase, of the stock, and demanded that the receiver receive the certificate and cancel it and repay the sum of $20,000 paid by him, or such proportionate part thereof as he would be entitled to receive as a creditor of the bank for that amount, which tender and demand the receiver refused to accept or accede to. Such tender was an idle ceremony, and added nothing to the rights of the defendant; for the receiver had no power, grounds, or right to cancel the certificate or to relieve the defendant from the responsibility attaching to him as one appearing upon the books of the bank as a shareholder and to whom had been accorded by the bank the privileges of a shareholder. His duty was to take charge of the assets of the bank and to enforce such assessment upon the shareholders as was made by the comptroller in virtue of the statute. Nor could the bank, after its suspension and the appointment of a receiver, have assumed to discharge the defendant from any liability attaching to him as a shareholder. Upon the failure of the bank the rights of creditors attached, and could not be affected by anything that the bank or its officers might, after such failure, have done or omitted to do... We must not be understood as expressing any opinion upon the question whether the defendant could have been discharged from liability as a shareholder if the facts stated in his answer by way of defense had been established in a separate suit in equity. Whether a decree based upon the facts set forth in the answer, even if established in a suit in equity, brought against the bank and the receiver after the appointment of a receiver, would be consistent with sound principle or with the statute regulating the affairs of national banks and securing the rights of creditors, is a question upon which we do not now express an opinion. We mean at this time only to adjudge that the facts set forth in the answer presenting his defense of relief which cannot be made available by way of defense in this action at law, and if sufficient to protect the defendant against the liability attaching to him as a shareholder, must be alleged and proved in a suit in equity to which the bank and the receiver are made parties. Some of the observations made in Scott v. Dewese, [1901] 181 U.S. 202, 21 S. Ct. 585, [45 U. S. (L. ed.) 822] are quite applicable to the present case. That was an action at law to enforce the individual liability imposed by § 5151 of the Revised Statutes. The defendant in that case sought to escape such liability upon the ground, in part, that he had been induced by false representations of the bank's officers to accept a certificate for a certain amount of its increased capital stock. No suit had been instituted to cancel the certificate or to rescind the subscription of stock. The court said: 'The present suit is primarily in the interest of creditors of the bank. It is based upon a statute designed, not only for their protection, but to give confidence to all dealing with national banks in respect of their contracts, debts, and engagements, as well as to stockholders generally. If the subscriber became a shareholder in consequence of frauds practiced upon him by others, whether they be officers of the bank or officers of the government, he must look to them for such redress as the law authorizes, and is estopped, as against creditors, to deny that he is a shareholder, within the meaning of § 5151, if at the time the rights of creditors accrued he occupied and was accorded the rights appertaining to that position.' Whether the defendant in that case could have been relieved from liability as a shareholder and had his subscription of stock canceled, if he had in good faith and in due time before the suspension of the bank instituted proceedings to obtain relief, was not decided."

In exceptional cases where there is no room for inference that credit has been given on the faith of the ownership of stock, one who was induced to purchase such stock by the fraudulent representations of the officers of the bank, should be permitted to rescind his contract as well when there are creditors as when there are none, and there should be no presumption of law to overcome the fact capable of proof in such a case. Stufflebeam v. De Lashmutt, (C. C. Ore. 1900) 101 Fed. 367.

Ultra vires.—A national bank which unlawfully acquires and holds the stock of another as an investment, is not estopped to deny its liability as an apparent stockholder for an assessment on such stock ordered by the comptroller of the currency. Concord First Nat. Bank v. Hawkins, (1889) 174 U.S. 364, 19 S. Ct. 739, 43 U. S. (L. ed.) 1007.

Set-off and Counterclaim Set-off and counterclaim.—The liability to be enforced against the shareholder is not a debt due to the bank, but is a sum of money equal to the par value of his stock, payable by him to the receiver as an officer of the government by force of
the law and the assessment authorized and made by the comptroller, and he cannot set off the amount of his claim as a creditor of the bank against his liability for the assessment. Hobart v. Gould, (D. C. N. J. 1881) 8 Fed. 57; Wingate v. Urchard, (C. C. A. 9th Cir. 1898) 75 Fed. 241, 44 U. S. App. 522, 21 C. C. A. 313. Nor can he set off his distributive share in the assets of the bank not then ascertained. Winston First Nat. Bank v. Riggins, (1899) 124 N. C. 534, 52 S. E. 801. Nor can he set up, by way of counterclaim, a claim for damages against the bank for fraudulent representations made to induce him to purchase stock. Lantry v. Wallace, (C. C. A. 8th Cir. 1899) 97 Fed. 855, 38 C. C. A. 510, affirmed, (1901) 182 U. S. 536, 21 S. Ct. 878, 45 U. S. (L. ed.) 1218. But a claim of such a nature that it is entitled to payment in full before the distribution of the assets can be made by way of dividends declared upon the debts due to creditors may be set off against the assessment. Welles v. Stout, (N. D. Ia. 1899) 38 Fed. 507.

Bank officers can make no promise binding on the receiver that funds loaned by a stockholder to the bank when in financial difficulty shall be returned if the bank is saved, and if not saved the amount shall be applied on the lender's individual liability as a stockholder; and the stockholders cannot set off such sum against the receiver's claim for the assessment. Sowles v. Witters, (C. C. Vt. 1889) 39 Fed. 403, (C. C. Vt. 187) 32 Fed. 130.

"The assessment imposed upon the stockholders by their own vote, for the purpose of restoring their lost capital, as a consideration for the privilege of continuing business, and to avoid liquidation under section 5205 of the Revised Statutes [infra, p. 767] is not the assessment contemplated by section 5131 . . . . The obligations of the shareholders under these two sections are entirely diverse; and payments made under section 5205 cannot be applied to the satisfaction of the individual responsibility secured by section 5151." Delan v. Butler, (1889) 115 U. S. 634, 7 S. Ct. 39, 30 U. S. (L. ed.) 260.

8. Recovery of Interest

The assessment draws interest from the date when it is made payable or from the date of the order if it is payable at once. Bowden v. Johnson, (1882) 107 U. S. 231, 2 S. Ct. 246, 27 U. S. (L. ed.) 386; Davis v. Watkins, (1898) 56 Neb. 298, 76 N. W. 575.

In an action at law by a national bank receiver against a stockholder pursuant to the direction of the comptroller to enforce individual liability of each stockholder to the amount of the par value of his stock, it was said: "The amount to be paid rests in the judgment and discretion of the comptroller," and "his determination cannot be controverted by the stockholders in suits against him;" and "when the order is to collect the full amount of the part of the stock, the suit must be at law;" and "the sum to be paid being liquidated, and due and payable when the comptroller's order was made, it follows that the amount bears interest from the date of the order. Otherwise there would be no motive to pay promptly, and no equality between those who should pay then and those who should pay at the end of a protracted litigation." Casey v. Galli, (1876) 94 U. S. 673, 24 U. S. (L. ed.) 168.

Sec. 5235. [Notice to present claims.] The Comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof. [R. S.]


Sec. 5236. [Dividends.] From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. [R. S.]

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I. CLAIMS

1. What Are Claims

The assets of the association are to be ratably divided and appropriated to the payment of all its legal liabilities, whether such liabilities are debts, technically so called, or result from the nonfeasance or malfeasance of the association in respect of its binding obligations and duties. Thus a claim against a bank for a loss through embezzlement by its officers of bonds on special deposit is a "claim" within the meaning of the law. Turner v. Keokuk First Nat. Bank, (1869) 26 Il. 562.

Where the insolvency and suspension of a bank puts it out of its power to perform a contract, no further act is necessary to fix its liability for a breach of such contract. Chemical Nat. Bank v. World's Columbian Exposition, (1897) 170 Ill. 82, 48 N. E. 331.

2. Priority of Claims

a. Debt Due United States


b. Preference Under State Laws

A state statute giving priority to the claims of savings banks which are depositors in insolvent banks is in conflict with the above section and is void as to national banks. Davis v. Elmira Sav. Bank, (1896) 161 U. S. 275, 16 S. Ct. 502, 40 U. S. (L. ed.) 700, reversing (1893) 73 Hun 357, 26 N. Y. S. 200.

Whether a state statute giving a preference to savings banks having deposits in insolvent banks was applicable to national banks was made a query in Auburn Sav. Bank v. Hayes, (N. D. N. Y. 1894) 61 Fed. 911.

c. Public Funds

The fact alone that a deposit of public funds in a national bank by a public officer was wrongful, and known to be so by the bank, does not entitle a claim therefor to priority of payment over those of general creditors on the insolvency of the bank. Lucas County v. Jamison, (S. D. In. 1908) 170 Fed. 338.

Unless county funds or the proceeds of county funds deposited in the bank by a county treasurer can be traced in the hands of a receiver the county has no preference over other creditors. Spokane County v. Clark, (C. C. Wash. 1894) 61 Fed. 538.

d. Property Not Part of Assets


Thus funds received by a national bank, which the party depositing had no authority of law to deposit, are not part of the assets to be ratably distributed, and must be returned in full to the rightful owner. San Diego County v. California Nat. Bank, (S. D. Cal. 1892) 52 Fed. 59.

In Massey v. Fisher, (E. D. Pa. 1894) 62 Fed. 585, an indorser paid the amount of a note to the bank and took a receipt, but did not take the note before the bank failed. It was held that the money did not belong to the bank, but that the bank held it in trust, and consequently it was not part of the assets to be ratably distributed.

A sum of money was contributed by the directors and put into the bank for
the purpose of retiring certain objectionable securities as required by the comptroller. On the insolvency of the bank, before the fund was fully used, it was held that the balance should be treated as a debt and not as a trust fund to be accounted for as a preferred claim. Booth v. Welles, (N. D. Ia. 1890) 42 Fed. 11.

e. Trust Funds, in General

"A trust fund received in such a manner that the ordinary relation of debtor and creditor is not established, should probably be returned intact, either by the insolvent bank or by the receiver subsequently appointed." Flint Road Cart Co. v. Stephens, (1888) 32 Mo. App. 341.

To impress a lien upon the general assets of an insolvent national bank in favor of a plaintiff for the proceeds of drafts sent to the bank for collection and remittance, where there were no debtor and creditor relations between the debitor and the bank, it must affirmatively appear that such proceeds can be traced into the assets of the bank in the hands of the receiver, or, in the alternative, that the fraudulently diverted proceeds have cumulated on the general assets or added again thereto. Am. Can. Co. v. Williams, (W. D. N. Y. 1908) 176 Fed. 816.

In all cases where an insolvent national bank holds funds as a trustee, to entitle a claim therefor to a preference over those of general creditors in the distribution of the bank's assets it must be shown that such funds have not been dissipated, but that they remain in the estate and can be identified, not by earmarks, but by being traced into the estate and there found, to its augmentation. Lucas County v. Jamison, (S. D. Ia. 1908) 170 Fed. 335.

Hallett v. Fish, (C. C. Vt. 1903) 123 Fed. 201 is a case where the plaintiff in an action against a national bank receiver, traced a certain fund into the hands of the receiver, so that, as the court held, it "is a share of the assets in his hands belonging to her, to be separated from the rest for her. It has belonged to her all the while, and should be delivered to her."

A cestui que trust is not entitled to a priority where a trust fund was deposited by the guardian as an ordinary deposit, though the bank knew that it was a trust fund. Paul v. Draper, (1900) 158 Mo. 197, 59 S. W. 77, 81 A. S. R. 296.

Trust funds coming into the hands of a receiver of a national bank which are not identifiable as belonging specifically to a particular person are held by him as assets of the bank, and must be ratably apportioned among all the bank's creditors, as expressly provided by this section. Emigh v. Earling, (1908) 154 Wis. 505, 115 N. W. 126, 27 L. R. A. (N. S.) 243.

f. Claim of Depositors

"The paying of actual money by a customer into a bank of deposit does not constitute a bailment, because, by the settled custom, recognized by the Supreme Court of the United States, the House of Lords, and numerous other courts, the bank is authorized to mingle the money at once with the general fund, creating immediately the relation of debtor and creditor, subject by further custom to draft in the usual course of business." Beal v. Somerville, (C. C. A. 1st Cir. 1892) 50 Fed. 647, 5 U. S. App. 14, 1 C. C. A. 598, 17 L. R. A. 291.

"We think the true rule as to the deposit of checks and drafts by a depositor as distinguished from money is laid down in Beal v. Somerville, [C. C. A. 1st Cir. 1892] 50 Fed. 647, [5 U. S. App. 14] 1 C. C. A. 598, 17 L. R. A. 291.

... We have carefully examined all the cases presented to us by the respective counsel, and concluded that the weight of authority establishes this as the true rule: That, in the absence of a special contract, the property in checks or drafts on depositories other than the one in which the deposit is made by the owner of the checks and drafts remains in such owner until collection is made, credit entered and notice given of such credit to the depository receiving such checks or drafts from the owner. Under this rule, it becomes a question of fact rather than of law for the court. St. Louis, etc., R Co. v. Johnston, [1890] 133 U. S. 566, 10 S. Ct. 390, 33 U. S. (L. ed.) 683."

Goshorn v. Murray, (W. D. Pa. 1912) 197 Fed. 407, holding on the evidence, in a suit in equity against a national bank receiver, by a plaintiff who had deposited checks and vouchers with the bank for collection, that the relation of debtor and creditor had not become established, and that the proceeds which had been received by the collecting bank to which they were forwarded and transmitted to the defendant receiver, remained "definitely earmarked as complainant's money," and he was entitled to recover the same from its custodian, the defendant receiver. See also Philadelphia v. Eckels, (E. D. Pa. 1896) 98 Fed. 485; Standard Oil Co. v. Hawkins, (C. C. A. 7th Cir. 1896) 74 Fed. 395, 46 U. S. App. 115, 20 C. C. A. 468, 33 L. R. A. 739.

When a bank receives deposits of cash while insolvent, and fails without sufficient money on hand to pay back all of the deposits as received, the law will presume that the money was paid out by the bank in the order that it was received, and that the money on hand is the money of the last depositor, and so on back in the inverse order of the deposits as to time. Cherry v. Territory, (1907) 17 Okla. 213, 49 Pac. 190.

Where a bank receives deposits while
in a failing condition, and at the time it closes its doors it has on hand a sufficient amount of cash to repay such deposit, such payment will not be made ahead of the others, when the evidence on the particular trial affirmatively shows, without reference to the legal presumption, that such cash was deposited by or on behalf of the other creditors. Cherry v. Territory, (1907) 17 Okla. 221, 89 Pac. 192, 8 L. R. A. (N. S.) 1254.

Where a bank is insolvent—on the last two days that it transacts business, and receives deposits, and it affirmatively appears from the evidence that there was found in the bank when it closed its doors $20,000 in cash, and that $12,857.39 was deposited on the last day it transacted business, in an action for a preference by one who deposited on the day before the last on which it received deposits, his recovery of a preference will be limited to the cash on hand less the deposits of the last day; there being no attempt to trace the identical money deposited into any other assets of the bank. Cherry v. Territory, (1907) 17 Okla. 213, 89 Pac. 190.

When moneys of the territory are deposited by the territorial secretary in a bank that was insolvent, and it afterwards fails, and the territory is unable to trace the identical funds deposited, it should be confined to the general rules of law regarding presumptions of fact applied to other depositors; and when, under such rules, it is evident that the deposits of the last day on which the bank transacted business belong to other creditors, a preference will be denied the territory as to such deposits, even though no preference is claimed by those entitled thereto; and, under such circumstances, it is immaterial whether or not the secretary had any authority for making such deposit. Cherry v. Territory, (1907) 17 Okla. 213, 89 Pac. 190.

In Richardson v. Olivier, (C. C. A. 5th Cir. 1900) 105 Fed. 277, 44 C. C. A. 468, 53 L. R. A. 113, it was held that one who had deposited a check for collection was entitled to recover the amount collected thereon, which had gone into the hands of the receiver as assets, and that he was not deprived of such right of recovery by the fact that he was a stockholder of the bank. A check deposited on the day of suspension, when the bank was known by its officers to be insolvent, remains the property of the depositor. Richardson v. Olivier, (C. C. A. 5th Cir. 1900) 105 Fed. 277, 44 C. C. A. 468, 53 L. R. A. 113.

The depositor of a check drawn on the national bank in which it was deposited, the drawer having funds on deposit to meet the same and the amount of the check being credited to the account of the depositor, had no preferential claim against the receiver of the bank. Beard v. Pella City Independent Dist., (C. C. A. 8th Cir. 1898) 68 Fed. 375, 60 U. S. App. 372, 31 C. C. A. 562, reversing (S. D. Ia. 1897) 83 Fed. 5.

One who deposits checks and drafts in a bank when it is in a failing condition cannot secure a preference for the amount thereof over other creditors on the money in the bank at the time of its failure, without tracing the proceeds of such checks and drafts, and showing that such proceeds are included in such cash. Cherry v. Territory, (1907) 17 Okla. 213, 89 Pac. 190.

Where the secretary of the territorial board for leasing the school land of the territory without any authority deposited the money, checks, and drafts received from the rents of such land in a national bank, and the bank subsequently fails, before the territory can be paid ahead of the other creditors of the bank it must affirmatively prove by a preponderance of evidence that the particular monies, checks and drafts so deposited, or the proceeds thereof, were turned over to the receiver of the bank, or that such deposits went to swell the assets of such bank. Cherry v. Territory, (1907) 17 Okla. 221, 89 Pac. 192, 8 L. R. A. (N. S.) 1254.

One who was induced to deposit drafts in an insolvent national bank by a fraudulent holding out of the bank by its officers as sound, had a right to recover the transaction and recover from the receiver the proceeds collected by the bank on the deposited drafts, where he was able to follow and identify the same, separate from other funds of the bank. Craigie v. Smith, (1884) 14 Abb. N. C. 409, affirmed (1885) 99 N. Y. 131, 1 N. E. 537, 59 Am. Rep. 9.

7. Claim of Payee of Check or Draft

"In Laclede Bank v. Schuler, (1887) 120 U. S. 511, 7 S. Ct. 644, 30 U. S. (L. ed.) 704, it was decided, that as between the right of general creditors in a fund received from a bank by an assignee under a general assignment for the benefit of creditors and the payee of an outstanding check or draft, there was no such equitable assignment pro tanto, of the funds in the receiver's possession, as gave to such payee a priority over the other general creditors. This, unquestionably, is the law, also, respecting funds in the hands of a receiver of a national bank appointed by the Comptroller. In each case the purpose is to obtain a ratable distribution of the insolvent bank's assets. In neither case, in the absence of an assignment more effective than the drawing of a check, will the federal law allow one set of creditors to obtain an advantage over another set." Chicago First Nat. Bank v. Selden, (C. C. A. 7th Cir. 1903) 120 Fed. 212, 56 C. C. A. 392, 62 L. R. A. 559, holding also that the moment a national bank went into the hands
of a receiver, the federal law became the law of the distribution of its assets, and that the state law on the subject of checks and drafts, and their effect as assignments at law, "cannot be allowed to displace the federal law looking to a ratable distribution among the creditors."

h. "Adjudicated" Claim

When a creditor has recovered a judgment on his claim, he does not thereby acquire a lien on the property or secure any preference. "He must take his position with other creditors whose claims are allowed as proven, and await the action of the comptroller in the distribution of the assets realized by the receiver." Green v. Walkill Nat. Bank (1875) 7 Hun (N. Y.) 63, citing National Pulquique Bank v. Bethel First Nat. Bank, (1870) 36 Conn. 325, 4 Am. Rep. 80.

3. Secured Creditors


4. Attorney’s Fee on Unmatured Promissory Notes

A provision of a promissory note that, if not paid at maturity, the makers and endorsers shall be liable for all costs of collecting or attempting to collect the same, including an attorney’s fee, cannot be enforced beyond the allowance of statutory costs against the receiver of an insolvent national bank who took charge of its assets for the purpose of liquidation before the note matured. Citizens’ Bank, etc., Co. v. Thornton, (C. C. A. 5th Cir. 1909) 174 Fed. 752, 98 C. C. A. 478.

5. Interest


As the debts of an insolvent bank must be liquidated by the receiver as of the date when insolvency supervenes, and the amount of all debts must be computed at that of date, it follows that in a suit against the receiver to establish a demand which he has declined to allow, interest cannot be allowed on such demand subsequent to the date when the bank ceased to do business and a receiver was appointed. American Nat. Bank v. Williams, (C. C. A. 8th Cir. 1900) 101 Fed. 943, 42 C. C. A. 101.

“The only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him, or by the adjudication of a competent court, to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends to take the value of the claim at that time as the basis of distribution. If interest is added on one claim after that date before the percentage of dividend is calculated it should be upon all, otherwise the distribution would be according to different rules and not ratably as the law requires.” White v. Knox, (1884) 111 U. S. 784, 4 S. Ct. 656, 28 U. S. (L. ed.) 408.

“The dividends are to be paid on the adjudicated claim, not on the amount due upon the claim when adjudicated. The judgment established the claim as a claim against the bank at the time of the insolvency, and the amount due when the judgment was rendered. Thus the claim was adjudicated and the amount due at the date of the judgment ascertained; but for the comptroller to pay the relator on the amount due him at that time, and the other creditors on the amount due them eight years before, when the insolvency occurred, would certainly not be making ratable dividends from the assets on all claims against the bank. It was clearly right, therefore, to ascertain from the judgment how much was due on this claim at the date of the insolvency and make the distribution accordingly.” White v. Knox, (1884) 111 U. S. 784, 4 S. Ct. 656, 28 U. S. (L. ed.) 403.

Demand.—In the case of claims due to depositors a demand is not necessary to the right to interest. Chemical Nat. Bank v. Bailey, (1875) 12 Blatchf. 480, 5 Fed. Cas. No. 2,635; Richmond v. Irons (1887) 121 U. S. 27, 7 S. Ct. 788, 30 U. S. (L. ed.) 884.

But the receiver is not obliged immediately upon taking possession of the assets to pay over to a third person a fund in his hands claimed as a trust fund. He is entitled to have a judicial determination of the question, and pending
such determination he cannot be charged with interest on the amount. Richardson v. Louisville Banking Co., (C. C. A. 5th Cir. 1899) 94 Fed. 442, 36 C. C. A. 307.

Remedy to recover interest.—Assumpit against the receiver is not the proper remedy to obtain the claim of a creditor out of surplus assets in the hands of the comptroller. The action should be brought against the bank. Chemical Nat. Bank v. Bailey, (1875) 12 Blatchf. 480, 5 Fed. Cas. No. 2,035.

6. Set-off of Claims

See also cases cited under the heading Recoupment and Set-off in notes to R. S. sec. 5324, supra, at p. 558.


The debtor may set off his claim against the bank though it was that of surety for a depositor whose claim he paid after the suspension of the bank. Kilby v. Carthage First Nat. Bank, (1900) 32 Misc. 370, 66 N. Y. S. 579.

A customer of a national bank borrowed money from the bank and gave his time note therefor, depositing the amount borrowed to his credit to be drawn against, the balance to be applied to the payment of the note when due. It was held that on the insolvent and dissolution of the bank and the appointment of a receiver before the maturity of the note he had an equitable right to have the balance to his credit at the time of the insolvency applied to the payment of the indebtedness on the note. Scott v. Armstrong, (1892) 188 Spokan Cole, 13 S. Ct. 148, 36 U. S. (L. ed.) 1059, reversing (S. D. Ohio 1888) 36 Fed. 63. But see Stephens v. Schuchmann, (1888) 32 Mo. App. 333.


When the claims are wholly independent of each other and between different parties they do not occupy the position of mutual demands between the parties originating in mutual contract, and cannot be set off. A due joint note belonging to the bank at the time of its suspension cannot afterwards be made the subject of an equitable set-off in favor of its makers against notes not then due, held by them against the bank and other insolvent makers jointly, the latter notes having been allowed at the time the receiver was appointed by one of the defendants only, and having no connection with the former note, having originated on a separate and distinct transaction. Belch v. Wilson, (1875) 25 Minn. 296, 33 Am. Rep. 467.


II. ESTABLISHMENT OF CLAIMS

After disallowance.—The creditor is not concluded by the presentation of the claim to the disallowance by the receiver, and he may sue on such disallowed claim. Bethel First Nat. Bank v. National Paquioque Bank, (1872) 14 Wall. 383, 20 C. S. (L. ed.) 840, affirming (1870) 36 Conn. 323, 4 Am. Rep. 89; Green v. Walkill Nat. Bank, (1876) 7 Hun (N. Y.) 63.

Nor is he concluded or estopped by the acceptance of dividends on part of his claim and he may still sue to recover the balance. Chemical Nat. Bank v. World's Columbia Exposition, (1897) 170 Ill. 82, 48 N. E. 331.

A state court has jurisdiction to determine and segregate a trust fund in the hands of a receiver of an insolvent national bank and to establish it as a preferred claim against the bank, though it has no authority to direct the course of the comptroller. Earle v. Pennsylvania, (1900) 178 U. S. 449, 20 S. Ct. 915, 44 U. S. (L. ed.) 1146, reversing Com. v. Chestnut St. Nat. Bank, (1899) 189 Pa
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St. 606, 42 Atl. 300; Flint Road Cart Co. v. Stephens, (1888) 32 Me. 341.

It is competent for a state court to determine as between the plaintiff in an attachment suit and a bank which was served as garnishee before its suspension, what rights were acquired by the plaintiff as against the bank by the service of attachment, and its judgment thereon is binding on the comptroller in distributing the assets of the bank. Earle v. Pennsylvania, (1900) 178 U. S. 449, 20 S. Ct. 915, 44 U. S. (L. ed.) 1146, reversing Com. v. Chestnut St. Nat. Bank, (1899) 180 Pa. St. 606, 42 Atl. 300.


Limitation of action.—All the assets of the bank pass to the receiver at the time of his appointment, and constitute a trust fund for the bank’s creditors which statutes of limitation do not affect. Riddle v. Butler First Nat. Bank, (W. D. Pa. 1886) 27 Fed. 503.

Certificates of deposit issued on a national bank, whether payable on demand or running for a certain length of time, do not become immediately payable so as to set the statute of limitations in motion on the appointment of a receiver for the bank. Riddle v. Butler First Nat. Bank, (W. D. Pa. 1886) 27 Fed. 503.


Interest.—The finding for the plaintiff will include interest to the date of judgment, though the plaintiff will be entitled to a dividend only upon the basis of the debt (whether as of the date when the business of the bank was suspended by the order of the comptroller. Riddle v. Butler First Nat. Bank, (W. D. Pa. 1886) 27 Fed. 503.

Where a plaintiff recovers a national bank receiver a share of the assets as being the property of the plaintiff—"a right, and not a debt."—he recovers no interest. Hallett v. Fish, (C. C. Vt. 1903) 123 Fed. 201.

III. DIVIDENDS AND DISTRIBUTION

1. Dividends on Claims


In order to be ratable the claims must be estimated as of the same point of time, which is the date of the declaration of insolvency or suspension of business. White v. Knox, (1864) 111 U. S. 784, 4 S. Ct. 686, 28 U. S. (L. ed.) 603; Merrill v. National Bank, (1889) 173 U. S. 131, 19 S. Ct. 360, 43 U. S. (L. ed.) 640.

Those portions of the collections on account of sales of butter actually coming into the hands of the receiver of a national bank which had virtually acquired and operated through its officers an insolvent creamery company doing business under an arrangement by which the proceeds of sales, less a stated compensation, were to be divided pro rata among those furnishing the milk, may be recovered by the latter, even though the transaction may have been beyond the powers of the bank, and they are further entitled to participate pro rata as general creditors to the extent that the proceeds of such sales had been diverted and appropriated by the bank. Rankin v. Emigh, (1910) 218 U. S. 27, 30 S. Ct. 672, 54 U. S. (L. ed.) 915, affirming (1908) 134 Wis. 565, 115 N. W. 128, 27 L. R. A. (N. S.) 243.

Set-off.—A shareholder’s individual liability for the debts of the bank may be set off against a dividend due on the deposit account, though the claim for the dividend was assigned to others before the amount of the stockholders’ liability was ascertained. Brownell v. Armstrong, (1888) 10 Ohio Dec. (Reprint) 368, 20 Cine. L. Bul. 465; King v. Armstrong, (1893) 30 Ohio St. 222, 34 N. E. 163.

Interest on dividends will be allowed where necessary to put creditors on an
equality. Thus a person establishing his claim by judicial proceedings is entitled to interest on the amount of his dividend from the time when the dividends were declared and paid to other creditors. Armstrong v. American Exch. Nat. Bank, (1890) 133 U. S. 433, 10 S. Ct. 450, 33 U. S. (L. ed.) 747.

But one who has wrongfully delayed presenting his claims until long after dividends are declared is not entitled to interest on his dividend. Chemical Nat. Bank v. Armstrong, (C. C. A. 6th Cir. 1893) 59 Fed. 372, 16 U. S. App. 465, 8 C. C. A. 155, 28 L. R. A. 231.


Where in a suit for the whole claim after the receiver has rejected a part only, he denies the liability in toto, the part offer may be considered as withdrawn and interest on the whole dividend will then be allowed. Chemical Nat. Bank v. Armstrong, (C. C. A. 6th Cir. 1895) 55 Fed. 573, 31 U. S. App. 75, 13 C. C. A. 47, 28 L. R. A. 231.

2. Distribution to Shareholders

Who entitled.—Liquidation dividends belong to the holders of the shares of the bank's stock, whether such shares are or are not recorded on the books of the bank. Bath Nav. Inst. v. Sagadahoc Nat. Bank. (1867) 89 Me. 500, 36 Atl. 996.

Pledgers of stock, though not registered as owners or pledgees, are entitled to the distributive portion of the assets of the bank applicable to such shares, as against the claim of the receiver to set off such shares against the stockholder's indebtedness to the bank. McConville v. Means, (1889) 10 Ohio Dec. (Reprint) 452, 21 Cinc. L. Bul. 193.

A purchaser at a sheriff's sale of shares of stock levied upon to pay an assessment laid on all the shares by the comptroller to pay the debts of the bank, but who himself pays no part of such assessment, is not entitled to share as a stockholder in the distribution of surplus funds until all assessments called for and paid in by the other stockholders are repaid. Richardson v. Wallace, (1892) 39 S. C. 216, 17 S. E. 726.


Sec. 5237. [Injunction upon receivership.] Whenever an association against which proceedings have been instituted, on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal. [R. S.]


By Judicial Code, § 24, par. Sixteenth, in title JUDICIARY, vol. 4, pp. 840, 1064, federal District Courts are given jurisdiction, regardless of the amount in controversy, of suits to enjoin the comptroller of the currency or any receiver acting under his direction, as provided in the text R. S. sec. 5237. As to venue of such suits see Judicial Code, § 49, in title JUDICIARY, vol. 5, p. 482.

"Circuit" Courts mentioned in the text R. S. sec. 5237 were abolished and their powers and duties conferred on District Courts by Judicial Code, §§ 289-291, in title JUDICIARY, vol. 5, pp. 1082, 1083.
Sec. 5238. [Fees and expenses.] All fees for protesting the notes issued by any national banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof. [E. S.]


"The policy of this section seems to be that all expenses incurred in the administration of the affairs of the bank shall be paid out of the assets of the bank." (1860) 19 Op. Atty.-Gen. 633.

Expenses of the receivership do not include compensation to the district attorney for conducting a suit in which the receiver is a party. Gibson v. Peters, (1898) 150 U. S. 342, 14 S. Ct. 134, 37 U. S. (L. ed.) 1104, on a certificate of division of opinion in (E. D. Va. 1888) 36 Fed. 487, setting aside judgment in (E. D. Va. 1888) 35 Fed. 721. It had previously been ruled that compensation of the district attorney for such services could be included in the expenses. (1892) 20 Op. Atty.-Gen. 476.

Expenses of proceedings for forfeiture of the charter of a national bank, instituted by the comptroller of the currency should be defrayed out of the funds or assets of the association. (1860) 19 Op. Atty.-Gen. 633, ruling also that a reasonable fee of the district attorney for his services in such proceedings might be included in such expenses.

Charges of a master, including the expenses of an expert accountant employed by him, amounting to several hundred dollars, in a suit by stockholders against the bank and its directors, the receiver subsequently appointed being made a defendant by amendment of the bill, were ordered to be paid out of the assets in the receiver's hands, where it was shown that the master's services had been beneficial to all the stockholders, and that in consequence of the investigation set on foot by the bill, there had been a thorough overhauling of the affairs of the bank by the receiver which had resulted in the recovery of a large sum of money by him. McElhenny v. Ashland First Nat. Bank, (1879) 7 Wkly. Notes Cas. 115, 16 Fed. Cas. No. 8,779.

An attorney's fee stipulated in a preliminary note as part of the costs of collection is not chargeable against the assets of the bank in the receiver's hands. Citizens' Bank, etc., Co. v. Thornton, (C. C. A. 5th Cir. 1900) 174 Fed. 752, 98 C. C. A. 478, where the court said: "The statutes do not contemplate that the assets in his hands are to be charged with the expense of creditors in establishing the validity of their claims, otherwise than as the general law allows them to be taxed in their favor, as in the case of other successful suitors, and then such costs are a part of the general expense of administration, which is to be deducted from the assets before dividends are declared."

Sec. 5239. [Penalty for violation of this Title.] If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation. [E. S.]


"Circuit courts mentioned in this section were abolished and their powers and duties conferred on District Courts by Judicial Code, §§ 289-291, in title JUDICIARY, vol. 5, pp. 1082, 1083.
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I. FORFEITURE OF CHARTER

As a condition precedent to suit against directors, see infra, this note, III, p. 878.
An information to enforce a forfeiture for violation of this section is based upon the violations of the law by the directors of the bank and not upon violations by other officers of the bank. "Hence, the allegation that the banking association, aside from the directors, knowingly permitted the doing of the named acts, is tendering an immaterial issue." Trenholm v. Commercial Nat. Bank, (N. D. In. 1889) 38 Fed. 925.

The effect of a decree dissolving the corporation and forfeiting its rights and franchises on an information brought by the comptroller of the currency, founded upon a violation of the National Bank Act, is to abate a suit against a bank to enforce the collection of a demand. Selma First Nat. Bank v. Colby, (1874) 21 Wall. 609, 22 U. S. (L. ed.) 687.

II. COMMON LAW LIABILITY OF DIRECTORS AND ENFORCEMENT THEREOF

1. Liability in General

Such liability affirmed.—A stockholder may maintain a bill on behalf of himself and all other stockholders against the directors to hold the latter liable at common law for losses due to acts of maladministration committed by them. This seems to have been recognized in Herrmann v. Edwards, (1915) 238 U. S. 107, 35 S. Ct. 839, 59 U. S. (L. ed.) 1224, following Whitemore v. Amoskeag Nat. Bank, (1880) 134 U. S. 527, 10 S. Ct. 592, 33 U. S. (L. ed.) 1002. But as to federal jurisdiction of such a suit, see infra, this note, p. 877, 3. Jurisdiction of suit.

In Williams v. Brady, (C. C. N. J. 1916) 232 Fed. 740, replying to the contention that there is no common-law liability of a director of a national bank, the court said: "The proposition seems to be based upon counsel's misconception of what was held and said by the Supreme Court in Yates v. Jones Nat. Bank, (1907) 206 U. S. 158, 27 S. Ct. 638, 51 U. S. (L. ed.) 1002. I cannot gather anything from the opinion in that case which would warrant such a construction, but, on the other hand, it appears to me very clear that the court recognized that there is a liability on the part of national bank directors for failure to perform the duty which the general principles of the law cast upon them when they become directors, distinct from and in addition to the duties and liabilities imposed by the statute. . . . That case simply decided that the National Bank Act (Act June 3, 1864, ch. 106, 13 Stat. L. 99) imposes upon directors of national banks duties which did not rest upon them at common law, and that section 5239 affords the exclusive rule by which to measure the right to recover damages, based upon a loss resulting solely from the violation of such duties. The same question as is here presented was raised in Allen v. Luke, 163 Fed. 1018 (C. C. Mass. 1908), and was decided adversely to defendant's contention; Judge Lowell entertaining the same view of Yates v. Jones National as is here expressed. That there exists a liability on the part of national bank directors for failure to perform the duty imposed upon them by the general principles of the law, irrespective of the statute, is, I think, also clear from Briggs v. Spauhling, (1901) 141 U. S. 132, 11 S. Ct. 924, 35 U. S. (L. ed.) 622, where the
measure of such duty is defined. See, also, 
Rankin v. Cooper, 149 Fed. 1010 (W. D. Ark. 1907); or to make false representations which are believed and acted upon by third parties, they are liable to respond for the injury done to the one defrauded thereby. 
Prescott v. Haughey, (C. C. Ind. 1895) 65 Fed. 653; Gerner v. Mosher, (1899) 58 Neb. 156, 78 N. W. 394, 46 L. R. A. 244; 
Gerner v. Yates, (1900) 61 Neb. 100, 84 N. W. 596; Merchants' Nat' Bank v. 
Thoms, (1892) 11 Ohio Dec. (Reprint) 
632, 28 Cinci. L. Bul. 164. And see 

Contrary view.—But in Zinn v. Baxter, (1901) 65 Ohio St. 341, 62 N. E. 327, holding 
that a stockholder in a national bank, who had parted with his stock, could not, 
before a dissolution of the bank, maintain 
a bill in equity against directors, for 
the common benefit of all the shareholders, 
to recover losses in consequence of the 
wrongful acts of the directors, the court 
said: "It is urged that at common law, 
and under the rules of equity, a share-
holder may maintain an action against 
directors for such damages as he has 
individually sustained by reason of the 
wrongful acts of the directors, even though 
the same acts damned all the stock-
holders in the same degree as they did 
him, and even though the corporation is 
a going concern, and has not been diss 
olved." The error of this contention lies 
in supposing that the statute, the 
common law, and rules of equity may all be 
invoked in the same case, and that, where 
one may be found too narrow, the other 
may be called in to help out, and that 
the right of action is given partly by statute, 
partly by the common law, and partly by 
the rules of equity. The correct rule is 
that, as Congress has legislated upon the 
subject, and given and defined the right 
of action, the right thus given by Congress 
is the only right, and that the action must 
be maintained under the act of Congress, or fall; and that the liability of the 
directors of a national bank is measured by 
that act alone, and cannot be enlarged or 
changed by the common law or rules of 
equity in the case. In the case of Briggs v. Spaulding, (1891) 141 U. S. 132, 11 S. Ct. 924, 
35 U. S. (L. ed.) 662, which was a bill by 
a receiver of a national bank against the 
directors for damages, as in the present 
case, the bill charged that, independently 
of the acts of Congress, the directors were 
liable as trustees for the bank, its 
stockholders and creditors, and upon the hear-
ing this view was ably urged by counsel; 
but the Supreme Court of the United 
States ignored the claim, and disposed of 
the case in favor of the directors upon 
the provisions of the national banking act alone. The duty of the directors being 
declared by the act, as well as their lia-

bility for the violation of that duty, it is 
competent to resort to the common law and 
rules of equity to ascertain whether
such duty has been properly performed; and that was done in the above-cited case, but the court went no further. It is therefore clear that the common law and rules of equity cannot be invoked in opposition to the acts of Congress to enable a shareholder in an action like the one at bar to maintain such action against the directors solely on the ground that he is entitled to his check, and before a dissolution of the bank."

"What is the measure of liability where there is an alleged breach of duty by directors, under the principles of the common law? If this liability is measured by the oath under the sanction of which they act, they must diligently and honestly administer the affairs of the association. Under the authorities, it seems entirely clear that if no honesty appears, if the directors act in good faith, they are not answerable for a mistake or error of judgment, however serious. But for the results of negligence they are answerable. They must bring to the discharge of their duties reasonable and ordinary care and diligence in conducting the affairs of the corporation." Bailey v. Babcock. (W. D. Pa. 1915) 241 Fed. 501, holding, however, that the facts in the instant case did not render the directors personally liable according to the standard stated in the foregoing quotation. The court further said: "Negligence is a question of fact under all the circumstances. And in passing on this question, we must keep in mind that the facts must be viewed and considered as they then presented themselves, and not from the illuminated viewpoint of subsequent events. . . . It is not difficult to find in the light of after events that the judgment of the directors was greatly at fault. But under all the facts and circumstances of the case as they were when that judgment was called into exercise, I cannot convict the defendants of negligence in the execution of their trust."

In McCormick v. King, (C. C. A. 9th Cir. 1917) 241 Fed. 737, 154 C. C. A. 439, a bill by a national bank against directors of the bank, the proofs showed the frequent allowance of large overdrafts to three borrowers, and that at times the respective amounts owing by those persons respectively exceeded one-tenth the amount of the capital stock of the bank.

The court said: "It is no defense in an action of this character, for the officers who were in charge of the affairs of the institution that the by-laws which forbade the payment of checks unless the drawer had funds on deposit sufficient to meet such check, was copied from the by-laws of other banks, and that notwithstanding such by-laws other banks also often allow overdrafts. . . . Even if it were true that such a practice would be no authority for bank officials to allow customers to overdraw in sums and incur liability in excess of one-tenth of the amount of the capital stock of the bank paid in. For months before this bank failed it was the business of the board of directors to make it apparent to the loan and discount committee of the bank that, if such acts of the officers were continued, it would mean a sacrifice of the interests of the stockholders. But the president and vice-president, who was no longer a director, and who had been president and vice-president of the bank, had for many years been in the practice of departure from duty, and suspension followed. We can therefore reach no conclusion other than that the acts referred to were not mere errors of judgment, but were in gross mismanagement of the bank, for which the individuals (president and vice-president) are liable under the general principles of the common law, as well as under the statutes." It was further held that the defendant Bowman, a director, was liable for the losses due directly to the positive negligence of the president and loan committee, the court saying: "The fact that Mr. Bowman lived 200 miles away is not an excuse for him. He lived that distance . . . when he voluntarily accepted the directorship, and to exonerate him from neglecting to attend a meeting of the board or inquiring into the conduct of the institution would be practically to hold that there was no meaning and significance whatever to the oath he took that he would, so far as the duty devolved upon him, honestly and diligently administer the affairs of the association. . . . If continued omission to give any attention could excuse, then the greater the inattention of a director to his duties the less the liability he would incur. . . . If the evidence showed any effort or attention on the part of Mr. Bowman, his appeal might find some foundation of merit; but, as we scrutinize his course, it cannot be squared with any standard of ordinary care or reasonable diligence. . . . Our opinion is that his liability (and to be measured primarily by the rules of the general common law, and that his want of knowledge of the gross mismanagement of King and Andrews [president and vice-president] was due to such inattention to the duty which was imposed upon him of exercising a reasonable supervision over the conduct of those in charge of the bank that he, too, is liable to the same extent as are King and Andrews."

2. Survival of Action

3. Jurisdiction of Suit

Judicial Code, sec. 24, par. Sixteenth in title Jurisdiction, vol. 4, pp. 540, 1084, gives jurisdiction to United States District Courts, regardless of the sum or value of the matter in controversy, of all "cases for winding up the affairs" of any national banking association. In Bates v. Dresser, (D. C. Mass. 1915) 229 Fed. 772, a suit in equity by a national bank receiver, the plaintiff's claim of a right to recover was based upon the ground that the defendants, as president and directors of the bank, were bound to use due care and diligence in the management and supervision of its affairs, and that, through their negligence in this respect, they failed to discover the defalcations of the bank's bookkeeper in season to prevent the whole or any part of the losses which the bank sustained during the three years and three months that his speculations were going on. The court said: "As there is no diversity of citizenship, and the ground of action is for a breach of their duties as directors at common law and in equity, federal jurisdiction depends upon the fact that the proceedings is brought by a receiver of a national bank in the course of winding up its affairs and is sanctioned by section 24, paragraph 16 [above cited in this paragraph] of the Judicial Code of 1911. International Trust Co. v. Weeks, (C. C. Mass. 1902) 116 Fed. 388; Weeks v. International Trust Co., [C. C. A. 1st Cir. 1903] 126 Fed. 370, 60 C. C. A. 236; International Trust Co. v. Weeks, [1906] 203 U. S. 364, 27 S. Ct. 69, 51 U. S. (L. ed.) 224; Anten v. U. S. Nat. Bank, [1899] 174 U. S. 125, 19 S. Ct. 628, 43 U. S. (L. ed.) 920; North Dakota Guarantee Co. v. Hanway, [C. C. A. 5th Cir. 1900] 104 Fed. 965, 44 C. C. A. 312; McCartney v. Earle, [C. C. A. 3d Cir. 1902] 116 Fed. 462, 53 C. C. A. 392. The question decided in the recent case of Herrmann v. Edwards, [1915] 238 U. S. 107, 35 S. Ct. 393, 59 U. S. (L. ed.) 1284, differs from the one under consideration, as that suit was not brought by a receiver in the course of winding up the affairs of a national bank, and jurisdiction, if it existed, was held to depend upon diversity of citizenship or the presence of a federal question."

Where a bill by a stockholder on behalf of himself and all other stockholders against a national bank, its directors and its cashier to recover moneys lost by their illegal conduct was not sustainable by reason of any provision in the National Bank Act, and no other federal motion was involved, and all the individual parties were citizens of the state where the bank was located, and where the suit was brought in the federal court, the latter had no jurisdiction of the suit. Whittemore v. Amoskeag Nat. Bank, (1890) 134 U. S. 527, 10 S. Ct. 592, 33 U. S. (L. ed.) 1002, followed in Herrmann v. Edwards, (1915) 238 U. S. 107, 35 S. Ct. 393, 59 U. S. (L. ed.) 1224.

If an action against directors to enforce their personal liability is based solely upon their common-law liability for losses due to their inattention or negligence, no question of federal law is involved and therefore a federal court has no jurisdiction of the action where the plaintiff and the defendants are not citizens of different states. Nat. Bank of Commerce v. Wade, (C. C. Wash. 1897) 84 Fed. 10, where the action was brought by the bank located in Washington against citizens of that state.

4. Pleading

In Williams v. Brady, (D. C. N. J. 1916) 232 Fed. 740, holding that the bill by a national bank receiver sufficiently charged liability, as against a motion to dismiss, the court said: "I fail to see how the facts, upon which it is sought to base liability under the common law against those directors who persistently failed to attend meetings, could be more specifically set forth. It is not open to doubt, I think, that a willful and continued failure on the part of a director to attend meetings of the board at which the business of the bank is conducted, and to familiarize himself, to some extent, with the bank's affairs, is a violation of the duty which the common law imposes upon directors, and, if loss results therefrom, that he is liable, because such action is, in itself, a failure to exercise the ordinary care and prudence in the administration of affairs of the bank which the law imposes upon directors. Of course, a director is not required to attend every meeting, and it may be that some of the losses which were the result of actions which were not violations of any statute, taken at meetings at which some of the directors, who were occasionally absent, were not present, and who did not thereafter approve, expressly or substantially, such actions of the board, cannot be held liable for these losses. But quite a different situation is presented by a willful and continued failure, during the whole course of one's directorship, to attend meetings of the board and give to the board the benefit of his judgment and advice. This, coupled with a charge that the losses resulted therefrom, sets forth a cause of action."

In Rankin v. Cooper, (W. D. Ark. 1907) 149 Fed. 1010, a suit by a national bank receiver, the court said: "An examination of the bill of complaint in this case has led me to the conclusion that it states a common-law cause of action for damages sustained by the bank by reason of losses caused by the negligence of the directors so far as imprudent loans to
Mr. Allis and his associates are concerned." See further annotation from this case infra, this note, p. 878.

III. STATUTORY LIABILITY OF DIRECTORS AND ENFORCEMENT THEREOF

1. Duties as to Management, in General

a. Summary Statement

"Briefly summarized, I understand the law on this subject to be as follows: (1) Directors are charged with the duty of reasonable supervision over the affairs of the bank. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision over its affairs. (2) They are not insurers or guarantors of the fidelity and proper conduct of the executive officers of the bank, and they are not responsible for losses resulting from their wrongful acts or omissions, provided they have exercised ordinary care in the discharge of their own duties as directors. (3) Ordinary care, in this matter as in other departments of the law, means that degree of care which ordinarily prudent and diligent men would exercise under similar circumstances. (4) The degree of care required further depends upon the subject to which it is to be applied, and each case must be determined in view of all the circumstances. (5) If nothing has come to the knowledge to awaken suspicion that something is going wrong, ordinary attention to the affairs of the institution is sufficient. If, upon the other hand, directors know, or by the exercise of ordinary care should have known, any facts which would awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. (6) Directors are not expected to watch the routine of every day's business, but they ought to have a general knowledge of the manner in which the bank's business is conducted, and upon what securities its larger lines of credit are given, and generally to know of and give direction to the important and general affairs of the bank. (7) It is incumbent upon bank directors in the exercise of ordinary prudence, as a part of their duty of general supervision, to cause an examination of the condition and resources of the bank to be made with reasonable frequency. I have drawn the foregoing propositions largely from the leading cases of Briggs v. Spaulding, [1891] 141 U. S. 132, 11 S. Ct. 924, 34 U. S. (L. ed.) 662; Gibbons v. Anderson, [W. D. Mich. 1897] 80 Fed. 345; Martin v. Webb, [1884] 110 U. S. 7, 8 S. Ct. 428, 28 U. S. (L. ed.) 49; Warner v. Penoyer, [C. C. 2d Cir. 1888] 91 Fed. 587, [61 U. S. App. 732], 33 C. C. A. 222, 44 L. R. A. 761; Cockrill v. Cooper, [C. C. A. 8th Cir. 1898] 86 Fed. 7 [37 U. S. App. 576], 29 C. C. A. 529, and the recent decisions of the Supreme Court of Ohio in the case of Mason v. Moore, [1908] 73 Ohio St. 275], 76 N. E. 932 [4 Ann. Cas. 240, L. R. A. (N. S.) 597]. * * * As has been well said, the courts in dealing with instances of negligence by the directors of banks 'are under perplexing restraint lest they should, by severity in their rulings, make directorships repulsive to the class of men whose services are most needed, or, by laxity in dealing with glaring negligences, render worthless the supervision of directors over national banks, and leave these institutions a prey to dishonest executive officers.' Robinson v. Hall, [C. C. A. 4th Cir. 1894] 63 Fed. 222 [23 U. S. App. 48], 12 C. C. A. 674." Per Finkenbarg, J., in Rankin v. Cooper, (W. D. Ark. 1907) 140 Fed. 1101.

b. Care Required

See also supra, this note, II, 1, Liability in general, p. 874.

The degree of care to which the bank directors are bound is that which ordinary, prudent, and diligent men would exercise under similar circumstances, and in determining whether such care has been exercised the restrictions of the statute and the usages of the business should be taken into account. Briggs v. Spaulding, (1891) 141 U. S. 132, 11 S. Ct. 924, 35 U. S. (L. ed.) 662, affirming Movius v. Lee, (N. D. N. Y. 1897) 190 N. Y. 517, 85 N. Y. 290, 102 Am. St. 486.


In Bailey v. Babcock, (W. D. Pa. 1915) 241 Fed. 501, a bill in equity by a national bank over its presidential liability of the bank's directors for alleged misconduct and mismanagement, the court said: "The illegal acts charged against the defendants fall into two classes: First, those which are claimed to be violations of the
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National Bank Acts; and, second, those
which are alleged to constitute a breach of
duty by the directors as agents of the
bank, under the common law. It is en-
tirely clear under the authorities that a
different measure of liability must be ap-
piled in the two cases. In the former the
duty imposed is that enjoined by the stat-
ute; and, where a statute creates a duty
and prescribes a penalty for non-perform-
ance, the rule provided in the statute is
the exclusive test of liability."

Want of knowledge of wrongdoing will
not shield the directors from liability if
their ignorance is the result of gross inat-
tention. Briggs v. Spaulding, (1891) 141
1897) 80 Fed. 345; Gernert v. Mosher,
(1899) 58 Neb. 153, 78 N. W. 394, 46 L. R.
A. 244.

The directors are not insurers of the
good faith and diligence of the executive
officers, and where they have acted in good
faith and with ordinary diligence in exer-
cising their duty of general control and
supervision they are not personally liable
for losses sustained through the miscon-
duct or want of diligence of the executive
officers. Warner v. Penoyer, (C. C. A. 2d
Cir. 1898) 91 Fed. 587, 61 U. S. App. 372,
33 C. C. A. 222, 44 L. R. A. 761; Wittern
v. Bowles, (C. C. Vi. 1887) 31 Fed. 1;
Rankin v. Cooper, (W. D. Ark. 1907) 149
Fed. 1010.

Long neglect.—In an action by the re-
ceiver of a national bank against its di-
rectors for losses caused by mismanage-
ment, it appeared that the directors, with
knowledge of the insolvency of the bank,
failing to record mortgages given to secure
large indebtedness to the bank, resulting in
a loss of the greater part of such in-
debtedness; that for three years they left
this management of the bank almost wholly
to the cashier, without requiring a bond
of him, although he was not possessed of
any considerable property; that they
allowed the cashier's indebtedness to the
bank to increase from year to year; that
they permitted loans to be made to indi-
viduals and firms largely in excess of the
amounts allowed by law. It was held
that the directors were liable for the loss.
Robinson v. Hall, (C. C. A. 4th Cir. 1894)
63 Fed. 222, 25 U. S. App. Ge, 12 C. C. A.
674, reversing (E. D. N. C. 1894) 69 Fed.
648.

c. Absence of Directors

The mere fact that a director of a na-
tional bank does not attend to his duties
by reason of continued ill health or other
business engagements does not necessarily
relieve him from liability for losses sust-
ained by the bank through the failure of
the directors to exercise proper care and
supervision over its affair. Rankin v.
Cooper, (W. D. Ark. 1907) 149 Fed. 1010.
And so in case of frauds committed dur-
ing the absence of a director, leave for
which was given by the board in the case
of his illness, he is not personally liable
where the bank suffers loss and he was
ignorant of the unlawful acts. Briggs v.
Spaulding, (1891) 141 U. S. 192, 11 S. Ct.

d. Delegation of Duties

In general.—The directors are not called
upon to devote themselves to the details of
the business management, and may prop-
erly commit these to their duly author-
ized officers, but they are not absolved
from the duty of reasonable supervision.
Warner v. Penoyer, (C. C. A. 2d Cir.
C. C. A. 2221, 44 L. R. A. 761; Briggs v.
Spaulding, (1891) 141 U. S. 192, 11 S. Ct.
924, 35 U. S. (L. ed.) 602; Gibbons v.
345; Hanna v. People's Nat. Bank, (1901)
35 Misc. 517, 71 N. Y. S. 1076.

Directors may intrust to the cashier all
the discretionary powers which usually ap-
 propriet to the immediate management of
the business of the bank, including the
discounting of notes. Warner v. Penoyer,
(C. C. A. 2d Cir. 1898) 91 Fed. 587, 61
U. S. App. 372, 33 C. C. A. 222, 44 L. R.
A. 761.

Supervision.—The duty of the board of
directors is not discharged by the selection
of officers of good reputation for ability
and integrity and then leaving the offi-
cers of the bank without any other super-
vision or examination than mere inquiry
of such officers and reliance on their state-
ments until some cause of suspicion at-
tracts their attention. Gibbons v. Ande-

Committees.—By the appointment from
their number of a discount committee and
an examining committee the directors
shift their responsibility to the members
of such committees. Warner v. Penoyer,
(C. C. A. 2d Cir. 1898) 91 Fed. 587, 61
U. S. App. 372, 33 C. C. A. 2221, 44 L. R.
A. 761; Hanna v. People's Nat. Bank,
(1901) 35 Misc. 517, 71 N. Y. S. 1076.

2. Violation of Banking Laws, in General

A director who participates in or con-
ents to any violation of the national bank-
ing laws by the board is individually
liable for the resulting loss. Briggs v.
Spaulding, (1891) 141 U. S. 192, 11 S. Ct.
924, 35 U. S. (L. ed.) 602; Cassidy v. Uhl-
man, (1900) 54 App. Div. 265, 56 N. Y.
S. 670.

The officers of a national bank are not
technical trustees of express trusts, but
they are the agents of the bank charged
under the national banking laws with an
implied trust to use the funds of the
bank for only the purposes specified in
these laws, and to preserve them for their
creditors and stockholders; and they are
personally liable to the bank for losses

3. "Knowingly Violate or Knowingly Permit," etc.

In Bailey v. Babcock, (W. D. Pa. 1915) 241 Fed. 501, speaking of Thomas v. Taylor, (1912) 224 U. S. 73, 32 S. Ct. 403, 56 U. S. (L. ed.) 673, the court said: "In that case the comptroller of the currency had given notice to the directors of a national bank to collect or charge off certain assets as doubtful. In disregard of this notice, a statement was made representing the assets to be good, and it was held that the directors had disregarded the direction of the officers appointed by the law to examine the affairs of the bank, whose directions must be observed, and that a violation is in effect intentional, when one deliberately refuses to examine that which it is his duty to examine. This case again before the Supreme Court (1916) 240 U. S. 541, 36 S. Ct. 429, 60 U. S. (L. ed.) 785, and the court affirmed again that the test of liability was not negligence, but the fact that the act was violated knowingly. . . . It is clear, therefore, that the words of the statute 'knowingly violate, or knowingly permit to be violated,' still stand as the test of civil liability. These words are not obscure or of doubtful meaning, and must be given effect in applying the statute."

The directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the comptroller of the currency, made and published conformably to R. S. sec. 5211, supra, p. 790, cannot be held civilly liable to any one deceived to his injury by such report, since the exclusive test of such liability is furnished by this section, which makes a knowing violation of the provisions of the title relating to national banks a prerequisite to such liability. Yates v. Jones Nat. Bank, (1907) 206 L. S. 158, 27 S. Ct. 635, 51 U. S. (L. ed.) 1002.

Directors are not liable for the illegal or negligent acts of the cashier or other officers by whom the bank is managed if they have no knowledge of such acts and do not connive at them or willfully shut their eyes and permit them. Clews v. Bardon, (E. D. Wis. 1888) 36 Fed. 617.

In Clews v. Bardon, (E. D. Wis. 1888) 36 Fed. 617, it was held that none of the directors had knowingly violated or knowingly permitted the violation of any of the provisions of the banking law, and the directors were not liable for such violation by the cashier.

4. "Participated in or Assented to," etc.


Persons elected directors within ninety days of the failure of a bank will not be held liable for losses caused by unlawful acts of the executive officers because they did not compel an investigation and examination of the business of the bank, where the bank was apparently prosperous and in good credit, and there was nothing to excite suspicion. Briggs v. Spaulding, (1891) 141 U. S. 132, 11 S. Ct. 924, 35 U. S. (L. ed.) 662.

Newly elected directors.—While a director of a national bank ought not to be held responsible for the conduct of its business from the very day of his election, if he has not been a director before, he becomes responsible for acts or omissions from the time he acquires knowledge of the bank's condition and begins to actively participate in its affairs. Rankin v. Cooper, (W. D. Ark. 1897) 149 Fed. 1010.

5. Ultra Vires Transaction.

In Bailey v. Babcock, (W. D. Pa. 1915) 241 Fed. 501, the plaintiffs sought to charge the defendant directors with liability for losses resulting from an alleged ultra vires investment. But after reviewing the evidence the bill was dismissed, the court saying: "Under these circumstances, if the investment is to be regarded as testimonially ultra vires, I do not feel that the defendants should be held to answer for the loss which seems fairly chargeable to an error in business judgment. Under the authorities, where the question of ultra vires is involved in doubt, the cases go far to hold that the advice of counsel is a protection to the trustee or director who has sought such advice and honestly acts under it."

6. Taking Deposits After Insolvency

A director who, with knowledge of the insolvency of the bank, takes part in directing the receipt of deposits is personally liable for the resulting loss. Cassidy v. Ulmann, (1900) 54 App. Div. 205, 64 N. Y. S. 670.
7. Excessive Loans

In general.—In an action by a national bank to recover damages sustained in consequence of excessive loans made by former directors in violation of this section, it was held that the issues to the jury were whether the loans were made when the borrower was already indebted to one-tenth of the capital actually paid in by the bank, whether such loans were knowingly made by such directors, and what portions of the moneys were so lost. Mangum City Nat. Bank v. Crow, (1918) 27 Okla. 107, 111 Pac. 210, Ann. Cas. 1912B 647.

Where the directors of a national bank became aware, through the report of a committee of their number, and also by notices sent them individually by the comptroller of the currency, that the bank had been making excessive loans to its president and to other persons, firms, and corporations with which he was associated, but took no effective steps to reduce such loans, or to prevent their increase, which continued until the bank became insolvent, it was held that they were jointly and severally liable for all losses which the bank sustained through subsequent transactions and which could have been prevented by a proper discharge of their duties. Rankin v. Cooper, (W. D. Ark. 1907) 149 Fed. 1010.

Where a bank director was not acting as a director in obtaining discount of certain notes belonging to his father by the bank, it was held that he could not be held liable because he induced or permitted the bank to extend credit to his father in excess of the legal limit fixed by R. S. sec. 6200, supra p. 761. Hicks v. Steel, (1905) 142 Mich. 292, 105 N. W. 767, 4 L. R. A. (N. S.) 279.

Necessity for injury or loss to bank.—Directors of a national bank cannot be made to respond to damages or to pay excessive loans, unless some injury was done to the bank or loss sustained by reason thereof. Emerson v. Gaither, (1918) 103 Md. 564, 44 Atl. 26, 7 Ann. Cas. 1114, 8 L. R. A. (N. S.) 738.

8. False Reports to Comptroller of Currency

Directors incurred personal liability to unpaid depositors for damages attributable to false representations of the bank's condition in official reports made to the comptroller of the currency and published pursuant to R. S. sec. 3211, supra p. 780, where such directors knew that said representations were false when they attested said reports, or with such knowledge otherwise participated in or assented to the making and publication of said reports. Jones Nat. Bank v. Yates, (1916) 240 U. S. 541, 36 S. Ct. 499, 60 U. S. (L. ed.) 788, reversed, (1919) 25 Neb. 121, 130 N. W. 844, 1135) holding that judgments for the plaintiff were supported by substantial evidence, the court also saying: "Whether this or that director attested a particular report is not controlling upon the question of assent. The official reports required by law are the reports of the bank, and not simply of those signing and attesting." See also Chesbrough v. Woodworth, (C. C. A. 6th Cir. 1912) 195 Fed. 875, 116 C. C. A. 465.

In Yates v. Jones Nat. Bank, [1907] 206 U. S. 179, 27 S. Ct. 638, 51 U. S. (L. ed.) 1002, the Supreme Court of Nebraska, affirming the decision of a state court, had held the directors of a national bank liable for making false statements to the comptroller of the currency. It had held that the means of informing were accessible to them, and whether the attesting directors possessed knowledge of the falsity of the report was wholly immaterial. The judgment of the court below was reversed, on the sole ground that it did not appear that the violation in question was intentional." Bailey v. Babcock, (W. D. Pa. 1915) 241 Fed. 501.

Reporting doubtful assets at full face.—Where the directors attested to be correct an official report of the bank's condition, which included, at their full face, as part of the bank's resources assets which they had been informed by the comptroller of the currency were doubtful, and for the collection, or removal from the bank, of which immediate steps should be taken, it was held that they were liable to one who, on the strength of the report, bought stock of the bank, for the depreciation thereof by reason of the shrinkage in the value of the specific assets, but not for its depreciation from impairment, then unknown to the directors, of other assets. Taylor v. Thomas, (1909) 195 N. Y. 690, 59 N. E. 1113, affirming (1908) 124 App. Div. 53, 108 N. Y. S. 454, which modified and affirmed (1907) 53 Misc. 411, 106 N. Y. S. 538.

Nature of issue.—An action under this section for damages caused by buying bank stock on the faith of false reports of the bank's condition sent to the comptroller of the currency and published involves no direct issue of negligence. The directors are not exonerated solely because they acted in good faith in making the original loan; nor are they liable merely because they negligently made or permitted to be made reckless or bad loans, or negligently failed to collect loans that were collectible, or because with diligence and care they would have known that loans, reported as assets, were bad. The sole primary issue is whether the defendants caused or permitted to be made a statement of the bank's condition, upon which statement the plaintiff relied to his injury and
which statement the defendants knew was materially false. In the trial of this issue the detailed history of the entire transaction and of each defendant's connection is, speaking generally, admissible as tending to show whether the loans were at the time in question in fact bad, and whether each defendant knew that fact, but not as otherwise establishing any liability. Chesbrough v. Woodworth, (C. C. A. 8th Cir. 1912) 196 Fed. 875, 116 C. C. A. 465.

9. Violation of Legal Reserve Requirement

A loss resulting to a national bank from bad loans, which were not repaid, cannot be said to have been caused by a violation of law by the directors in failing to keep on hand the legal reserve required by R. S. sec. 5191, supra, p. 741. Allen v. Luke, (C. C. Mass. 1908) 163 Fed. 1018.

10. Permitting Stock Speculation by Officers

Where the directors of a national bank engaged in or knowingly permitted stock speculation by the president and vice-president with the bank's funds, it was held that they were liable for the losses sustained. McKinnon v. Morse, (S. D. N. Y. 1910) 177 Fed. 576.

11. Charging Usurious Interest

In a suit to charge the directors with personal liability it was immaterial that they, on behalf of the bank, charged usurious interest on a loan where there was no evidence whatever that any damages were sustained thereby. Bailey v. Babcock, (W. D. Pa. 1916) 241 Fed. 501.

12. Form of Remedy—at Law or in Equity

In general—the suit against directors to recover for losses caused by violations of the National Bank Act, such as declaring dividends in excess of profits, loaning funds in excess of the limit allowed by law, or misapplying the funds, may be brought in equity or at law, according to the nature of the issues involved. Cockrill v. Cooper, (C. C. A. 8th Cir. 1898) 86 Fed. 7, 57 U. S. App. 576, 29 C. C. A. 529; National Bank of Commerce v. Wade, (C. C. Wash. 1897) 84 Fed. 10; Welles v. Graves, (N. D. Ia. 1891) 41 Fed. 450; Cooper v. Hill, (C. C. A. 8th Cir. 1899) 94 Fed. 582, 36 C. C. A. 402; Stephens v. Overstolz, (E. D. Mo. 1890) 43 Fed. 771.

At law.—In Coriscaena Nat. Bank v. Johnson, (C. C. A. 5th Cir. 1915) 218 Fed. 392, 134 C. C. A. 510, in a suit of equity by a national bank the bill charged the defendant, who had been an officer of the plaintiff bank, with liability for the loss sustained by the bank on a loan of its funds in an amount which exceeded one-tenth of the amount of the bank's paid-in capital and surplus, the ground of the asserted liability of the defendant being his alleged participation in and responsibility for the violation of the statutory prohibition of such a loan. The court, per Walker, J., said: "Plainly a suit to recover damages so sustained may be maintained at law, and is not cognizable by a court of equity, in the absence of any showing of the inadequacy of the legal remedy which is available. Cockrill v. Cooper, (C. C. A. 8th Cir. 1898) 86 Fed. 7, 57 U. S. App. 576, 29 C. C. A. 529; Stephens v. Overstolz, (E. D. Mo. 1890) 43 Fed. 465. In the case at bar no fact was alleged or proved which tended to show any inadequacy of the legal remedy to which the plaintiff might have resorted. The plaintiff's claim was that it had lost the total amount loaned, less what had been and what might yet be realized from certain corporate stock which it had received in a settlement of the bankrupt estate of one of the insolvent borrowers. The holding of that stock by the plaintiff constituted no ground for a resort to a court of equity. The bank's claim was subject to be reduced by the amount already realized on that stock and by the reasonable value of it, if it still represents anything of value. This abatement of the amount or damages recoverable could be made in a court of law as well as in a court of equity. It was simply a matter of showing the actual loss sustained by the plaintiff as a result of the forbidden loan. It was not made to appear that in a court of law there was any obstacle in the way of proving and recovering the damages sustained. In short, we discover no equitable feature in the claim sought to be enforced. It was a simple legal demand for damages, to be assessed in a judgment for money. The suit in equity could not properly be maintained because the case was one where a plain, adequate, and complete remedy may be had at law for the wrong complained of. Southern Pac. R. Co. v. U. S., (1906) 200 U. S. 341, 26 S. Ct. 296, 50 U. S. (L. ed.) 507; Smyth v. New Orleans Canal, etc., Co., (1891) 141 U. S. 656, 12 S. Ct. 119, 35 U. S. (L. ed.) 891. The trial court, in the decree rendered, expressed the correct conclusion, that there was no equity in the bill. But a dismissal of the bill did not properly follow from that conclusion. The case is one calling for the application of equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv). The decree, instead of dismissing the bill, should have ordered a transfer of the suit to the law side of the court, to be there proceeded with as one to which no complaint was made of the requirement of the rule mentioned." In Stephens v. Overstolz, (E. D. Mo.
1890) 43 Fed. 465, an action at law was brought by a receiver of a national bank, after forfeiture of its charter to enforce the liabilities of a defendant for a wrongfull loan of money, and a demurrer not questioning the propriety of suing at law instead of in equity was overruled by Mr. Justice Miller.

In Stephens v. Overstolz, (E. D. Mo.) 43 Fed. 771, an action at law of the receiver of an insolvent national bank against the executrix of a deceased president and director of the bank to recover damages alleged to have been sustained by the bank, it was urged that the remedy was in equity, and not at law, but the court, per Thayer, J., Mr. Justice Miller concurring, said: "Our conclusion is that, for the purpose of determining whether an action at law will lie in the case at bar, consideration ought to be given chiefly to the question whether the remedy in equity, as compared with equity in equity, is convenient and adequate, and not more burdensome to the party proceeded against. The suit before us is to recover whatever damages the Fifth National Bank may have sustained in consequence of excessive loans knowingly made or assented to by the defendant's testator, while serving in the capacity of director. The suit is by a receiver duly appointed, in whom are now vested all claims of the bank; and, as whatever injury resulted from making the excessive loans in question was a damage primarily done to, and recoverable by, the bank, it is not apparent that any stockholder or creditor of the institution can maintain a suit against the executrix for the alleged excessive loans either during the pendency or after the termination of the present action. There is no necessity, therefore, to resort to equity to avoid a multiplicity of suits. Furthermore, the issues to be tried appear to be such as can be conveniently tried of by a court of law. They are simply whether certain specified loans, made to four different parties, were made at a time when the several parties were already indebted to the bank in a sum equal to one-tenth of its capital actually paid in, and whether such loans were knowingly made or assented to by the testator and what portion of the moneys so loaned were lost. We can foresee no inherent difficulty in trying all of these issues intelligently and fairly in a court of law. The case appears to be one in which there is no necessity for invoking the aid of a court of chancery, either because of the nature of the issues involved, or to avoid a multiplicity of actions."

In Conway v. Halsey, (1875) 4 J. L. 462, it was held that an action at law could not be maintained by a stockholder of a national bank against the president and directors for mismanagement of the corporate affairs, because the right of action for damages incident to such mismanagement was vested primarily in the corporation. Beasley, C. J., said: "Since the decision in the case of Smith v. Heads, reported in (1847) 12 Metc. (Mass.) 371, 46 Am. Dec. 690, and which occurred in the year 1847, I do not find that it has anywhere been doubted that an action will not lie in behalf of a stockholder in a corporation against its directors for their negligence in so conducting its affairs that its capital had been impaired or lost and the shares of its stock in that manner rendered worthless. The judgment, with respect to its constituent facts, was identical with the transaction described in the present declaration, for the complaint in that instance was that the directors of a corporate company had by their malfeasance in delegating the whole control of its business to its president and cashier, occasioned the waste and loss of its entire capital. The adjudication was rested on general principles which lie at the basis of all corporate existence. These were, in substance, the following, viz.: That there is no legal privity between the holders of shares in a corporation, in their individual capacity, on the one side, and the directors of such company on the other; that the directors are not the bailees, agents or trustees of such several stockholders; that the corporation is a distinct person in law, in whom all the corporate property is vested, and to whom all its agents and officers are responsible for all torts and injuries diminishing or impairing its property; that the individual members of the company have no right or power to intermeddle with the property or concerns of such company, or to call any agent or officer to account, or to discharge them from any liability; that the injury done to the capital by wasting it, is not, in the first instance, or necessarily, a damage to the stockholders; that all sums which could in any form be recovered on that ground would be assets of the corporation, to be applied, in the first instance, to the payment of debts, the surplus only being distributable among the stockholders, and that it is therefore only an indirect, contingent and subordinate interest in damages so to be recovered that is vested in shareholders. These are the main grounds leading to the decision in the case referred to, and such grounds are so plainly just and reasonable that they appear to have been adopted in each of the previous cases of authorities on the subject that are to be found by a reference to any of the text-books. . . . The legal effect of the doctrine thus established is that those acts of the officers and agents of the corporation which diminish or destroy the capital of the company are direct injuries to the corporate body, and that it only
can seek reparation for such wrongs. And in such cases if the directors or other
principal officers are the wrong-doers, or if not being thus implicated, they refuse
to promote the requisite suit, a stock-
holder, acting for himself and the other
stockholders and for the company, may
call such delinquent officials to account
in a court of equity. The theory is that
under the given conditions the corpora-
tion is entitled to indemnification, and
that when this is effected the stock-
holder ceases to be a loser. . . . To the
extent of the legal rules established by
the train of cases to which reference has
been thus made, I did not understand
upon the argument that any contention
was raised, the plaintiff's case being
placed exclusively on the basis of the
force and the five thousand two hundred
and thirty-ninth section of the National
Bankrupt Act. The section thus relied
on is in these words: . . . It is insisted
that the clause of the above-recited pro-
vision which relates to the violations of
this law by the officers of a national bank,
applies to the circumstances stated in
this declaration, and renders the defend-
ants liable to this action. The position
is not tenable. The act declares that
the charter of any of these banks shall
be forfeitable if the directors knowingly
violate certain provisions of the statute,
and it is for a violation of such provision
that a personal responsibility is imposed
on such officers. When the act of
the officers has been such that its effect
will be to put the institution out of exist-
ence, then and then only, are they made
liable to the private suit of the stock-
holder or other person injured by their
willful disobedience of the requirements
of the law. As it is entirely unreason-
able, therefore, to infer that it was the
legislative intention that the charters of
these valuable institutions should be
liable to be lost by reason of any negli-
gence and want of care of their directors,
it necessarily follows that such negli-
gence and want of care will not lay the
basis of a suit of a shareholder against
them. The banking act organizes these
financial institutions, and establishes
various fundamental regulations to which
they are required strictly to conform;
and it is quite in keeping with the pur-
pose of the spirit of this law to find in
it a declaration that if the directors
should willfully disobey any of such fund-
amental injunctions, the penal conse-
quence should be that they should make
good not only the loss they resulting
to the corporation, but also that occa-
sioned to individuals by their malfeas-
ance. The plaintiff's case is not brought
within the scope of this remedial clause
of this section, inasmuch as it does not
show a willful violation of any one of
such fundamental regulations. There is
also another objection to the applica-
tion of this section of this act to the
plaintiff's case. When the injury in
question gives a private remedy, derived
from the misconduct of the directors,
to the individual stockholder, the only
reasonable deduction from the words and
purposes of the law is, that such redress
is aimed at injuries directly and not in-
directly falling on such stockholder. In
the present case, the injury is indirect
and derivative: the plaintiff has suffered
a loss because the property of the cor-
poration was squandered, purloined or
lost. Now, for such a loss the statute
gives to the company the right to obtain
an indemnification by suit, and by such
recovery the indirect and derivative loss
of the stockholders is, ipso facto re-
paired. For the sake of example, let
us say that the capital of a bank is
$800,000, which is purloined or lost by
the misconduct of the directors; the stock
thus becomes worthless because the com-
pany is made insolvent, but if the cor-
poration sue the directors and recover an
amount equal to the capital of the bank,
that sum is returned to the stock of the
members. It follows, therefore, that unless we im-
pute to persons passing this act the de-
sign to provide for a duplicate repara-
tion for the misconduct of these officers,
first to the corporation, and then, secondly,
by way of duplication to each member of
the bank, it is clear that what I have
called these derivative injuries are not
those for which an independent remedy
is provided in favor of each member of
the company. This consideration derives
an increase of weight from the circum-
stance that the same remedy that is
given to the stockholders is afforded 'to
any other person,' and if this action
can be sustained, so would an action be
sanctioned that should be brought by
any creditor of the insolvent bank.
In the suit of Ackerman v. Halsey, Mr.
Justice Depue, sitting in the Essex Cir-
cuit, considered this same question, and
after having examined the subject with
care, as appears from the opinion pre-
pared by him, came to the same con-
clusion as that above expressed."

In equity.—Where a stockholder's
agent of a national bank sought to re-
cover from directors losses sustained by
stock speculations of the president and
vice-president with the directors' knowl-
edge and participation, it was held that
a bill in equity for an accounting was
sustainable, though a recovery at law
could be had as to some of the trans-
actions involved. McKinnon v. Morse,
(S. D. N. Y. 1910) 177 Fed. 576.

In National Bank of Commerce v.
Wade, (C. C. Wash. 1897) 84 Fed. 10,
overruling a demurrer to a bill by a na-
tional bank against its directors to en-
force their liability under the third sec-
5239. Hanford, J. said: "If the
statute does more than to re-enact the
common law and principles previously familiar to equity practice, all that is new consists of an extension of the liability in favor of shareholders and other persons who may be injured by acts of the directors in violation of the statutes, so as to authorize suits and actions by persons who otherwise would be compelled to look to the association alone to make good their losses. I hold that even if the statute does create a liability enforceable by an action at law, nevertheless it does not diminish the jurisdiction of the courts in equity, unless the conditions are such that the remedy at law is equally adequate and complete. In this case the transactions involved are complicated by the subsequent exchanging of promissory notes and taking of property as security for the loans which are alleged to have caused the losses complained of. These securities must be converted into money, or otherwise disposed of, before the amount of the loss can be definitely ascertained. It is obvious, therefore, that the complainant is entitled to relief in equity, because the remedy at law is not adequate or complete.”


In Cockrill v. Cooper, (C. C. A. 8th Cir. 1898) 86 Fed. 7, 57 U. S. App. 576, 20 C. C. A. 529, a suit in equity by a national bank receiver against directors to recover for losses due to their excessive loans the question was raised whether the wrongs complained of in the bill could be redressed in equity or whether a court of law was alone competent to afford relief. The court said: “In behalf of the appellants [defendants] it is urged, in substance that, as the directors of a corporation are not entitled with the title to its property and effects, they are not trustees, but mere agents, of the corporation, and that an action brought against them by the corporation or its receiver to recover damages for mismanagement of the corporate affairs is necessarily one of legal cognizance, which can only be maintained at law. It may be conceded that directors are not, technically trustees, because they are not vested with a title to the corporate property, and that their relation to the corporation which they represent is that of agents, and that for many acts of misfeasance and nonfeasance they can be sued at law. But it does not follow from this concession that the jurisdiction of courts of law over directors is so far, exclusive as to prevent courts of equity, under all circumstances, from affording redress for similar wrongs. It is admitted, as we understand, even by those courts which have taken the most advanced ground in support of the jurisdiction at law, that cases may arise where the obstacles in the way of obtaining speedy and complete relief at law for illegal and negligent acts of directors are so great as to justify a resort to equity. In the case of Hayden v. Thompson, (C. C. A. 8th Cir. 1895) 36 U. S. App. 361, 17 C. C. A. 592, and 71 Fed. 60, this court upheld the right of a receiver of an insolvent national bank to maintain a bill in equity against the shareholders of the bank, collectively, to recover dividends which had been paid in violation of section 5204 of the Revised Statutes. The right to sue in equity was maintained on the ground of avoiding a multiplicity of actions; also, on the ground that the suit was one to redress a fraud and breach of trust; and, generally, because the remedy at law was inadequate. Many other courts have entertained bills in equity, or have asserted their right to do so, for the purpose of compelling the directors of a corporation to make good losses which the corporation had sustained by reason of their unauthorized, negligent, or fraudulent acts. Briggs v. Spaulding, (1891) 141 U. S. 192, 11 S. Ct. 924, 35 U. S. (L. ed.) 662; Hornor v. Henning, (1878) 93 U. S. 228, 23 U. S. (L. ed.) 879; Stone v. Chisolm, (1885) 113 U. S. 302, 5 S. Ct. 487, 28 U. S. (L. ed.) 901; Robinson v. Hall, (C. C. A. 4th Cir. 1894) 25 U. S. App. 48, 12 C. C. A. 674, and 43 Fed. 222. Indeed, if there is any conflict of opinion touching the power of a court of chancery in this respect, it arises over the circumstances that shall be deemed sufficient to warrant its exercise. It is doubtless true that a stronger showing, by allegation and proof of necessity for equitable relief, is required in some jurisdictions than in others, but the right of a court of equity to exercise jurisdiction in suits brought against directors, when the remedy at law is, for any reason, not fully adequate, cannot be successfully denied. The truth is that
the office and functions of a director are so much akin to those of a trustee that in many cases no substantial reason can be given for exempting directors from that degree of control by a court of equity which is ordinarily exercised over trustees. The doctrine is well settled in the federal courts that, in those cases where the right of a court of equity to afford redress for wrongful acts depends upon the inadequacy of the legal remedy, courts of equity may exercise jurisdiction, unless the legal remedy, is "as plain, . . . practical, and efficient to the ends of justice and its prompt administration as the remedy in equity." In determining whether a suitor should be permitted to sue in equity, the federal courts have always attached much importance to the fact that the remedy in the latter forum, as compared with the remedy at law, "will save time and expense and a multiplicity of suits, and settle finally the rights of all concerned in one litigation." In other words, the argument of inconvenience is never overlooked, but is given great weight. Boyce v. Grundy, (1830) 3 Pet. 210, 213, 7 U. S. (L. ed.) 655; Oelrichs v. Spain, (1872) 15 Wall. 211, 228, 21 U. S. (L. ed.) 43; Freetea v. Maxwell Landgrant Co., (C. C. A. 8th Cir. 1892) 4 U. S. App. 326, 330, 1 C. C. A. 607, and 50 Fed. 674; Hayden v. Thompson, (C. C. A. 8th Cir. 1895) 36 U. S. App. 361, 363, 17 C. C. A. 592, and 71 Fed. 60. If these tests are applied to the case in hand, we think it may be safely asserted that the receiver is entitled to invoke the remedial powers and processes of a court of chancery to redress the wrongs of which he complains. The proceeding is brought against 16 directors, or their personal representatives, whose corporate names were not identical, except in four cases. If the receiver is compelled to sue at law, numerous actions must be brought: and very likely several separate actions would have to be brought against some of the directors, to comply strictly with the rules of procedure of law governing the joinder of parties. It is also fair to infer from what is stated in the bill that the excessive loans therein complained of were made or taken by one set of directors, and if, in the event of continued, renewed, or enlarged by another, so that a suit brought against any one of the directors would probably involve an inquiry into the proceedings of the board of directors, and into many of the financial transactions of the bank for the entire period during which its affairs are alleged to have been mismanaged. If the legal remedy is pursued, it is probable, therefore, that the receiver would find it necessary, in preparing his proof in numerous cases, to travel over much of the same ground in each case, while it is certain that the burden and expense of the litigation would be largely increased, and that the litigation itself would be needlessly prolonged and delayed. The right to sue in equity, however, does not depend altogether upon the considerations last mentioned. One charge contained in the bill is that the directors on several different occasions declared and appropriated dividends, in violation of section 5204 of the Revised Statutes. An investigation into the merits of this charge will necessarily involve a critical inquiry into the financial condition of the bank on each of said occasions; and as this court held in Hayden v. Thompson, (C. C. A. 8th Cir. 1903) 36 U. S. App. 361, 369, 17 C. C. A. 592, and 71 Fed. 60, that is an inquiry which is peculiarly appropriate to a court of chancery, since an account of any considerable length of intricacy cannot be stated before a jury with that degree of fairness and accuracy which is necessary, or at least desirable, in a judicial proceeding. We are led to the conclusion, therefore, that the legal remedy for the grievances alleged in the bill is neither as practical and efficient, nor as conducive to the speedy and correct administration of justice, as the remedy obtainable in equity. In the latter forum it will be possible in a single proceeding, and with much less labor and expense, to measure the responsibility of each director for the losses which the bank may have sustained in consequence of the alleged negligent and unauthorized acts of the directors, and at the same time to adjust all rights and equities of the directors, as between themselves, and as between them and the receiver, with reasonable accuracy, and with a close approximation to exact justice. In a case of this character such a result may not at first sight appear feasible. On this branch of the case, it is proper to add that for obvious reasons the courts of equity are best adapted to adjust controversies such as usually arise between receivers of insolvent corporations and the directors and managers of such concerns. The remedial processes of a court of chancery are of special utility in such cases, since it is usually found necessary, in the course of such proceedings, to unravel many irregular and intricate transactions, to the end that the responsibility for losses which have been sustained through the careless or fraudulent acts of directors or other managing officers may be located where it rightfully belongs. In a court of law there is always a greater probability that the innocent director will be found responsible that the innocent will be made to suffer for the wrongful acts of others. For this reason it seems evident that receivers and assignees of insolvent corporations will be embarrassed and delayed in their
discharge of their duties, that the creditors of such concerns will in many cases sustain loss, and that equal and exact justice will not always be done, if the right of such creditors to invoke the remedial powers of a court of chancery in aid of the administration of the trusts that have been committed to their charge is denied. The public interest therefore seems to demand that the right of such officers to sue in the forum of equity should neither be viewed with disfavor, nor denied on slight or technical grounds. It is sufficient to say that in the present case we have discovered no adequate reasons for denying the complainant’s right to equitable relief."

13. Jurisdiction of Federal or State Courts

See also supra, this note II, 3, Jurisdiction of Suit, p. 877.

Suit by stockholders.—The case of Huff v. Nat. Bank. (N. D. Cal. 1909) 173 Fed. 59, was a bill in equity for an accounting to which the defendants demurred for want of jurisdiction of the court. There was no diversity of citizenship, the parties being all citizens of the state, but the jurisdiction of the court was invoked upon the ground that the suit was one arising under the Constitution and laws of the United States within the terms and meaning of the Judiciary Act now constituting Judicial Code, sec. 24, in Judicary, vol. 4, p. 838. Overruling the demurrer, Van Fleet J., said: "The complainants sue in the capacity of stockholders of the defendant corporation, a national banking association, and for its benefit; it being alleged that the latter has, after proper notice and demand, failed and neglected to bring the action. The material features of the bill are, in substance and effect, that at the times of the commission of the acts complained of the individual defendants were officers of the defendant bank, one of them being the president and a director and the other two directors thereof, and as such officers having the control and being intrusted with the management and conduct of its business and affairs; that while acting as such officers the last-mentioned defendants were guilty of acts of malfeasance in office, in that at divers times, which are alleged with particularity and detail, they wrongfully and without right withdrew from the funds of the bank large sums of money, and employed the same to their own private use and benefit, and without adequate return to the bank, and made loans of the funds of said bank to irresponsible and insolvent borrowers, without adequate or any security, for the purposes of speculation, in which such officers were privately interested; and it is alleged that such withdrawals and loans were knowingly had and made by said officers in sums largely in excess of the limit allowed by specific provisions of the national banking law and contrary to and in violation thereof, and that said acts of the defendants have resulted in great loss to the bank, much in excess of the jurisdictional amount, for which loss it is asked that the defendant be compelled to account. I am of opinion that these facts make a case arising under the laws of the United States — not remotely or indifferently, but directly and positively — and that the measure of liability and recovery for such violation is likewise specifically furnished by the same law. Obviously it seems to me that in such a case the suit must be held to be one arising under a law of the United States, because the right to recover, if it exists, is thus directly given by an act of Congress, and the court is bound, therefore, in determining the controversy to decide whether or not the act gives the right claimed under it. Nor is this view to my mind at variance with the contention of the defendants, based upon the language of some of the cases, that it must appear from the averments of the bill that the construction of a federal statute is necessarily involved; for, in order to determine whether or not the act relied on does give the right claimed, the court is necessarily required to construe the act. That that question of construction is a matter in actual controversy sufficiently appears from a pleading which, like the present bill, merely alleges the violation of the statute, the fact of the injury resulting from such violation, and the fact that compensation has not been made for that injury. Such controversy exists because, if the complainants’ construction of the law be correct, the defendants ought to have made good the loss resulting from their wrongful acts; and their failure so to do is in itself a denial of the correctness of that construction. These views are fully sustained by National Bank of Commerce v. Wade. (C. C. Wash. 1897) 84 Fed. 10, involving the same provisions of the Revised Statutes and under facts precisely similar to those presented in the present bill, where the bank was suing its delinquent officers... The idea that the bill should allege that the defendants actually disputed the construction of the statute claimed by the complainants is not, so far as I have been able to discover, supported by any of the cases upon the subject. To the contrary, it is now firmly settled that the existence of a federal question must appear from the complainant’s statement of his own case, and cannot be aided by any allegation as to what the defendant claims or contends in that
petition, and therefore the action was properly brought in the courts of this state. In Brinkerhoff v. Boatwick, (1852) 8 N. Y. 52, it was held that the state court had jurisdiction of a suit in equity to enforce the personal liability of directors under the text R. S. sec. 5209, the court saying: "The jurisdiction of the state courts over actions against national banks is expressly recognized by the Act, and such jurisdiction has been repeatedly exercised in actions by receivers to collect claims due to such banks. There can be no reason why civil actions brought by stockholders in place of the receiver to enforce claims against delinquent directors or officers, should stand upon any different footing. The only cases in which exclusive jurisdiction is conferred by the Banking Act upon the courts of the United States, so far as we can find, are proceedings to enforce the forfeiture of the franchise of banking associations for violation of the Act (§ 5239) and proceedings to enjoin the comptroller of the currency from winding up the corporation, through a receiver. There is nothing in the Act which withdraws from the jurisdiction of the state courts civil actions to enforce rights of individuals against national banks or their officers."

14. Survival of Action

See also, supra, this note II, 3, Jurisdiction of Suit, p. 877.

State courts have jurisdiction of suits against directors to enforce their personal liability for damages as provided in this section. Jones Nat. Bank v. Yates, (1916) 240 U. S. 541, 36 S. Ct. 429, 60 U. S. (L. ed.) 788. State courts may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the comptroller of the currency, the civil liability prescribed by this section. Yates v. Jones Nat. Bank, (1907) 206 U. S. 158, 27 S. Ct. 638, 51 U. S. (L. ed.) 1002. In Zinn v. Baxter, (1901) 65 Ohio St. 341, 62 N. E. 327, a suit in equity by a shareholder of a national bank to enforce the liability of directors under the text R. S. sec. 5239, the court said: "The rights of the bank and of its stockholders, as well as the liabilities of its officers and directors, were fixed and imposed by that [national bank] Act alone, and therefore the statutes of Ohio, the common law, and rules of equity, as to such rights and liabilities, have no application; but the rights and liabilities being ascertained under the provisions of said Act, the same may be enforced in the state courts unless otherwise provided by act of Congress; but, with such power or otherwise provided by Act of Congress as to the grievances of which complaint is made in the
who have been injured for that violation of the trust. In effect that was a principle which existed before the statute was enacted. The statute declares the mode of proceeding, the liability of the wrongdoer, and the limit of his responsibility. It is not so essentially a penal statute intended to punish a wrongdoer for a wrongful act as to bring it within that class of penalties, the liability for which expires with the death of the party. The statute imposes a legal liability upon the officers of the bank for certain things which they may do which shall result in an injury to the bank, its stockholders or creditors. The statute says, in effect, that they shall be liable for whatever damages result to any one from their violation of duty. Penal statutes, strictly speaking, are generally those which impose a punishment measured only by the offense or guilt of the party. They generally say that, for every such offense, the party shall be held liable, and confined or imprisoned for a limited time. Generally they say exactly what the punishment shall be; that is, a party who does thus and so shall be liable to a fine of $500 or some other sum, or shall be liable to imprisonment for so long a time. Penalties of that nature are of a criminal character, but in this case, and in some others that might be cited, the object of the statute does not appear to be punishing the wrongdoer for the wrongful act, but rather to render him liable to all parties to the extent of the injury they have sustained; and the right to sue is given to the bank or its receiver, and even to the stockholders, and perhaps to the creditors of the bank who have been damaged by the wrongful act in question. Whoever is injured may sue, and the extent of the recovery depends upon the damage which the party suing has sustained. It does not fix any definite sum to be paid by the party for his wrong-doing. It simply says he must make good the damage he has inflicted upon one of the bank. This is because it is a remedial statute. The officers of a bank are forbidden to do a certain thing, because it may tend to the ruin of the bank. The statute says you shall not do that, and if you do it you shall be liable to all persons injured by your wrongful act. You shall be liable to the bank, you shall be liable to the stockholders, and you may be liable to the general creditors of the bank, or the depositors of the bank. The extent of that liability is not affected by the circumstances which misled you, or by your criminal intention, but depends on the fact that the act was done knowingly, and was in violation of the law. The extent of the liability incurred is the amount of damage you have inflicted upon others. We are of the opinion that the right of action in this case is not terminated by the death of the wrongdoer, but that the damage for which he is liable is a claim that survives against his estate as any other claim. Some point was made that the receiver has no right to sue, because the damage had not been sustained at the time of the director's death, or at the time of the appointment of a receiver of the bank. I confess I have had some difficulty in apprehending the force of that argument. All that I can make of the contention is that although the wrong had been done, and the money had been loaned, yet, because it was not found out until after the receiver was appointed that the wrong had occasioned a loss to somebody, that, therefore, there was no right of action. We cannot assent to that view. The injury was done by the direct or in his lifetime by the wrongful loan of the money in question, and the loss had really occurred before the receiver's appointment, although it was not known prior to that time, yet the men to whom the money was loaned are not entitled to it. It has been quite uniformly decided that both the action which is given by the common law and that which is based upon section 5230 of the Revised Statutes survive.'" Stephens v. Overstolz, 43 Fed. 465, (E. D. Mo. 1880, Justice Miller); Boyd v. Schneider, 131 Fed. 223, 65 C. C. A. 200, (C. C. A. 7th Cir. 1904); Allen v. Luke, 141 Fed. 694, (C. C. Mass. 1906); Allen v. Luke, (C. C. Mass. 1906) 163 Fed. 1018. In Yates v. Jones National Bank, (1907) 206 U. S. 155, 27 S. Ct. 636, 51 U. S. (L. ed.) 1002, and Briggs v. Spanlding, (1891) 141 U. S. 182, 11 S. Ct. 924, 35 U. S. (L. ed.) 662, the actions proceeded against the representatives of some of the deceased directors. See also Rankin v. Cooper, (W. D. Ark. 1907) 149 Fed. 1015; Cockrill v. Cooper, (C. C. A. 8th Cir. 1898) 86 Fed. 7, 15, 57 U. S. App. 576, 29 C. C. A. 529; Williams v. Brady (D. C. N. J. 1916) 232 Fed. 740.

In Allen v. Luke, (C. C. Mass. 1906) 141 Fed. 694, a bill in equity by a national bank receiver against directors under the text R. S. sec. 5239, the executors of a deceased director, who were made defendants, demurred upon the ground that the cause of action did not survive the death of their testator, but the court said: "The contrary is settled for this court by Boyd v. Schneider, (C. C. A. 7th Cir. 1904) 131 Fed. 223, 63 C. C. A. 200."

15. Forfeiture of Charter as Condition Precedent to Suit

In Welles v. Graves, (N. D. Iowa 1890) 41 Fed. 469, sustaining a demurrer to the petition of a receiver in an action at law, it was held that no action either at law in equity, can be maintained by a national bank receiver or any other person against directors to enforce personal
liability under this section "unless it be averred and shown that it is based upon a judgment of forfeiture rendered by a court of competent jurisdiction." The court said: "To illustrate the point, suppose it is charged that the directors have violated title 62 by declaring one wrong-ful dividend, and by making one loan in excess of one-tenth part of the capital stock. The receiver sues the directors in a state court to recover the damages caused thereby. At the same time the comptroller brings a proceeding for forfeiture of the franchise of the bank in the proper United States court. In the state court the receiver recovers; that court holding that the dividend had been wrong-ly declared, and the excessive loan had been made. In the United States court the comptroller fails to make out his case, it being proven that the dividend was rightfully made, and that in fact the al-leged excessive loan was not excessive. Are the receivers to be compelled to pay the damages awarded against them in the state court, under such circumstances? Suppose the comptroller brings a pro-
ceeding to forfeit the charter upon cer-tain specified acts alleged to be violations of title 62, and, after a full hearing in the proper United States court, the judgment goes for the defendant. Then suppose the receiver brings suit to recover on the same specified acts against the direct-
ors, on the ground that these acts have been committed, and are in violation of title 62, and the directors plead as a de-
fense the adjudication in the forfeiture proceedings—Would not such plea be good? The receiver is but the hand of the comptroller, and an adjudication binding the comptroller must surely bind the receiver: and likewise the director is in privity with the corporation; so that it must follow that when, in a given proceeding brought by the comptroller, it has been adjudged that certain acts are not in violation of any provision of title 62, so as to justify the forfeiture of the charter of the bank, such adjudication must bind the receiver, acting under the comptroller, and estop him from count-
ing on the same acts as grounds for re-
cover against the directors. If this be true, is it not a strong argument in sup-
port of the proposition that an adjudica-
tion by the proper court, forfeiting the charter, is a necessary prerequisite to the main-
tenance of a suit against the direct-
ors under section 5239? ... It is clear that, under this section, the directors can-
not be held liable, except for violation of the provisions of title 62, of such a nature as to justify the forfeiture of the charter; and it is equally clear that the decision of whether violations of this nature have or have not occurred is not intrusted to the comptroller. He cannot determine that question, but he is authorized to bring a proceeding for the purpose of ascertaining whether such violations have taken place as will justify the forfeiture of the charter, the adjudication to be made by a court of the United States. If the court cannot for the purpose of forfeiting the charter, decide whether the provisions of the title have or have not been violated by the directors, can he decide the same question in order to deter-
mine whether the directors are liable to be proceeded against by the receiver for damages?"

In National Bank of Commerce v. Wade, (C. C. Wash. 1897) 84 Fed. 10, a suit by a national bank against directors of the bank to enforce their liability under the text R. S. sec. 5239, the defendants con-
tended that the suit was not maintainable, since no proceeding had been taken for forfeiture of the franchise and dissolution of the association. Overruling a demur-
ner based upon that contention, Hanford, J., said: "Counsel for the defendants contend that the bank was not compelled to pay the damages which the association shall have sustained in consequence of violations of the statute can be com-

c menced until after the association has ceased to exist. More concisely stated, the proposition is that the same law which creates a liability denies to the injured party all right to enforce it. The following authorities are relied upon: Welles v. Graves, (N. D. la. 1890) 41 Fed. 430-468; National Exch. Bank v. Peters, (E. D. Va. 1890) 44 Fed. 12-16; Hayden v. Thompson, (C. C. Neb. 1895) 67 Fed. 273-277; Gerner v. Thompson, (C. C. Neb. 1896) 74 Fed. 125-131; Ken-
dy v. Gibson, (1869) 8 Wall. 498, 19 l. S. (L. ed.) 476. The first two of these cases may be fairly regarded as decisions standing on the defendant's side of the argument. The case of Gerner v. Thompson was originally brought in a state court, and was removed by the de-
fendants into the United States Circuit Court for the district of Nebraska, and was remanded for want of jurisdiction. The court held that, if the action was to enforce only a common-law liability, there would be no federal question upon which the jurisdiction could be founded; and, if the action be considered as one to enforce a liability under a statute of the United States, it could not be maintained by the plaintiff, for the reason that the circuit court of appeals for that circuit had pre-
viously ruled in the case of Bailey v. Mosher, (C. C. A. Stiff Cir. 1894) 11 C. C. A. 304, 63 Fed. 468, 27 U. S. App. 398, that, after the appointment of a receiver of an insolvent national bank, an action of this character, based upon the provisions of the national banking Act, could be brought only in the name of the receiver. All of the opinion touching the question as to the necessity for an adjudi-
cation dividing a national banking asso-
ciation, before the liability of its di-
rectors for violations of the National Banking Act, could be enforced under the provisions of section 5239, Rev. Stat., was a mere voluntary expression, not necessary to the disposition of the case. In the case of Kennedy v. Gibson, a receiver of an insolvent national bank brought a suit against stockholders as a means of ascertaining how much they may make up a deficiency in the assets. In his bill, the complainant averred that it was necessary to collect the amount sued for to meet the balance of the bank's indebtedness. The court held that under the law it is for the comptroller of the currency to decide when it is necessary to institute proceedings against the stockholders of an insolvent national bank to enforce their personal liability, and whether the whole or a part, and, if only a part, how much, shall be collected; and, as these matters are referred to the judgment and discretion of the comptroller of the currency, action on his part is indispensable whenever the personal liability of the stockholders is sought to be enforced, and must precede the institution of a suit by the receiver, and the bill was held to be defective and insufficient for failure to aver that the comptroller had directed the receiver to commence the suit, or that he had made any order assessing the stockholders. Good and sufficient reasons are given in the opinion for requiring action by the comptroller in the exercise of his discretionary powers to precede the commencement of suits by a receiver, and to my mind the argument in the opinion of the Supreme Court in that case takes from the decision any possible bearing, by analogy or otherwise upon the question now under consideration.

The decision and judgment of the Circuit Court, by Judges Dundy and Riner, in Hayden v. Thompson, was reversed by the Court of Appeals of the Eighth Circuit, in a decision reported in (C. C. A. 8th Cir. 1895) 17 C. C. A. 592, 71 Fed. 60-70, 39 U. S. App. 361. By the opinion of the appellate court it is shown that the court was not authorized to consider or pass upon this question. So that case may also be eliminated from consideration. I will not extend this opinion by commenting on the decisions in Welles v. Graves and Bank v. Peters, further than to say that the reasons assigned do not impress me as being sound. I am not able to adopt the conclusions arrived at by the learned judges in those cases, for the reason that the words of the statute do not in any wise suggest the idea that Congress intended to deny to an association which has the strength, ambition, and honesty to continue its existence without having sustained losses in consequence of willful violations of law on the part of its directors, the right to recover the amount of such losses from the wrongdoers. If the comptroller finds reasons in any case to forbear prosecuting for a forfeiture of the franchise, his exercise of discretion should not be a shield to the real culprits, nor have the effect to make the real damage to the shareholders irreparable. . . . The opposite ruling of the Circuit Court for the Eastern District of Missouri, in Stephens v. Overstolz, (E. D. Mo. 1890) 43 Fed. 77-775, in my opinion comes nearer to being a correct interpretation of the law. The opinion in that case was delivered by Judge Thayer, and was concurred in by Mr. Justice Miller. It shows plainly that a decision of this question was necessary to a determination of the case, and that part of the opinion which bears upon this question was in fact a solemn adjudication, and not mere obiter dictum, as counsel for the defendants have supposed."

Another case holding that directors of a national bank can be made to respond for losses under R. S. sec. 5239, in advance of a forfeiture of the bank's charter is Cockrill v. Cooper (C. C. A. 8th Cir. 1898) 86 Fed. 7. 24 C. C. A. 529, 57 U. S. App. 576, an action by the receiver to subject directors for losses occasioned by excessive loans, where, relying to the contention that the suit was not maintainable until all the conditions mentioned in R. S. sec. 5239, including a forfeiture of the bank's charter, are shown to exist, the court said: "That interpretation of the statute to the extent that it would prevent a national bank, while a going concern, from maintaining a suit against its directors for losses sustained by acts that were confessedly unlawful, places the directors of such institutions in a more favorable position than the directors of other banks which are not subject to the provisions of the National Bank Act, and I believe was not the intent of the law-maker. Cases may easily be supposed, and have doubtless occurred, where a national bank has sustained damage by reason of excessive loans made with the approval of the board of directors, and yet the losses incident to such wrongful acts were not so great as to impair the bank's capital, and render a forfeiture of its charter either necessary or expedient. It can scarcely be supposed that Congress intended to frame a law which in a case of that kind would either compel the comptroller to forfeit the franchises of the corporation, or suffer its directors to escape liability for a plain violation of the law; yet such would be the necessary result if the contention in behalf of the appellees is well founded. Without purusing this branch of the case at greater length, we shall content ourselves with the statement that the forfeiture of a bank's franchises, in a suit
brought by the comptroller for that purpose, is not, in our judgment, a condition precedent to the maintenance of a suit against its directors for excessive loans. The two proceedings last mentioned have no necessary relation to each other. The directors of a bank, being agents of the corporation, are bound by the law of agency to act within the scope of the bank's charter and by-laws, and to exercise at all times a reasonable degree of care and diligence in the discharge of the duties which they have been appointed to perform."

16. Parties Plaintiff

a. In General

"Whoever is injured may sue," Stephens v. Overstolz, (E. D. Mo. 1890) 43 Fed. 465, per Mr. Justice Miller, who also said: "The right to sue is given to the bank or its receiver, and even to the stockholders, and perhaps to the creditors of the bank who have been damaged by the wrongful act in question."

A person who buys from another stock in a national bank in reliance upon a false report of its condition to the comptroller of the currency, and suffers damage thereby, has a right of action under this section against any officer or director who, knowing its falsity, authorizes such report. The one suffering such damages is within the statutory description "any other person." Cheshbrough v. Woodworth, (C. C. A. 6th Cir. 1912) 196 Fed. 875, 116 C. C. A. 465, wherein the court said: "It is urged that, as the statute refers to 'the association' and then to its stockholders' before using the phrase, 'any other person,' this last phrase, under the rule of ejusdem generis, cannot be extended to cover those who purchase bank stock in the market. This argument must be considered in connection with the cases of Yates v. Jones Nat. Bank, (1897) 206 U. S. 158, 27 S. Ct. 638, 51 U. S. (L. ed.) 1002, and Yates v. Uteca Bank, (1907) 206 U. S. 181, 27 S. Ct. 648, 51 U. S. (L. ed.) 1015, in which the Supreme Court seems to hold that strangers to the bank who are, by false reports, induced to make a deposit therein, are within the protection of this statute, and we are unable to find any basis of classification for applying the rule of ejusdem generis which would include those induced to become depositors and exclude those induced to become shareholders. The suggestion on the argument that the statute contemplates only those whose injury is derivative from an injury to the bank cannot be accepted, since the injury to the depositor in the Yates Case was not of that class. Nor is the statute one calling for the strict application of the rule invoked. The general banking law has made a great variety of regulations and requirements, and violations thereof would injure an equally great variety of persons. The phrase 'any other person' should be construed for the reason that detailed enumeration would have been very difficult. . . . The damages in such a case are personal to the plaintiff. He sues in his own right, not for the association. It suffers no such damage as plaintiff does by the report, and hence it or its receiver has no concern with this kind of action. It is true there might be a very large number of instances of individual injury resulting from one false report, making a burdensome volume of litigation; but each instance is individual, involving specific causal relation between report and damages, and the similar instances have no legally common character."

Damages to a national bank from the misfeasance or mismanagement of its officers are assets of the bank, recoverable only in an action by the bank or for the benefit of all the stockholders and creditors. Yates v. Jones Nat. Bank, (1906) 74 Neb. 734, 105 N. W. 287.

b. The Bank, the Receiver, or Stockholders

See also cases cited supra, this note, 12, Form of Remedy, at Law or in Equity, p. 882.


A receiver of a national bank may maintain a suit against the directors in behalf of creditors and stockholders to re
cover sums alleged to have been lost to the bank through the misconduct or negligence of its directors, is not a necessary condition precedent that violations of the Banking Act should have been previously adjudged in a suit brought by the comptroller. Allen v. Luke, (C. C. Mass. 1906) 141 Fed. 864. For other cases see supra, this note, p. 3.

Where the receiver refuses to bring the suit, a stockholder or creditor may maintain such suit for the benefit of himself and such other stockholders and creditors as elect to join him. In re Chetwood, (1897) 165 U. S. 443, 17 S. Ct. 335, 41 U. S. (L. ed.) 782; Ackerman v. Halsey, (1883) 37 N. J. Eq. 356; Nelson v. Burrows, (1881) 9 Abb. N. Cas. (N. Y.) 280; Hand v. Atlantic Nat. Bank, (1877) 9 Abb. N. Cas. (N. Y.) 287, note; Brinckerhoff v. Bostwick, (1882) 58 N. Y. 52, reversing (1880) 23 Hun (N. Y.) 237; and where the receiver was one of the negligent directors his refusal to bring the action is not a condition precedent. Flynn v. Detroit Third Nat. Bank, (1900) 122 Mich. 642, 81 N. W. 572. A stockholder may also bring such suit where the bank is still under the control of the guilty directors. Morgan v. King, (1900) 27 Colo. 539, 63 Pac. 416; McCrory v. Chambers, (1892) 48 Ill. App. 445; Hanna v. People's Nat. Bank, (1901) 35 Misc. 617, 71 N. Y. S. 1076.

Stockholders of a national bank may maintain a suit in equity to call directors to account and make satisfaction for losses occasioned by breaches of their trusts where the corporation is still under the control of those who must be made defendants in such suit, including the receiver appointed by the comptroller and charged with misconduct as a director. Brinckerhoff v. Bostwick, (1882) 58 N. Y. 52, where the court also said: "The bank was a proper and even a necessary party defendant. The receiver was also a necessary party, as it was through him that the amount which might be adjudged against the directors was to be collected and paid over. The presence of both of these parties was necessary to a final determination of the controversy."

A former stockholder, who lost his stock by its sale by the bank on his failure to pay an assessment thereon, made necessary by negligence or misconduct of the directors in loaning its funds to irresponsible persons, may sue on behalf of himself and all others similarly situated to compel the directors to account for the value of the stock as it stood before the acts of negligence or misconduct. Hanna v. People's Nat. Bank, (1901) 35 Misc. 617, 71 N. Y. S. 1076.

"Where the directors of a national bank have violated the provisions of the national banking act, to the damage of the bank and its shareholders, and the bank fails upon request to bring an action against such directors for the recovery of such damages, an action of such directors may be brought for that purpose by a shareholder; but such action must be brought by such shareholder on behalf of himself and all the other shareholders, the bank must be made a party, the judgment must be in its favor, and the proceeds of such judgment will inure to the common benefit of all the shareholders alike, In such case a shareholder cannot maintain such action for his benefit alone while the bank is a going concern and has not been dissolved by proper action by the comptroller of the currency in a federal court. One who has been a shareholder in a national bank, but has parted with his stock, cannot maintain such action against the directors before the dissolution of the bank by proper proceedings in a federal court." Zinn v. Baxter, (1901) 65 Ohio St. 341, 62 N. E. 327, where the court expressly refrained from deciding whether such action by a shareholder could be maintained after dissolution of the bank, that question not being involved in the case.

c. Creditors

Suit in equity.—In Boyd v. Schneider, (C. C. A. 7th Cir. 1904) 131 Fed. 223, 65 C. C. A. 209, reversing (N. D. Ill. 1903) 124 Fed. 239, a depositor of a national bank brought a suit in equity, on behalf of himself and all others who might join him, against directors of the bank to recover losses to the assets of the bank, otherwise distributable to the depositors and creditors, alleged to have been caused by the negligence and misconduct of such directors. The bill showed that the receiver of the bank had been asked to bring suit against the directors to recover the amounts thus lost; that to the comptroller of the currency the same request had been made, but that the request had by both of them been denied. The bill prayed that an account be taken of the assets of the bank lost through the negligence and misconduct of the directors and each of them, that the amount each of the directors should be held responsible for should be ascertained, and each decreed to pay the amount so found due from him, to the receiver of the bank, to be by such receiver distributed in accordance with law. Holding that the suit was maintainable, the court, per Grosscup, J., said: "The chief insistence of the appellees is, that the right of action stated in the bill, if anything at all, is an asset of the bank vested by law in the receiver on his appointment, and therefore not one on which simple contract creditors are entitled to bring suit. If there be no privity of contract, or obligation of duty, between the directors and the depositors, the action may be sound; but if the nature of
the contract of deposit is such that the
duty of the directors in the premises runs
directly to the depositors, there can be no
doubt that the depositors can, in their
own right, bring such action as may be
essential to the fulfillment of their rights.
This leads to an examination of the
nature of the relation that subsists
between the directors of the bank and its
depositors. The relation of depositors to
the bank, and so far as directors stand
liable for the doings of the bank, the rela-
tion of the depositors to the directors,
while that of debtor and creditor, is
something more than the mere relation
of debtor and creditor. The contract
of deposit is a loan; out not a loan pure
and simple. On the acceptance of the deposit,
a premise is raised that the bank will
repay it on demand or at the time stipu-
lated; and to that extent the transaction
is a loan. But when this much is said,
the whole contract is not stated. The par-
ties deal with each other on a basis, not
merely that of borrower and lender, but
on the basis, that the party receiving the
money is a bank, organized under the
laws of the United States, and subject
to the provisions of law, present and
future, relating to the custody and dis-
position of the money deposited; and that
the party loaning the money is a depos-
itor, leaving his money with the bank on
the faith that such provisions respect-
ing the custody and disposition of the
deposit, will be observed. In legal effect,
the depositor says, Here is my money;
in consideration of its receipt, and such
interest as you pay, you can have its
use; but only on this condition, that
the use conform to the safeguards pro-
vided by the law. The acceptance of
money thus tendered, implies that the
bank and its directors, so far as they
are responsible for the doings of the bank,
agree to conform to the conditions named.
The law governing the custody and dis-
position of deposits thus enters into and
forms a part of the relation created be-
tween the parties (Walker v. Whitehead,
1875) 16 Wall. 314, 21 U. S. (L. ed.)
357; thereby creating direct privity of
relation between the directors and the
depositors. The bill clearly shows that
the deposits in the custody of the Na-
tional Bank of Illinois, as an entirety,
were used and disposed of contrary to
the provisions of law relating to custody
and disposition. The deposits were dis-
pensed of in sums, and to persons forbid-
den by law; and were used to pay divi-
dends when no dividends had been earned.
The bill shows also, that the directors
had knowledge of some of these violations
of law, such as the payment of dividends
out of the capital stock, and the increase
of loans in large amounts to the Calumet
Company, after notice from the comp-
troller that such loans were contrary to
law; and also, that of other violations
of law they would have been advised, had
reasonable diligence on their part been
exercised. It seems clear to us that on
such a state of facts, the directors are
answerable in some kind of action, di-
rectly to the persons to whom their duty
ran; and that, to the extent that the de-
positors suffered losses therefrom, the
right of action, whatever it may be, runs
directly to the depositors as a class. The
question is not determined by whether
the amount thus recovered might not be-
come an asset of the bank; but whether,
aside from that, the depositors may not
enforce the liability as a right special
to them—a right growing out of the
contract of deposit, and not common there-
fore, to stockholders and other creditors
not depositors. Unless the national ban-
king act cuts deep enough to cut out these
individual rights of action, the depositors
have, in some form, a right to bring action
on the claims set forth. . . . On the whole
matter our conclusion is that conside-
ring arguendo that the receiver might have
brought the action stated in the bill, his
right to bring such action is not exclu-
sive; and that, to the extent the directors
are responsible specially to the deposit-
ors, the depositors have a right of action
—an action, adequate to the fulfillment
of the obligation due the depositors by
the directors. The remaining question
is, whether the remedy should have been
in the form of actions at law, or a suit
in equity such as this. . . . It is a case
not alone of a number of persons having
separate and individual claims against
one party, arising from a common cause;
or one person having rights against a
number of persons, arising from a com-
mon cause; but the case of a number
of persons having each a right against
a number of persons, all arising from a
common cause. To this, too, must
be added the further consideration, that
neither of the depositors could, by sepa-
rate suits at law, recover to which he is entitled; for the defendants to such
 suits, being directors who served varying
terms, and subject, therefore, to varying
obligations, could not be called to com-
plete accounting and apportionment in a
suit at law. Our conclusion is that the
bill filed is the proper way to obtain an
enforcement of contrary rights the depos-
itors individually, or as a class, may have
against the directors individually, and as
a class. Indeed, both our conclusion on
this point of jurisdiction, and on the
right of depositors to bring the action di-
rectly, upon such a state of facts, the di-
rector or receiver, seems to be sustained, indirectly
at least, in Briggs v. Spaulding. [1891]
141 U. S. 132, 11 S. Ct. 934. 35 L. S. (L.
ed.) 662. There the suit was in equity by a depositor—the First National Bank
of Buffalo through its receiver—against
the directors, and no question seems to have been made that the suit in that form would not lie. While but four of the Justices were for sustaining the depositors' claim, the other five denied it, not on the ground that the suit would not lie, but that the claim was not made out by the evidence of what had already been said, the other points made in support of the decree below lost their point. The bill is not multifarious, because it does not proceed on distinct theories of recovery. The bill may have some surplusage, but it sets forth the obligations of the directors and their breach, with sufficient certainty. And the suit survives against the representatives of deceased directors, because it is a suit on contract, and not in tort. We think, too, under all the circumstances, that appellants ought to have leave to amend with respect to the time when their deposits were made. The special demurrers taken on the part of certain defendants, that they were not shown to have been directors at the time certain acts complained of were done, cannot be sustained. The bill shows, that during the whole period covered by the complaint, dividends were being paid out of capital stock; and to that extent, at least, all of the defendants named, are answerable to the depositors.

In Bailey v. Mosher, (C. C. A. 8th Cir. 1894) 63 Fed. 488, 27 U. S. App. 339, 11 C. C. A. 304, holding that the court below properly sustained a demurrer to a petition by a creditor of a national bank against directors of the bank, the alleged official misconduct, consisting of false and misleading reports as to the condition of the bank to the comptroller of the currency, by which the plaintiff was deceived and misled, Caldwell, J., said: "The petition shows that the bank of which the defendants are officers and directors, had been turned into the hands of a receiver appointed by the comptroller of the currency under the national banking act. The liability of the defendants, whatever it may be, for the acts complained of in the petition, is an asset of the bank, belonging equally to all the creditors in proportion to their respective claims, and cannot be appropriated, in whole or in part, by a single creditor to the exclusive payment of his own claim. It is the policy of the national banking law to secure the ratable distribution of the assets of an insolvent national bank among all its creditors. Assuming that the defendants are liable in damages for the acts complained of in the petition, they are liable at the suit of the receiver, who is the statutory assignee of the bank, and the proper party to institute all suits for the recovery of the assets of the bank, of whatever nature, to the end that they may be ratably distributed among its creditors. . . . But it is said the plaintiff is not suing as a creditor of the bank, or for its mismanagement, but for the fraud and deceit practiced upon him through the defendants' report to the comptroller of the currency, by which he alone was damaged. As we have seen, the frame of the petition will not support this contention."

17. Parties Defendant

In general.—The liability of the directors under this section is several. The plaintiff may arbitrarily select one as sole defendant or two or more to be joined as defendants. Against each individual selected, a sufficient case must be made out to show that he participated in the tort for which a verdict is had; but the plaintiff's reasons for the selection are wholly immaterial. Chesborough v. Woodworth, (C. C. A. 6th Cir. 1912) 195 Fed. 875, 116 C. C. A. 465.

Suit by receiver.—In Williams v. Brady, (D. C. N. J. 1916) 232 Fed. 740, sustaining a bill in equity by a national bank receiver to enforce the liability of directors under this section, the court said: "It is also urged that there is a fatal nonjoinder, because the personal representatives of one who is alleged in the bill to have been a director, and who has since died, is not made a party. The argument in support of this contention is that, as the plaintiff has attempted to charge the directors collectively and has elected to sue all together instead of separately, his failure to join one of the directors takes from the others their right of contribution from him, should they be held liable. No authority is cited, nor is the reasoning convincing. The plaintiff was at liberty to sue one, all, or any member of the directors that he saw fit for, as I understand it, each is liable for all losses due to his dereliction, although others may be also involved and likewise liable for the same losses. A joinder is, with regard to the degree of dereliction of which he is guilty. Cooper v. Hill, 94 Fed. 582, 36 C. C. A. 402 (C. C. A. 8th Cir. 1899); Williams v. McKay, 1899 46 N. J. Eq. 23, 18 Atl. 824. Moreover, if a defendant is entitled to contribution from his co-directors, I fail to see how the failure to join any co-director in this suit would preclude him from securing it. In Yates v. Jones Nat. Bank, (1907) 206 C. S. 158, 27 S. Ct. 638, 51 L. S. (L. ed.) 1002 the suit was not prosecuted against some of the directors. See also Freeman v. Jackson, (N. D. Ga. 1915) 227 Fed. 688, 697.

An officer is not liable for a misapplication of funds to the person paying such money to him as an officer of the bank and for its benefit; the remedy, if any, is against the person. Wilson v. Rogers, (1872) 1 Wyo. 51.

Suit by stockholder.—See Brinckerhoff v. Bostwick, (1882) 88 N. Y. 52, as quoted supra, this note, p. 893.
18. Pleading  
a. Bill or Complaint  
In general.—In Allen v. Luke, (C. C. Mass. 1906) 141 Fed. 694, a bill in equity by the receiver of an insolvent national bank against certain of its former directors to recover, in behalf of creditors and stockholders, money lost by the bank through the alleged misconduct of the defendants, a demurrer was sustained with leave to amend, Lowell, J., saying: "It was argued that the bill is uncertain in several respects:"

(a) That there is no sufficient allegation of loss arising to the bank as the result of any particular transaction complained of. For example, regarding the Mason & Hamlin loan, the bill alleges "there will be a probable loss on this indebtedness of Mason & Hamlin Company of not less than $30,000." A demandant may be altogether unable to state the precise amount of the loss. The transaction may not yet be closed, and the allegation of the bill, though open to criticism in form, seems substantially sufficient. If he think fit, the demandant may amend the above allegation by substituting some phrase like this: 'There will be a large loss on this indebtedness, the precise amount of which cannot yet be ascertained by your demandant, but, according to his best estimate, will be not less than $30,000.' "This bill further alleges that the bank is insolvent. From its insolvent the creditors must suffer loss. Though a recovery in this suit may restore solvency to the bank, and a surplus for the stockholders, yet the bill is not demurrable on that ground. To the varying rights of creditors, stockholders, and the present defendants, a court of equity can always do justice by orders made in the cause from time to time."

(b) That many of the transactions complained of, involving a tableau of loans and payments, are not sufficiently set out as to their dates and amounts. In this respect the bill seems demurrable under the decision of this court in Price v. Coleman, (C. C. Mass. 1884) 21 Fed. 357. If the complainant wishes to rely upon these matters he must amend by inserting transcripts of the accounts, or the like itemized statements, as was done in Stephens v. Overstolz, (E. D. Mo. 1890) 43 Fed. 191."

(c) That the bill does not set out with sufficient particularity the acts relied on to charge the several defendants. As to most of the transactions complained of, the bill alleges loss to the bank through the defendants' negligence and misconduct; but the nature of that misconduct is not set out. As it stands, the bill seems to me quite as objectionable in this respect as was the bill held demurrable by Judge Colt in Price v. Cloeman. Our judicial practice is sometimes complained of for depriving of his remedy a party who has good cause of action, but has failed to state that cause with precision. The complaint must have some foundation. Decisions which have acquired authority, and which cannot now be lightly disregarded, may require a particularity of allegation greater than that which is sufficient to inform the defendant of the charge brought against him. In the case at bar, the information given by the bill regarding the transactions of the bank with Mason & Hamlin, Mitchell, Coburn, Damon, and others, may in fact be sufficient to inform the defendants of the pecuniary nature of the transactions complained of. Perhaps the defendants would suffer no substantial harm if they were compelled to obtain more specific pecuniary information by showing, in an application for particulars, that these were needed in order to prepare their defense. As the complainant, however, can easily meet the requirements of the decided cases by adding to the bill a transcript of the several accounts in question, no harm is done him by requiring him to amend accordingly. To require him to particularize the nature of the defendants' negligence upon which he relies, is a more serious matter. This particularization, however, is required by substantial justice, as well as by precedent. The complainant believes that the bank has suffered loss through the negligence and misconduct of the defendants, its directors, and so believing, has brought suit against them. But in order that the defendants may prepare their defense, in order that they may by demurrer, raise questions of law without the expense of a trial of the facts, they are entitled to know the kind of alleged negligence upon which the complainant will rely. It is not sufficient that A., thinking he has a grievance against B., should state merely that he has a grievance, and leave it to the justice to the defendant and an economical ordering of judicial procedure require something more. Actionable negligence is not a habit of mind, but action or inaction contrary to the practice of reasonable men under the circumstances. The complainant must specify the action or inaction relied on. Here, for example, does he rely upon the failure of a given defendant to attend a particular meeting of the board of directors, or upon his joining in a particular vote which due care would have shown him to be improper, or upon specific intentional misconduct? These, or other kinds of action and inaction may be the concrete facts which the complainant has in mind when he charges negligence. The defendants are entitled to a concrete statement. Take, for example, the allegation in paragraph 32 of the bill, that the defendants 'suffered and permitted the said (false)
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reports to be placed on file in the department of the Comptroller of the Currency.' As to any particular defendant, what is the concrete misfeasance or nonfeasance upon which the complainant relies. Each defendant is entitled to know, as to himself in particular, what the complainant means by the words 'suffered and permitted,' for this reason, if for no other, that he may question by demurrer if the action or inaction complained of is ground for his liability under the decisions in Briggs v. Spaulding, [1891] 141 U. S. [132], 142, 11 S. Ct. 924, 35 U. S. (L. ed.) 862, and like cases. Most of the instances specified in the bill are the acts of the corporation, some appear to be acts of the board of directors. These acts, as such, do not render any defendants liable, but only the act or omission of that individual defendant, by which improper corporate acts have been caused or permitted. The individual acts, as well as the corporate, must be set out, and therefore these aggregative facts sufficient to put them upon their defense. I find that in the bill in Campbell v. Watson, [[1901] 62 N. J. Eq. 396, 50 Atl. 120] (a case much relied on by the plaintiff), plaintiff with much care pleaded that the failure of the bank was directly occasioned by the neglect of the directors to perform the duties imposed upon them by the by-laws of the bank and their oaths of office; that during the period in which the losses occurred the directors met as a board only once in three months, and did no other business than to elect officers, receive estimates from the cashier of the earnings of the bank during the preceding three months, and declare dividends, and that never during the period, so far as the minute book of the directors showed, did the board appoint a committee to examine the affairs of the bank, or as a board did they count or correct the cash, or make inventory of the assets, or compare the same with the ledger balances, or in any other way ascertain, or attempt to ascertain, the accuracy of the books of the bank; and that the directors swore to accounts made up by the cashier without making any substantial or bona fide attempt to verify the accounts or ascertain what the actual condition of the bank was. Now if such averments were proper, even against directors who were present, a fortiori there should be some facts stated which would show that the directors who were not present either purposely or negligently refrained from attending meetings and by so doing have become liable with those who did attend. Ackerman v. Haley, [1883] 37 N. J. Eq. 356. The allegation that the directors defendants were guilty of negligence, carelessness, and violation of the statutes in retaining in office Carragan as president and Vreeland as vice president should be more specific. If the wanton and incompetent is based
upon the doing of the things elsewhere stated in the bill, this should be set forth; or, if the unfitness consisted of dishonesty, it should be so averred. In other words, there should be some facts set forth upon which the pleader rests the averment. Brinkerhoff v. Bostwick, [1882] 88 N. Y. 52."

In Williams v. Brady, (D. C. N. J. 1916) 272 Fed. 740, holding that a receiver's bill against certain directors sufficiency alleged a common-law liability for losses resulting from the defendants' willful and continued failure to attend meetings of the board of directors, Haight, J., said: "Whether the directors, who never actually participated in or assented to the actions of other directors which were in violation of the provisions of the National Bank Act, can be held liable for losses resulting from such actions is a radically different question ... The only and whether of the bill, as far as I can find, to charge the habitually absent directors with violation of the statutes, except the violation of their oath of office (which is nothing more than a concrete statement of their common-law and statutory duty) ... are that they 'deliberately failed and refused to examine' into the condition of prior loans, where they are sought to be charged for loaning more to any one individual or corporation than the statute permits, etc. The question then arises whether a director, who does not actually participate or assent to a statutory violation, but who is sought to be charged therefore simply because he refused to examine into the affairs of the bank to ascertain whether violations were being committed or not, can be held liable for losses resulting from such violation under section 5239. ... I have very serious doubt as to his liability."

In Dudley v. Hawkins, (S. D. Ga. 1917) 239 Fed. 586, a bill in equity by a national bank against directors of the bank, for an accounting and for recovery of losses sustained by creditors and shareholders, a motion to dismiss, which was in substance a demurrer on several grounds, was denied, the court saying: "In the case before the court the averments are such that we are driven to the conclusion that the case must be heard on full proof, in order that we may determine whether or not the misconduct and neglect of duty charged was in fact intentional or otherwise; that is to say, not only whether they knowingly permitted, assented to, and allowed the violation of the national banking law, but also whether the facts were such as to charge men in their position with such knowledge. The president selected was a resident of a distant state; no bond was required of the cashier; the assistant cashier was notoriously profligate; he was the principal agent of the bank; the officers and directors approved large loans to insolvents; the cashier and assistant cashier were allowed to pay overdrafts of irresponsible persons to the amount of $80,716.47. Last, but not least, they were authorized in excess of the 10 per cent. limit on the capital stock: a number of those were to a director. Illegal dividends were declared at a meeting of the directors, where defendants were present. There is much else in the bill indicating such reckless mismanagement that inquiry whether the directors are chargeable with resulting loss seems demanded by equity. This is not an action by individual stockholders to redress individual injuries. It is brought, and the suit is properly filed, in equity. For the purpose of this motion, all of the averments of the bill must be held to be true, and taken all together, statements, charges, and prayers are so significant and apparently so meritorious that the duty of the court to overrule the several motions to dismiss seems imperative; and it will be so ordered."

In Stephens v. Overstolz, (E. D. Mo. 1890) 43 Fed. 465, an action at law by the receiver of a national bank against the executors of a deceased director to recover damages on account of a wrongful loan of $100,000. Mr. Justice Miller said: "There is one objection to what is termed the 'first clause' of the petition or declaration that we think is a good one. That count recites certain proceedings had in court by which the bank itself suffered a forfeiture of its charter by reason of the wrongful acts of its directors. The count, as we understand it, merely recites that the court before whom that proceeding was pending found that the wrongful acts in question were done knowingly by the directors, but does not contain any direct averment otherwise than by recital that the acts were done knowingly. The averment of course that the court found that the deceased director did certain acts knowingly is overruled by a motion made by the pleader that the deceased director did the acts knowingly. If this part of the petition had been demurred to specially we should have sustained it, because the knowledge of the director is not directly averred. But the demurrer is a general demurrer to the petition as a whole, and if there is one good cause of action stated in it the demurrer must of course be overruled. We do not know whether the plaintiff relies on the first count, but, as the matter stands, the other counts charge that the deceased did the acts and things complained of knowingly, and the demurrer must accordingly be overruled."

Amendment.—Where several depositors of an insolvent national bank filed a bill against its directors for a breach of their implied contract to see that the bank's assets were used according to law, but the bill failed to allege the time when complainants' deposits were made, complain-
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ants were entitled to leave to amend in that respect. Boyd v. Schneider, (C. C. A. 7th Cir. 1904) 131 Fed. 223, 65 C. C. A. 209.

b. Multifariousness

In Williams v. Brady, (D. C. N. J. 1915) 221 Fed. 118, a bill by the receiver of an insolvent national bank against several directors and other officers, the court held that the bill was not multifarious, saying: "The transactions described in the bill all grew out of the relationship of the several defendants to the insolvent national bank. It is true the transactions are many and extend over several years. Yet there are only a few characters of transactions; and inasmuch as the same legal questions will arise as to each group of general transaction it would seem to be just and highly convenient so to give the trial as that the liability of each defendant be determined in proceeding without imposing hardship or unnecessary expense upon any concerned."

19. Limitation of Actions

In general.—The statutes of limitation and the doctrine of laches may be invoked in defense of a suit against the officers to recover for losses caused by violation of the National Bank Act. Cooper v. Hill, (C. C. A. 8th Cir. 1899) 94 Fed. 532, 36 C. C. A. 402.

Directors of a national bank, while implied trustees, are not technical trustees, and hence directors who have ceased to be such prior to the failure of a bank, are entitled to plead limitations as a defense to a suit by a receiver of the bank, to recover losses sustained by their malfeasance or gross negligence. Emerson v. Geither, (1906) 103 Md. 564, 44 Atl. 26, 7 Ann. Cas. 114, 8 L. R. A. (N. S.) 728.

In National Bank of Commerce v. Wade, (C. C. Wash. 1897) 84 Fed. 10, a suit in equity by a national bank, no proceedings having been instituted to forfeit its franchise, against defendants who were its directors to enforce their liability under the text R. S. sec. 5239, it was urged by the defendants that the action was barred by R. S. sec. 1047 (in title Fines, Penalties, and Forfeitures, vol. 3, p. 330), and that because the comptroller of the currency could not then have maintained an action to forfeit the charter, the plaintiff could not maintain the instant suit. But Hanford, J., said: "This might be a logical conclusion if it were true that an adjudication forfeiting the charter in a suit instituted by the comptroller of the currency were a necessary prerequisite to an action against the directors to recover the amount of losses sustained in consequence of violations of the banking Act, committed by them; but, that proposition failing, the argument based on section 1047, Respectively, must likewise fail. The statute of limitations of this state provides that the right to commence an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument, is barred after three years from the time the cause of action accrued. But it must be remembered that at the time of making the loans which caused the losses complained of the defendants were the managing officers of the bank. I hold that in cases of this nature the statute of limitations will not begin to run so long as the estatue of trust is under the control or influence of the trustee... and, as this suit was commenced within three years from the time when the defendant gave up control of the bank to their successors, it is not barred by the statute of limitations."

In Cockrill v. Cooper, (C. C. A. 8th Cir. 1898) 86 Fed. 7, 57 U. S. App. 576, 29 C. C. A. 529, reversing (C. C. Ark. 1897) 75 Fed. 619, it was held, following decisions of the Arkansas Supreme Court in analogous cases, that, under the statute of limitations of Arkansas, a suit by a national bank receiver against its directors for losses caused by alleged acts of misfeasance and nonfeasance was not barred until after the lapse of three years.

In Welles v. Graves, (N. D. Ia. 1899) 41 Fed. 459, an action at law by a national bank receiver to enforce the liability of directors under R. S. sec. 5239, Shiras, J., said: "Section 5239 declares that any violation of the provisions of title 62, done or permitted knowingly by the directors of a national bank, shall be grounds for forfeiting the rights, privileges, and franchises of the bank. The doing the prohibited act is cause for a forfeiture which accrues under the provisions of the laws of the United States, and is therefore subject to the limitation of five years, enacted by section 1047. [Cited in the preceding paragraph.] I see no ground for excepting such a forfeiture from the general declaration touching suits for the enforcement of penalties and forfeitures contained in that section, and, in the view I take of the necessity of an adjudication forfeiting the charter of the bank as a prerequisite to the maintenance of a suit by the receiver against the directors, it follows that this limitation inures indirectly to the benefit of the directors. If, however, the receiver can maintain a suit to enforce the liability created by section 5239 against the directors, regardless of the question whether the charter has been forfeited or not, then the question would arise whether such liability is to be deemed a penalty provided for the violations of the statute, in which case the limitation of five years provided in section 1047 would apply; or does section 5239 simply impose the liability upon the directors, and create the right to recover damages on part of any one injured? A penal statute is ordinarily defined to be
one which inflicts a penalty for the violation of some one or more of its provisions. The doing the act forbidden incurs the penalty, regardless of the question whether injury has been caused thereby to any particular person. Under the provisions of section 5239, the liability of the directors is dependent, not only on the fact of a violation of some one or more of the provisions of title 62, but also on the fact of causing damage by such violation to the association, its shareholders or other parties. In this particular, therefore, the section does not impose a penalty, but creates a liability for damages, if any such are caused by the wrongful acts of the directors. If, then, the liability of the directors under section 5239 is not to be deemed a penalty, within the meaning of that term as used in section 1047, the limitation therein contained is not applicable. It is, however, urged on behalf of defendants that if the liability of the directors is not to be deemed a penalty within the meaning of section 1047, but is to be held to be merely a liability to respond to damage for a wrong committed, then the provisions of the statute of Iowa limiting such actions to two years is applicable. The question of when and under what circumstances the state statute of limitations is available as a defense in actions in the courts of the United States was considered by this court in May v. Buchanan County, [N. D. Ia. 1886] 29 Fed. 469, and the conclusion therein reached is, it seems to me, decisive of the present case. When the cause of action is created by a statute of the United States, the provisions of the state statute of limitations do not apply thereto, unless Congress has so declared. If, then, an action at law is maintainable by the receiver for the purpose of enforcing the liability of the directors created by section 5239, there seems to be no statutory provision limiting the time within which such action may be brought. If, however, the remedy against the directors is by a proceeding in equity, the court, in the absence of statutory limitation, can apply the recognized equitable principle of refusing to give relief claimed upon stale or antiquated demands, or where there has been laches on part of the complainant or long acquiescence on part of those now seeking relief, but would not, of course, be justified in refusing relief upon such grounds, unless the facts of the case were such as to clearly demand the application of the rule."

Accrual of cause of action.—Officers of a national bank, after having unwarily, but without any fraudulent intent, misappropriated the bank's funds in prospecting and developing mining property, retired from the management of the bank, leaving it solvent and prosperous. Subsequently the bank failed, and its receiver sued the directors to recover for misappropriation of funds. It was held that the statute of limitations would run from the time of the expenditure of money in such venture. Cooper v. Hill, (C. C. A. 8th Cir. 1899) 94 Fed. 582, 36 C. C. A. 402. But compare National Bank of Commerce v. Wade, (C. C. Wash. 1897) 84 Fed. 10, where it was held that the statute did not begin to run in the case of an action against its directors to recover for losses caused by violations of the National Bank Act until the successors of such directors were elected.

A stockholder is under no obligation to examine the books of the bank to ascertain whether he has been defrauded by the purchase of stock, and a cause of action against the officers of the bank for making false reports to the comptroller, whereby the plaintiff was misled into buying his stock, does not begin to run until the actual discovery of the fraud. Gerner v. Mosher, (1899) 58 Neb. 135, 78 N. W. 384, 46 L. R. A. 244.

Where a national bank suffered losses through the continued negligence of its directors, which was unknown to its creditors, and such directors remained in control until the appointment of a receiver on the bank's insolvency, it was held that a court of equity would entertain a suit to charge them with personal liability, notwithstanding the fact that an action at law to recover for their wrongful acts would be barred by limitation under the laws of the state. Bankin v. Cooper, (W. D. Ark. 1907) 149 Fed. 1010.

20. Conduct of Suit

A shareholder who sues on behalf of the corporation to recover for losses caused by the gross mismanagement of its directors, is entitled to conduct, manage, and control the litigation until its final determination. Chetwood v. California Nat. Bank, (1896) 113 Cal. 649, 45 Pac. 854.

21. Damages


A director who has failed to act is not liable for thefts or mismanagement by the cashier unless it appears inferentially at least that his omission had some proximate relation to the losses. Warner v. Penoyer, (C. C. A. 2d Cir. 1898) 91 Fed. 587, 61 U. S. App. 372, 33 C. C. A. 222, 44 L. R. A. 761.
The degree of dereliction of the officers is not material. All officers who are chargeable with any fault which has occasioned the loss are liable for the entire loss. Cooper v. Hill, (C. C. A. 8th Cir. 1899) 94 Fed. 582, 36 C. C. A. 402.

The right to the possession of all funds realized under a judgment recovered in a suit by a stockholder for losses caused by the mismanagement of the directors in the case of an insolvent bank is in the receiver or the agents appointed to succeed him. Chetwood v. California Nat. Bank, (1898) 113 Cal. 649, 45 Pac. 854.

Interest.—In a suit by a receiver against the officers of a national bank for an unlawful diversion of funds, interest may be allowed from the date of the misappropriation. Cooper v. Hill, (C. C. A. 8th Cir. 1899) 94 Fed. 582, 36 C. C. A. 402.

Sec. 5240. [Bank examiners — appointment — salaries — duties.] The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every member bank at least twice in each calendar year and oftener if considered necessary: Provided, however, That the Federal Reserve Board may authorize examination by the State authorities to be accepted in the case of State banks and trust companies and may at any time direct the holding of a special examination of State banks or trust companies that are stockholders in any Federal reserve bank. The examiner making the examination of any national bank, or of any other member bank, shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency.

The Federal Reserve Board, upon the recommendation of the Comptroller of the Currency, shall fix the salaries of all bank examiners and make report thereof to Congress. The expense of the examinations herein provided for shall be assessed by the Comptroller of the Currency upon the banks examined in proportion to assets or resources held by the banks upon the dates of examination of the various banks.

In addition to the examinations made and conducted by the Comptroller of the Currency, every Federal reserve bank may, with the approval of the Federal reserve agent or the Federal Reserve Board, provide for special examination of member banks within its district. The expense of such examinations shall be borne by the bank examined. Such examinations shall be so conducted as to inform the Federal reserve bank of the condition of its member banks and of the lines of credit which are being extended by them. Every Federal reserve bank shall at all times furnish to the Federal Reserve Board such information as may be demanded concerning the condition of any member bank within the district of the said Federal reserve bank.

No bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.

The Federal Reserve Board shall, at least once each year, order an examination of each Federal reserve bank, and upon joint application of ten member banks the Federal Reserve Board shall order a special examination and report of the condition of any Federal reserve bank. [R. S.]

This section was first amended by an Act of Feb. 19, 1875, ch. 89, 18 Stat. L. 329. The amendment consisted in striking out after the words "report of the condition of the association to the Comptroller," the words (which were in the original) "Every
person appointed to make such examination shall receive for his services at the rate of five dollars for each day by him employed in such examination, and two dollars for every twenty-five miles he shall necessarily travel in the performance of his duty, which shall be paid by the association by him examined. But no person shall be appointed to examine the affairs of any banking association of which he is a director or other officer,” and inserting in lieu thereof the last sentence commencing with the words “The persons,” making the section to read as follows: “Sec. 5240. The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller. That all persons appointed to be examiners of national banks not located in the redemption-cities specified in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive compensation for such examination as follows: For examining national banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one hundred thousand dollars and less than three hundred thousand dollars, twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars; those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred thousand dollars and over, seventy-five dollars; which amounts shall be assessed by the Comptroller of the Currency upon, and paid by, the respective associations so examined; and shall be lieu of the compensation and mileage heretofore allowed for making said examinations, and persons appointed to make examination of national banks in the cities named in section five thousand one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive such compensation as may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency; and the same shall be assessed and paid in the manner hereinafore provided.”

It was again amended by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 21, 38 Stat. L. 271 (see supra, this title, div. IV, p. 817), to read as given in the text.

As so amended, it superseded R. S. sec. 5241, which was as follows: “Sec. 5241. No association shall be subject to any visitatorial powers other than such as are authorized by this Title, or are vested in the courts of justice.”


It was superseded by the fourth paragraph of the preceding R. S. sec. 5240, as amended by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 21, 38 Stat. L. 271.

The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks in this section. Guthrie v. Harkness, (1805) 199 U. S. 148, 26 S. Ct. 4, 50 U. S. (L. ed.) 130, 4 Ann. Cas. 433, affirming (1904) 27 Utah 248, 75 Pac. 624, 107 A. S. R. 664, 1 Ann. Cas. 129.


Communications by stockholders to the examiners in relation to the affairs of the bank are not privileged communications. Cox v. Montagne. (C. C. A. 6th Cir. 1897) 78 Fed. 845, 47 U. S. App. 384, 24 C. C. A. 364.

An application by a bona fide stockholder of a national bank to examine its books, accounts, loans, etc., in order to determine the value of his stock, is not a visitation of the corporation, within this section, so as to prevent the stockholder from obtaining such relief under a state statute declaring that all books of any corporation shall be subject to the inspection of any bona fide stockholder at all reasonable hours. Harkness v. Guthrie, (1904) 27 Utah 248, 75 Pac. 624, 107 A. S. R. 664, 1 Ann. Cas. 129, judgment affirmed (1905) 199 U. S. 148, 26 S. Ct. 4, 50 U. S. (L. ed.) 130, 4 Ann. Cas. 433.

Where a stockholder had sued for false representations made by directors of a national bank on which he had purchased shares of the bank's stock at a price in excess of its true value, that he discontinued such suit and recommended it in the federal district court, it was not within the province of the federal courts not to deprive him of the right to compel the bank's officers to permit an examination of its records to ascertain the true value of its assets and stock,


Sufficiency of reasons for desiring inspection.—In Woodworth v. Old Second Nat. Bank, (1908) 154 Mich. 459, 117 N. W. 853, 118 N. W. 581, 15 Detroit Leg. N. 773, a national bank stockholder on Feb. 1, 1906, served on the directors written demand for an examination of its books and records, stating that he would renew the demand in person on Feb. 5, 1906, at three p.m. at the banking office, and that inspection was desired to commence at that time and continue at such hours as would not interfere with the bank's business. The notice cited a list of records to be inspected, and recited that it was to ascertain the true financial condition of the bank, the true value of its assets and capital stock, to ascertain the amount, nature, and date of the bank's losses through certain dealings with specified persons, and to investigate certain documents desired for use in a lawsuit commenced by relator. It was held that the relator's demand was made at the proper time and place, and that the notice disclosed a legitimate reason therefor.

The common-law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks in this section. Guthrie v. Harkness, (1905) 198 U. S. 148, 26 S. Ct. 4, 50 U. S. (L. ed.) 230, 4 Ann. Cas. 435, affirming (1904) 27 Utah 248, 75 Pac. 624, 107 A. S. R. 664, 1 Ann. Cas. 129.

"Visitorial power" means the power to control and arrest abuses, and to enforce a due observance of the statutes. State v. Portland First Nat. Bank, (1912) 61 Ore. 551, 123 Pac. 712, Ann. Cas. 1914B 158, wherein the court said: "The terms should also be interpreted in the light of the visitorial powers enumerated in the National Banking Act. These in brief are set out in § 5242, supra, p. 901 which provides for the appointment of bank examiners, authorized to make a thorough examination of the affairs of every banking association, examine its officers and agents, under oath, and make a report of the condition of the bank to the controller. These, we take, are the visitorial powers referred to, and which no authority but Congress can authorize."

Sec. 5242. [Transfers, when void.] All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, securities on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court. [R. S.]


As to the provision at the end of this section, that "no attachment, injunction or execution, shall be issued," etc., it was said in Pacific Nat. Bank v. Mixter, (1888) 124 U. S. 721, 8 S. Ct. 718, 31 U. S. (L. ed.) 567: "The original National Bank Act contained nothing of this kind, but the prohibition first appeared in the Act of March 3, 1873, ch. 269, § 2, 17 Stat. L. 603, as a new proviso, added to section 57 of the Act of June 3, 1864, ch. 106, 13 Stat. L. 116 . . . In the Revision of the Statutes, section 52 of the original act, and the amendment of section 57 adopted in 1873, relating to attachments and injunctions in state courts, were reenacted as section 5242, the amendment of section 57 being put in the revision at the end of what had been the original section 92."
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I. TRANSFERS


In Roberts v. Hill, (C. C. Vt. 1885) 24 Fed. 571 (rehearing of (C. C. Vt. 1884) 23 Fed. 311) the court said: "The scheme of the act, of which this section is one of the provisions, contemplates a ratably distribution of the assets of national banks among their creditors in the event of insolvency; and the intention of Congress, to secure equality among creditors by the appropriation of all the assets of an insolvent bank for a ratably division, it so dominating that the courts have held that a creditor cannot obtain a preference by adversary proceedings against the bank after insolvency has taken place. Accordingly, it has been adjudged that a creditor cannot acquire a lien upon the property of a national bank, after it has become insolvent, by a suit and an attachment of its property, although no receiver of the bank has been appointed; and that the attachment should be vacated upon the application of a receiver subsequently appointed, because it would be subversive of the theory of the National Currency Act to permit the creditor to obtain a preference thereby over the other creditors of the bank. Selma First Nat. Bank v. Colby, (1874) 21 Wall. 609, 22 U. S. (L. ed.) 687; Harvey v. Allen, (1879) 18 Blatchf. 29, 11 Fed. Cas. No. 6,177."

Where a bank after its suspension has assessed its stockholders and resumed business, and is examined and pronounced solvent, and almost immediately thereafter creditors attach property and a bond is given by officers of the bank as sureties to dissolve the attachment, it is not a fraudulent preference for the bank to transfer to such sureties a certificate of deposit on another bank to indemnify them. Price v. Coleman, (C. C. Mass. 1885) 22 Fed. 604.

2. "Insolvency," "Act of Insolvency," and "Contemplation Thereof"

In general.—"Insolvency, as ordinarily defined, is that condition of affairs in which a merchant or business man is unable to meet his obligations as they mature in the usual course of his business. Thomas v. Thompson, (1849) 4 Cush. 127; Venn v. McConnell, (1868) 11 Allen 555; Wager v. Hall. (1873) 16 Wall. 584, 599 [21 U. S. (L. ed.) 304]. An act of insolvency takes place when this state of affairs is demonstrated and the merchant has actually failed to meet some of his obligations. A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations." Roberts v. Hill, (C. C. Vt. 1885) 24 Fed. 571 (rehearing of (C. C. Vt. 1885) 23 Fed. 311) per Wallace, J.

The term "act of insolvency" means any act which would be an act of insolvency on the part of an individual banker, not simply such an act as would authorize the comptroller under the banking act to appoint a receiver. Irons v. Manufacturer's Nat. Bank, (1875) 6 Biss. 301, 13 Fed. Cas. No. 7,068.

Contemplation of insolvency.—The provisions of the Act are not directed against
NATIONAL BANKS


In Ball v. German Bank, (C. C. A. 8th Cir. 1911) 187 Fed. 750, 109 C. C. A. 498, holding that the defendant was liable to the plaintiff, a national bank receiver, as a transferee in violation of R. S. sec. 5202, the court said: "After carefully weighing the evidence, we are unable to reach any other conclusion than that the transfer was made at least in contemplation of an act of insolvency."

3. With a View to Preference

In Ball v. German Bank, (C. C. A. 8th Cir. 1911) 187 Fed. 750, 109 C. C. A. 498 (certiorari denied (1912) 225 U. S. 709, 32 S. Ct. 840, 56 U. S. (L. ed.) 1287) holding that the plaintiff, receiver of the First National Bank, was entitled to recover the value of certain notes constituting bills receivable, which the First National Bank had transferred to the creditor, the defendant, the court said: "The First National Bank was not only actually insolvent, but its final effort to continue in business had failed. It knew on Saturday evening, when the notes were transferred, that it would not open its doors for business again. In these circumstances it must be charged with knowledge of its own condition, and of the necessary consequence of its act in transferring a substantial part of its assets to secure one creditor, namely, that that creditor would thereby get a preference over others. This consequence the cashier [who made the transfer] admits he knew. In the case of National Security Bank v. Butler, (1889) 129 U. S. 223, 9 S. Ct. 281, 32 U. S. (L. ed.) 682, the Supreme Court dealt with a similar situation, and there said: 'The undisputed facts of the case showed that the act of the cashier could, under the circumstances, have no other result, if allowed to stand, than to operate as a preference in favor of the Security Bank; that the Pacific Bank had decided to close its doors and to go into liquidation; that after that the necessary consequence of the transfer was to create a preference,' etc."

4. Intent to Prefer

The intent of a national bank after it is insolvent to prefer a creditor by a transfer of assets in violation of the statute may be conclusively presumed, where the transaction was such that it could have no other effect if allowed to stand than to work a preference. National Security Bank v. Price, (C. C. Mass. 1885) 22 Fed. 697, affirmed (1889) 129 U. S. 223, 9 S. Ct. 281, 32 U. S. (L. ed.) 682.

"An intent to give a preference is presumed when a payment is made to a creditor by a debtor who knows his own insolvency, and therefore knows that he cannot pay all his creditors in full. A preference is the natural and probable consequence under such conditions." Roberts v. Hill, (C. C. Vt. 1885) 24 Fed. 571, rehearing of (C. C. Vt. 1885) 22 Fed. 311.

5. Knowledge by Transferee


A transfer of securities made by an insolvent national bank to a creditor bank after the directors of the former had voted to close its business and go into liquidation, is within the prohibition of the statute though the creditor bank did not know or suspect that the other bank was insolvent or contemplated insolvency, or that the directors had voted to close it and go into liquidation, and although the transfer took place before the application was actually made to the comptroller for the appointment of a receiver. National Security Bank v. Butler, (1889) 129 U. S. 223, 9 S. Ct. 281, 32 U. S. (L. ed.) 682.

6. Time of Creation of Priorities


Thus the right acquired by service of an attachment against a national bank as a garnishee is not lost by the suspension of the bank and the appointment of
a receiver, but the assets of the bank pass to the receiver burdened with the lien in favor of the plaintiff in the attachment as to the interests of the defendant in the garnishment suit. Earl v. Pennsylvania, (1900) 178 U. S. 449, 20 S. Ct. 915, 44 U. S. (L. ed.) 1146; reversing (1899) 189 Pa. St. 606, 42 Atl. 300.


7. Transactions in Ordinary Course of Business

In general.—"It is a matter of common knowledge that banks and other corporations continue, in many instances to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided." McDonald v. Chemical Nat. Bank, (1899) 174 U. S. 610, 19 S. Ct. 787, 43 U. S. (L. ed.) 1106, affirming (N. Y. 1897) 80 Fed. 357, (C. C. A. 2d Cir. 1898) 84 Fed. 574, 55 U. S. App. 420, 28 C. C. A. 548, and holding that the text R. S. sec. 5242 did not apply to transactions by the bank in the ordinary course of its business, though at that time the bank was actually insolvent with the knowledge of its officers where at the time it had committed no act of insolvency.

"Whether a bank is or is not actually insolvent may, often, a question hard to answer. There may be good reason to believe that, though temporarily embarrassed, the bank's affairs may take a fortunate turn. Some of the assets that cannot at once be converted into money may be of a character to justify the expectation that, if actual and open insolvency is avoided, they may be ultimately collectible, and thus the ruin of the bank and its creditors be prevented. McDonald v. Chemical Nat. Bank, (1899) 174 U. S. 610, 19 S. Ct. 787, 43 U. S. (L. ed.) 1106." Easton v. Iowa, (1903) 188 U. S. 220, 23 S. Ct. 288, 47 U. S. (L. ed.) 452.

The cashier of a national bank who was also executor of an estate, purchased the drafts for persons for whom he was in the habit of negotiating loans, and drew the amount thereof from a deposit in the bank standing to the credit of the estate. He knew at the time that the bank was insolvent, but the pursuit of the drafts was long deferred, and the deposit was not withdrawn with the intent to secure a preference. It was held that the transaction was not in violation of the statute. Tuttle v. Frerichs, (1884) 38 N. J. Eq. 12.

Checks and remittances mailed in the usual course of business of the bank to another bank, with the understanding that they are to be credited to its constantly overdrawn account, become the property of the latter bank as soon as they are deposited in the post office, and its title thereto is not affected by the insolvency of the sender bank between the time of mailing and the receipt of letters containing such remittances. McDonald v. Chemical Nat. Bank, (1899) 174 U. S. 610, 19 S. Ct. 787, 43 U. S. (L. ed.) 1106, affirming (N. Y. 1897) 80 Fed. 357, (C. C. A. 2d Cir. 1898) 84 Fed. 874, 55 U. S. App. 420, 23 C. C. A. 548.

The mere payment of certificates of deposit held by a director, on their maturity, or the taking up of the certificates of deposit before maturity, on the ground that they were issued at too high a rate of interest, where the bank is actually insolvent at the time, but such insolvency has been successfully concealed from the directors and the bank examiner, is not an unlawful preference where the director receiving the payment acts in good faith without knowledge of the insolvency. Hayes v. Beardsley, (1892) 136 N. Y. 299, 32 N. E. 855, where the court said: "In order to uphold a recovery in an action like this there should be some satisfactory evidence that the cashier or other officer actually paid the money of the bank in contemplation of insolvency for the purpose of giving a preference to the payee, and with a view to prevent the application of the assets of the bank to the creditors generally, as provided in the National Banking Act. We think all the circumstances surrounding these deposits and payments forbid such an inference. The facts of this case as found by the trial judge failed to bring it within any of the authorities cited by the learned counsel for the appellant. The insolvency of this bank seems to have been covered up and concealed by the cashier with great skill and ingenuity. It was not even discovered by the bank examiners in making their examination of the bank, and no one of the directors had the least suspicion of it. The fact that the defendant, entirely ignorant of the insolvency of the bank, was a director, does not under such circumstances make him liable for the payments made to him. In the trial of the case and in
weighing and balancing the evidence that fact might have weight—in some cases controverted—by the weight of the evidence of the bank. But when after all the evidence is given it is found that the director acted in good faith, was ignorant of any wrongdoing or of the insolvency of the bank, then a payment made to him must be treated under section 2242 like payments made to any other creditor of the bank."

Transfers to secure loans.—Nor does the statute apply to security given and taken in good faith when a loan is made to the bank although the creditor knew at the time that the bank was insolvent. Armstrong v. Chemical Nat. Bank, (S. D. N. Y. 1890) 41 Fed. 234; Stapleton v. Stockton, (C. C. A. 5th Cir. 1889) 91 Fed. 326, 65 U. S. App. 412, 33 C. C. A. 642, holding that the fact that as a part of the same transaction it is further agreed that such security shall also stand as security for antecedent debts does not avoid it to the extent of the present advances, though it be void as to such antecedent indebtedness.

Application of credits.—A bank which in good faith and in the ordinary course of business has accepted a draft of a national bank on the day preceding the latter's failure, and subsequently pays such draft, is not prohibited from applying on account thereof all collections made by it subsequent thereto upon securities in its hands belonging to the insolvent bank, as the lien for the payment of the draft arises at the time of the acceptance. In re Armstrong, (S. D. Ohio 1890) 41 Fed. 391.

Settlement of lease of real estate.—The owner of real property leased to a national bank for building purposes is not liable to account to the bank's receiver for the bank building erected thereon, which the bank, while insolvent and in course of voluntary liquidation, remained over to him in consideration of a release from all further liability under the lease; the bank being at the time in arrears for rent and taxes, and the income from the property not exceeding the charges against it. Brown v. Schlesinger, (1904) 194 U. S. 15, 24 S. Ct. 558, 48 U. S. (L. ed.) 857, affirming (C. C. A. 5th Cir. 1902) 118 Fed. 981, 55 C. C. A. 475, holding that the transaction did not constitute an illegal preference.

S. Payment of Deposits

The statute does not apply to a deposit of drafts for collection, accepted by the bank with the knowledge of its officers that the bank was hopelessly insolvent and was about to suspend business. Craigie v. Hadley, (1885) 99 N. Y. 131, 1 N. E. 537, 53 Am. Rep. 9, affirming Craigie v. Smith, (1884) 14 Abb. N. Cas. (N. Y.) 409, holding that the depositor's right to reclaim the drafts or their proceeds was not precluded by R. S. sec. 5242, since the plaintiff did not claim under a transfer from the bank, but under his original title. See also Importers', etc., Nat. Bank v. Peters, (1890) 123 N. Y. 272, 25 N. E. 319, affirmed (1899) 51 Hun 640 mem., 4 N. Y. S. 699.

The fact that the depositor of a check, fraudulently received by the officers of the bank after knowledge of its insolvency and on the day on which it suspended, is a stockholder, does not affect his right to claim the proceeds. Richardson v. Olivier, (C. C. A. 5th Cir. 1900) 105 Fed. 277, 44 C. C. A. 468, 53 L. R. A. 113.

"It is extremely unusual for a depositor of a bank to demand security as a condition of allowing his money to remain. Such a demand suggests at once the belief in his mind of the existence of an exceptional state of affairs in a financial institution. A bank ordinarily represents financial stamina of the first order. It is trusted, without security, as the safest custodian or debtor that can be selected. Its resources consist of cash, or securities which can readily be converted into money, in order to meet instantly any demands which may be made upon it. Even when it is subjected to the strain of an extraordinary emergency, like a run, it is supposed that a solvent bank will be able to provide itself with funds to carry it safely through. When a depositor asks a bank to give him security for the payment of his deposit, the inference is almost irresistible that he distrusts the solvency of the bank. The only reason why McGregor called for his deposits was because he feared the bank was not safe. He could not be reassured of its solvency by the representations of the officers. He could be satisfied by nothing except the money or adequate security," Roberts v. Hill, (C. C. Vt. 1885) 24 Fed. 571 (rehearing of (C. C. Vt. 1885) Fed. 311), where the court, upon review of the evidence, concluded that McGregor, the defendant's intestate had reasonable cause to believe that the bank of which the plaintiff became receiver was insolvent when the bank transferred a note to him as security for his deposit, and a decree setting aside such transfer was entered.

In a concurring opinion in the same case, Wheeler, J., said: "The officers of this bank were largely interested in it as stockholders and otherwise, and were largely indebted to it personally. The insolvent condition of the bank rested largely upon their own inability to pay what they owed it. They were very anxious to save the bank, and put forth every effort to do so, and hoped to succeed. They transferred the note in question to the defendant's intestate to quiet him, because he insisted upon security, and not because they had any desire to
pay him in preference to others. They did this to save the bank, and not to prefer him. This was before thought to be decisive in favor of the validity of the transfer. Robertson v. Hill, (C. C. Vt. 1882) 23 Fed. 311, [the same case on former hearing]. But the available assets of the bank were so small in comparison with the liabilities that, had the officers stopped and considered its situation, they must have seen that ultimate failure was inevitable. Impelled by their interest and desire to save the bank and themselves in standing and credit so long as they could, they bent all their efforts to that end. Still the hopeless insolvency of the bank was within their contemplation if they would contemplate it. That they did not, should not not it seems, take the case out of the statute. The insolvency of the bank was before them, and, with it before them, they gave this creditor a preference. This now appears to be within the statute. I concur, therefore, in the entry of a decree for the plaintiff setting aside the transfer of this note."

9. Set-Off

"Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference; and, it is clear that it is only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent." Scott v. Armstrong, (1892) 246 U. S. 499, 16 S. Ct. 148, 36 U. S. (L. ed.) 1069. Followed in Merve v. Dyer, (1895) 15 Mont. 317, 39 Pac. 314.

"The purpose of section 5242 no doubt was to prevent a national bank, when insolvent, or in contemplation of insolvency, from so disposing of its assets as to prevent their proper application to the redemption of its notes in circulation and the ratable distribution of the remainder among its creditors; and, its provisions extend no further than to declare void any disposition by the bank of its choses in action, securities or other assets, made with the view of preventing their application to the payment of its circulating notes, or with a view to prefer one creditor to another; and to prohibit attachments, injunctions or executions against such bank or its property before final judgment. The section, as we understand it, does not prohibit the allowance of any valid set-off, legal or equitable, which a debtor of a bank may have against any obligation owing to it by him at the time of its insolvency. The allowance of such a set-off is not the creation of a preference, but an ascertaining of the just amount due. To exact the payment of more than that would be unjust, and the section, we think, does not require that to be done."


"The note of the case where the claim sought to be offset is acquired after the act of insolvency is far otherwise, for the right of the parties became fixed as at that time, and to sustain the transfer would defeat the object of these provisions. The transaction must necessarily be held to have been entered into with the intention to produce its natural result,—the preventing of the application of the insolvent's assets in the manner prescribed.” Scott v. Armstrong, (1892) 146 U. S. 499, 13 S. Ct. 148, 36 U. S. (L. ed.) 1059. See also Davis v. Knipp, (1892) 92 Hun 297, 36 N. Y. S. 705.

10. Liens, Equities, etc.

In Scott v. Armstrong, (1892) 146 U. S. 499, 13 S. Ct. 148, 36 U. S. (L. ed.) 1069, the court said: "Liens, or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency, and not in contemplation thereof, are not invalidated. The provisions of the Acts are not directed against all liens, securities, pledges, or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency." Effect of insolvency on contracts— This section, said the court in Earle v. Carson, (1903) 188 U. S. 42, 23 S. Ct. 254, 47 U. S. (L. ed.) 373, “by a negative affirmative establishes the validity of all contracts otherwise lawful, made by the bank concerning its assets before its failure, albeit at the time such contracts were made the bank was insolvent, unless the contracts come within the restrictions which the section imposes—that is those entered into after the commission of an act of insolvency or in contemplation thereof or made with a view to prevent the application of the assets of the bank, in the manner prescribed by law, or with the purpose of giving a preference to one creditor over another."

11. Transfer of Other Than Assets

The object of the statute is to secure the preservation and distribution among the creditors of the assets belonging to the bank fairly and without preference. Decatur First Nat. Bank v. Johnstone, (1893) 97 Ala. 655, 11 So. 690; Corn Exch. Bank v. Byler, (1886) 101 N. Y. 303, 4 N. E. 635, affirming (1885) 37 Hun (N. Y.) 475. This case does not apply to the transfer by the bank of notes and other evidences of debt in its possession which are not part of its assets but are the property of others. Bell v. Hanover Nat.
Bank, (S. D. N. Y. 1893) 57 Fed. 821; Corn Exch. Bank v. Bye, (1886) 101 N. Y. 303, 4 N. E. 635, affirming (1885) 37 Hun (N. Y.) 473. See also Monmouth First Nat. Bank v. Dunbar, (1887) 118 Ill. 623, 9 N. E. 166, affirming (1886) 19 Ill. App. 558. Thus notes given in renewal of other notes held by a national bank, the original notes not being returned, are not "evidence of debt" or "assets" of the bank within the meaning of the statute. Decatur First Nat. Bank v. Johnston, (1893) 97 Ala. 655, 11 So. 690.

12. Suit by Receiver to Avoid Transfer

In Ball v. German Bank, (C. C. A. 8th Cir. 1911) 187 Fed. 750, 109 C. C. A. 495 (certiorari denied (1912) 225 U. S. 709, 32 S. Ct. 840, 56 U. S. (L. ed.) 1267), an action at law by the receiver of a national bank to recover the value of certain notes transferred by the bank to the defendant in violation of R. S. sec. 5242, the court said: "It is also contended that plaintiff mistook his rem- edy, in fact, his action should have been in equity to set aside the transfer of the notes and restore them to the receiver, and not an action at law for a conversion. To this, also we are unable to agree. The defendant had in its pos-session the notes, the transfer of which was void under the law. They belonged to the plaintiff, but defendant appropriated them to its own use. They had a fixed value, which afforded a ready measure of damages, and we perceive no reason why an action at law for their conversion was not available to plaintiff. The action was resorted to without complaint or criticism in the National Security Bank Case [National Security Bank v. Butler, (1889) 129 U. S. 223, 9 S. Ct. 281, 32 U. S. (L. ed.) 682]." In Hayes v. Beardley, (1892) 136 N. Y. 290, 32 N. E. 865, the receiver also recovered in an action at law.

On the other hand, the receiver of a national bank may sue in equity to set aside a transfer void under R. S. sec. 5242. An instance of such a case is Roberts v. Hill, (C. C. Vt. 1883) 24 Fed. 571, rehearing of (C. C. Vt. 1885) 23 Fed. 811.

II. ATTACHMENT, INJUNCTION, OR EXECUTION

1. Constitutionality

"The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks and to what extent the institutions shall be subject to state control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress, and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit." Van Reed v. People's Nat. Bank, (1905) 198 U. S. 554, 25 S. Ct. 775, 49 U. S. (L. ed.) 1161, 3 Ann. Cas. 1154.

"The section is not unconstitutional. It is not claimed that the Act of Congress authorizing national banks is unconstitutional. If Congress has power to authorize the creation of the national banks, it has power to protect them, and to regulate their trade and intercourse with others, by granting them special immunities, and protecting them against suits or proceedings in state courts by which their efficiency would be impaired.

... The legislature of this state has provided, among other things, that court houses, certain public buildings and many classes of property shall be exempt from execution. It might provide that no attachment should issue in any case. We see no reason why the legislature of the nation has not the power to provide that no attachment shall issue against any bank created and existing under its authority." Dennis v. Seattle First Nat. Bank, (1890) 127 Cal. 453, 59 Pac. 777, 78 A. S. R. 79.

2. Effect of Later Legislation

The provisions of this section as to attachment, injunction, etc., were not repealed by force of the provision in the closing paragraph of section 4 of the Act of July 12, 1882, ch. 290, set forth in div. VI, infra, p. 928. Freeman Mig. Co. v. National Bank, (1894) 160 Mass. 398, 35 N. E. 865; Railroad v. Pacific Nat. Bank, (1883) 93 N. Y. 371.

In Van Reed v. People's Nat. Bank, (1905) 198 U. S. 554, 25 S. Ct. 775, 49 U. S. (L. ed.) 1161, 3 Ann. Cas. 1164, affirming (1903) 173 N. Y. 314, 66 N. E. 18, 106 A. S. R. 666, the court, speaking of sec. 4 cited in the last preceding paragraph, said: "There is nothing in this section [4] enlarging the right of attachment against national banks. Before the passage of this section [4] circuit courts of the United States had jurisdiction of suits against national banks because they were corporations of federal origin. It was the purpose of this legislation to deprive such banks of the right to invoke the jurisdiction of the federal courts simply upon the ground that they were created by and exercised their powers under the Acts of Congress. Petrie v. Commercial Nat. Bank, (1892) 142 U. S. 644, 19 S. Ct. 325, 35 U. S. (L. ed.) 1144; Continental Nat. Bank v. Buford, (1903) 191 U. S. 119-123, 24 S. Ct. 64, 48 U. S. (L. ed.) 119. It regulated the jurisdiction of the courts to entertain such
actions against corporations of this character, and had nothing to do with the kind and character of remedies which could be had against them. Certainly there is nothing in the Act repealing the prior provisions of § 5242."

3. Attachment

a. All National Banks, Solvent or Insolvent

This section "operates as a prohibition upon all attachments against national banks under the authority of the state courts. That was evidently its purpose when first enacted, for then it was part of a section which, while providing for suits in the courts of the United States or of the state, as the plaintiff might elect, declared in express terms that if the suit was begun in a state court no attachment should issue until after judgment. Whether this form of its re-enactment in the Revised Statutes does not change its meaning in this particular. It stands now, as it did originally, as the paramount law of the land that attachment shall not issue from state courts against national banks, and writes into all state attachment laws an exception in favor of national banks. . . . Although this provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances." Pacific Nat. Bank v. Mixter, (1888) 124 U. S. 721, 8 S. Ct. 718, 31 U. S. (L. ed.) 557.


b. Jurisdiction not Obtainable by Attachment

In general.—Jurisdiction over the person or property of a national bank is not acquired by the issue of an attachment out of a state court before judgment, which, by reason of this section, is beyond the power of the court. Merchants' National Bank v. Troy Grocery Co., (1905) 144 Ala. 665, 39 So. 476; Meyer v. Ceur d'Alene First Nat. Bank, (1904) 10 Idaho 175, 77 Pac. 334; McBride v. Illinois Nat. Bank, (1908) 128 App. Div. 503, 112 N. Y. S. 794.

Foreign attachment.—In Van Reed v. People's Nat. Bank, (1906) 198 U. S. 564, 25 S. Ct. 715, 49 U. S. (L. ed.) 1161, 3 Ann. Cas. 1164, affirming (1903) 173 N. Y. 314, 66 N. E. 16, 105 A. R. 666, the plaintiff, who was the owner of a claim against the defendant national bank, commenced an action in the state of New York by levying an attachment upon the funds of the defendant in that state, upon the ground that it was a foreign corporation. The defendant, appearing specially for that purpose, moved to have the attachment vacated upon the
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ground that it was prohibited by R. S. sec. 5242. Holding that the attachment was properly vacated, the court said: "It is further insisted that, whether or not the writ was upon the property of the bank, jurisdiction is obtained of it by the issuing of the attachment; but we cannot take this view. There was no personal service in the court of original jurisdiction and the attachment being without the power of the court by reason of the terms of the federal statute, no jurisdiction was acquired in the case, either over the person or property of the defendant."

So in Safford v. Plattsburgh First Nat. Bank, (1889) 61 Vt. 373, 17 Atl. 748 where the defendant national bank was located and doing business in the state of New York it was held that a motion to dismiss must be sustained where the only service made on the defendant, as appeared by the officer's return, was by leaving a true and attested copy of the writ of attachment named therein as having funds of the defendant in his hands. The court said: "The service of a trustee writ upon the trustee, and thus preventing the defendant from receiving whatever may be in the hands of the trustee, is in legal effect attaching his property; and treating the service here made as an attachment of the defendant's property, the attachment, as we have seen, was illegal and void, and the service attempted to be made was not such a one as the defendant was bound to regard." See also Norris v. Merchants' Nat. Bank, (1888) 30 Ill. App. 54; Rosenheim Real-Estate Co. v. Southern Nat. Bank, (Tenn. Ch. App. 1897) 46 S. W. 1026.

In Garner v. Providence Second Nat. Bank, (S. D. N. Y. 1895) 66 Fed. 369, an action in a New York court against a nonresident national bank was begun by service or a warrant of foreign attachment and personal service of summons in another state. On petition of the defendant it was duly removed to the federal court where on motion of the defendant the attachment was vacated as improperly issued under R. S. sec. 5242," and, "said the court, inasmuch as the summons was personally served outside of the limits of the state, such service should be set aside and declared void."

Waiver of objection.—Where process against a national bank located in another state was served only by garnishment of a debt due the defendant and the latter after entering a special appearance for the purpose of moving to dismiss the suit for want of jurisdiction, filed the general issue, and thereafter moved to dismiss for want of jurisdiction, it was held that the filing of the general issue was a general appearance which waived all matter in abatement and gave the court jurisdiction. Norris v. Merchant's Nat. Bank, (1888) 30 Ill. App. 54. But see McDonald v. Marquette First Nat. Bank, (1891) 41 Ill. App. 368, holding that the federal statute is prohibitory in respect of attachments, and Wallach v. Billings, (1911) 161 Ill. App. 317, where the court expressly refrained from deciding whether such prohibition merely creates a privilege which may be waived by the defendant bank.

In Rosenheim Real-Estate Co. v. Southern Nat. Bank, (Tenn. Ch. App. 1897) 46 S. W. 1026, it was held that where a foreign attachment was issued against a nonresident national bank, the defendant's objection to the jurisdiction was not a subject of waiver. The court, after quoting from Pacific Nat. Bank v. Mixter, (1888) 124 U. S. 721, 8 S. Ct. 718, 31 U. S. (L. ed.) 567, said: "This language is explicit, and leaves no room for argument or doubt, and it is absolutely controlling in this case. This being so, it is wholly useless to discuss the question of whether or not the defendant bank entered its appearance, and gave the court jurisdiction by reason of the appearance of its attorney, and the interposition of its plea in abatement, and by the subsequent grant of an appeal from the decree [for plaintiff] by the chancellor. We are of opinion, however, that such an appearance by an attorney did not waive the question of the jurisdiction of the court, and give it jurisdiction over the nonresident defendant."

In Merchants' Laclede Nat. Bank v. Troy Grocery Co., (1907) 150 Ala. 128, 43 So. 208, an action against a nonresident national bank was commenced by attachment and affidavit in a justice court. The defendant made an appearance and the justice notified plaintiff who thereupon executed bond, as required. The plaintiff then filed its complaint, the defendant demurred thereto, the demurrer was overruled, and judgment rendered against the defendant. An appeal was prosecuted to the Circuit Court, whereupon defendant moved to quash the attachment and to stay all the proceedings. The Circuit Court denied the motion, and on appeal the Supreme Court reversed the cause and ordered the attachment dismissed. The cause being remanded, the court, proceeding to try it, had before it the complaint already filed, and the appearance of the defendant bank. Thereupon the defendant filed a plea to the jurisdiction of the court setting up the invalidity of the attachment under R. S. sec. 5242. Judgment was rendered for the plaintiff. Affirming this judgment, the Supreme Court said: "The record shows that the plaintiff lodged with the justice a complaint, to which the defendant demurred, and after the
demurrer was overruled interposed a plea to the merits. Section 562 of the Code of 1896 provides: "If the defendant appears and pleads, the cause proceeds as in suits commenced by summons and complaint; if he fails to appear, etc. A general appearance dispenses with the necessity of a formal notice, and is a waiver of any previous irregularity in the service of process. . . . The unconditional appearance of the defendant gave the court jurisdiction of the person and of the subject-matter of the complaint, and over which the court under the law could exercise jurisdiction, notwithstanding it had no jurisdiction as to the attachment. After the attachment was dissolved, the defendants having pleaded to the merits of the complaint, the suit stood as if there had been no attachment, and was but a suit upon the complaint; the necessity of a summons being dispensed with by virtue of defendant's plea. When this case was here before (Merchants' Bank v. Troy Grocery Co., [1905] 144 Ala. 605, 39 S. 476), it appears to have been upon the refusal of the trial court to dissolve the attachment. It was then held that in so much as the attachment was issued before final judgment, its issuance was violative of the federal statute and authorities, and was void; that inasmuch as it was violative of the federal statute, and void, the state court had no jurisdiction and that jurisdiction could not be conferred by the appearance of the defendant whether general or special, and to this proposition we strictly adhere. We do not understand the court to hold, however, that the plaintiff could not maintain a suit on the complaint, or that the defendant could not confer jurisdiction by appearing and pleading to the complaint. Jurisdiction of attachment and of a suit upon a complaint is quite distinct; but inasmuch as the attachment was dissolved and dismissed, the defendant having answered the complaint and submitted to the jurisdiction of the court in that respect, which it had the right to do, the court below had the right to proceed as if there had never been an attachment."

c. Foreign Attachment Against Bank


d. Bond to Dissolve Attachment

As an attachment cannot issue before judgment in a suit against a national bank it follows that a bond to dissolve an attachment thus unlawfully issued is void, and will not support a judgment or a transfer of securities by the bank to indemnify the sureties. Pacific Nat. Bank v. Mixter, (1888) 124 U. S. 721, 8 S. Ct. 718, 31 U. S. (L. ed.) 667; Planters' Loan, etc., Bank v. Berry, (1892) 91 Ga. 264, 18 S. E. 137.

e. Attachment in Federal Courts

The effect of the statute is that all state attachment laws must be read as if they contained a provision in express terms that they are not to apply to suits against a national bank; and such power being eliminated from the state statutes, it follows that an attachment cannot issue against a national bank before judgment in a suit begun in a federal court, for such court is not authorized to issue attachments in common-law cases against the property of a defendant, except as provided by the laws of the state in which the court is held for the courts thereof. Pacific Nat. Bank v. Mixter, (1885) 124 U. S. 721, 8 S. Ct. 718, 31 U. E. (L. ed.) 667; Garner v. Providence Second Nat. Bank, (S. D. N. Y. 1895) 66 Fed. 569. See R. S. sec. 915 in JUDICIARY, ante, p. 64.

f. Garnishment of Bank; Replevin Against Bank

Garnishment.—The statute must be construed in connection with the preceding parts of the same section declaring null and void certain transfers, assignments, deposits, and payments made after the commission by the bank of an act of insolvency, or in contemplation thereof, with intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view to preference by the bank of one creditor to another. An attachment sued out against the bank as garnishee is not an attachment against the bank or its property, nor a suit against it within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others. Earle v. Pennsylvania, (1900) 178 U. S. 449, 20 S. Ct. 915, 44 U. S. (L. ed.) 1146, recrediting Com. v. Chestnut St. Nat. Bank, (1899) 189 Pa. St. 606, 42 Atl. 300; Earle v. Conway, (1900) 178 U. S. 466, 20 S. Ct. 918, 44 U. S. (L. ed.) 1149, affirming Conway v. Chestnut St. Nat. Bank, (1899) 189 Pa. St. 610, 42 Atl. 303; Conway v. Schall, 42 W. N. C. (Pa.) 329.

Replevin.—And it follows that the statute does not prohibit an action of replevin against a national bank to recover property of the plaintiff in its possession. Corn Exch. Bank v. Blye, (1886) 101 N.
4. Injunction or Execution

a. In General

"It was further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true." Pacific Nat. Bank v. Mixter, (1888) 124 U. S. 721, 8 S. Ct. 718, 31 U. S. (L. ed.) 567. The prohibition against granting an injunction before final judgment applies though the bank has ceased to do business and no longer exercises its function as a fiscal agent or governmental agency. Wallach v. Billings, (1911) 161 Ill. App. 317.

b. Federal Courts


c. State Courts

The issue of a preliminary injunction is forbidden to state courts by the provisions in the text. Freeman Mfg. Co. v. National Bank of Republic, (1894) 160 Mass. 398, 35 N. E. 865, holding that the Acts of July 12, 1882, sec. 4; March 3, 1887, sec. 4, and August 13, 1888, sec. 4, taking away the special jurisdiction of the federal courts in actions by and against national banks, did not repeal R. S. sec. 5242, though their effect was to end the power of citizens of the same state as the bank to get an injunction anywhere, while leaving that power to citizens of another state who have the right to sue in the federal court by virtue of their diverse citizenship. "This statute is a complete bar to the issuance of an injunction by a state court against a national banking association. . . . For the foregoing reason alone the injunction was properly dissolved as against the bank." Meyer v. Coeur d'Alene First Nat. Bank, (1904) 10 Idaho 175, 77 Pac. 334.

The prohibition as to injunction applies not only in the case of the general assets of a national bank, but also to an order restraining the transfer or enforcement of particular securities as wrongfully pledged to the bank without notice. Freeman Mfg. Co. v. National Bank of Republic, (1894) 160 Mass. 398, 35 N. E. 865.

d. Receivership in Final Judgment

In Cogswell v. Norwich Second Nat. Bank, (1903) 76 Conn. 252, 56 Atl. 574, where a plaintiff suing as a stockholder in a national bank whose charter had expired and as ceutul que trust of a special fund in the hands of those in control, brought an action for the appointment of a receiver to wind up the affairs of the bank and to collect certain assets which it was charged that the managers had wrongfully charged off or disposed of, the defendant bank controlled, in view of the provisions in R. S. sec. 5242, that no receiver, either temporary or permanent, to retake possession of its property, could be appointed before final judgment in the cause, inasmuch as the appointment would operate as an equitable execution, and be tantamount to an injunction touching the disposition of its property. The court conceded that there was no power to appoint a receiver to wind up a national bank at the instance of a stockholder so far as concerns such causes of action as are by act of Congress made the foundation of winding-up proceedings to be brought under the authority of the United States. "For other causes of action," said the court, "Congress has left the state courts free to grant relief of that nature whenever the general rules of equity may be deemed to call for it . . . . The only remaining reason of appeal is a general claim of error in rendering the final judgment and appointing a permanent receiver. The complaint having been adjudged sufficient, and the defendant having refused to plead over, it was proper to grant the relief asked for in the plaintiff's claim, so far as it might appear to be sanctioned by the principles of equity upon the facts admitted by the demurrer. . . . The claim for relief, though in form single, is in effect threefold. What it demands, to restate it in proper order (and there was no demurrer to it for formal defecte), is, first, that the fund set apart for the benefit of the plaintiff and the other original stockholders be recovered and duly applied; second, that the affairs of the defendant be wound up under the direction of the court, instead of that of those who had gained the control of it and were using their power for improper purposes; and, third, that a receiver be appointed to accomplish these ends. If the appointment, as made, operated as an execution, attachment or injunction within the meaning of Rev. St. U. S. § 5242, it was not in violation of that section, since not made before, but as part of the final judgment in the case."

Sec. 5243. [Use of the title "national."] All banks not organized and transacting business under the national-currency laws, or under this

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Title, and all persons or corporations doing the business of bankers, brokers, or savings institutions, except savings-banks authorized by Congress to use the word "national" as a part of their corporate name, are prohibited from using the word "national" as a portion of the name or title of such bank, corporation, firm, or partnership; and any violation of this prohibition committed after the third day of September, eighteen hundred and seventy-three, shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is committed or repeated. [R. S.]


Savings bank.—In People r. National Sav. Bank, (1889) 129 Ill. 618, 33 N. E. 288, the court said: "The new name, selected by the company — 'National Savings Bank'—is, in our opinion, an unfortunate one. It is generally understood that savings banks are patronized chiefly by the poorer and laboring classes of the community. The use of the word 'National' might convey to their minds the impression that the bank was organized under the Act of Congress in relation to national banks. Indeed, it is a serious question, whether under the terms of the latter Act, the name can be legally made use of at all.'

Building and loan association.—In Lamb v. Pioneer Sav., etc., Co., (1894) 106 Ala. 501, 17 So. 870, the court said: "There is no force in the contention that the note and mortgage are void because the word 'National' formed part of the original corporate name of the plaintiff. The law supposed to be offended is section 5243 of the Revised Statutes of the United States, ... We incline the opinion that it would necessitate a latitudinous construction of this statute to visit invalidity upon contracts made by or with corporations within the scope of their corporate powers, contravening its prohibition by the use of the word 'National.' But that question need not be decided. The plaintiff is essentially a corporation of the class known as 'Building & Loan Associations,' having its own peculiar functions, powers and franchises, distinguishable from the functions, powers and franchises of the corporations referred to in the statute, nor is it engaged in the transaction of the business against the transaction of which, under the use of the word 'National' is a part of a corporate name, the statute is divided.'

"International" bank.—In (1899) 22 Op. Atty-Gen. 475, advising the Secretary of the Treasury that the use by state banks of the word "international" as a portion of their name or title is not in violation of this section. Attorney-General Griggs said: "The section is a penal statute, and in the derivation of the otherwise common right of individuals, corporations, and associations, and by settled rules of construction, must be construed strictly, and its provisions cannot be extended by construction, implication, or otherwise beyond the plain meaning of its language.

The word 'international' is just as much a separate and distinct word in our language as is the word 'national,' and the two words instead of being synonymous or of similar meaning, have entirely different meanings, and neither can be correctly used to express the idea conveyed by the other, nor is either so used in the ordinary use of our language. Under a statute not penal in its nature it might be proper to inquire, in view of the obvious purpose of this section, whether the word 'international' is either in sound or construction so similar to the word 'national' as to be fairly calculated to deceive or to lead to the belief that the bank using it as part of its name was a national bank. Even in such a case it would seem difficult to arrive at that conclusion. Such a question would be addressed to the average intelligence of mankind and not to a mere thoughtless observer or hearer of the word. And it is not believed that this average intelligence, with that ordinary thought and care which is expected of anyone, would be led to believe that a bank a portion of whose name was the word 'international' was a national bank. But, however, this may be, no such considerations are pertinent under such a statute as this.'

Effect in pleading.—In Baltimore Third Nat. Bank v. Teal, (C. C. Md. 1881) 5 Fed. 505, where a demurrer to a declaration was sustained, the court said: "The title of the plaintiff, 'The National Bank of Baltimore' is not in itself an averment either that the plaintiff is a banking association, established in the district of Maryland, or that it is established under the law of the United States providing for national banking associations. There are other Baltimores than the one in Maryland, and there does not appear to be in the National Bank Act anything to prohibit an association formed in any other state from having its first to take the title of the plaintiff, if they had seen fit, and if the comptroller of the currency had approved. The name of the bank is subject only to
the approval of the comptroller of the currency, and we find nothing in the Act itself which would prevent an association from adopting any name which he approves of. It is argued that as section 5243 imposes a fine upon any firm or corporation not organized under the National Bank Act which shall use the word ‘national’ as a part of the name of such corporation or partnership, it follow

that the title ‘National Bank of Baltimore’ necessarily implies that it is lawfully established under that Act. This we do not think is a necessary inference, or that it is equivalent to the positive averment required. It is quite supposable that the name might be used unlawfully, notwithstanding the fine imposed by the statute.”

An act authorizing the appointment of receivers of national banks, and for other purposes.

[Act of June 30, 1876, ch. 156, 19 Stat. L. 63.]

[Sec. 1.] [Appointment of receiver, when authorized.] That whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes. [19 Stat. L. 63.]

Sections 2 and 3 of this Act are given in the following paragraphs of the text.
Section 4 of the Act amended R. S. sec. 5206, supra, p. 767.
Section 5, relating to the stamping of counterfeit, altered, and worthless notes, is given under the title CURRENCY, vol. 2, p. 708.
Section 6, relating to reports of savings and trust companies, is given supra, p. 813. R. S. secs. 5234 and 5239, mentioned in the text, are given supra, pp. 850, 872. See the notes to said R. S. sec. 5234.

The power of the comptroller to appoint a receiver is not limited in cases in which his action may be taken before the bank has ceased to do a banking business. The words “close up” used in this section mean the liquidation and closing up of the business of the bank, and he may, against the wishes of all parties, appoint a receiver of the bank which has by vote of its stockholders gone into liquidation. Washington Nat. Bank v. Eckels, (C. C. Wash. 1893) 57 Fed. 870. See further R. S. 5234, supra, p. 850.

Powers, duties and liabilities of receivers. See notes to R. S. sec. 5234, supra, p. 851.

Sec. 2. [Enforcement of individual liability of shareholder.] That when any national banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor’s bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any
court of the United States having original jurisdiction in equity for the district in which such association may have been located or established. [19 Stat. L. 63.]

See the note to the preceding section 1 of this Act.


Suits by receivers appointed by the comptroller of the currency under R. S. sec. 5234, supra, p. 850. See the notes to that section.

Prior to the enactment of the text section—A creditors' bill was maintained in Wheeler v. Kost, (1875) 77 Ill. 206, against stockholders of an alleged insolvent national bank to enforce payment of certain judgments previously obtained against the bank.


Within those rulings a suit by a creditor of a national bank brought under the provision of sec. 2 is a suit arising under the laws of the United States of which a federal court has jurisdiction without regard to the citizenship of the parties. Wyman v. Wallace, (1906) 201 U. S. 230, 26 S. Ct. 495, 50 U. S. (L. ed.) 738, affirming (C. C. A. 8th Cir. 1904) 135 Fed. 286, 85 C. C. A. 40) and holding that such suit would be unattainable, though both parties were citizens of the same state; and consequently that the federal court had jurisdiction, though the plaintiff creditor sued as assignee of a non-negotiable note given by the bank to a citizen of the state where the bank was located, the plaintiff being a citizen of another state, and would have been barred from maintaining the suit on the ground of diverse citizenship by the provision respecting suits by assignees in the state constituting Judicial Code, sec. 24, par. first in title JUDICIARY, vol. 4, p. 839, with notes at p. 974 et seq.

It was also held in the case last above cited that the suit was maintainable in the federal court, though the defendant was a national bank (lawfully holding stock in the insolvent bank) and notwithstanding a provision in sec. 4 of the Judiciary Act of Aug. 13, ch. 866, 25 Stat. L. 436, superseded by the substantial re-enactment thereof in Judicial Code, sec. 24, par. sixteenth, in title JUDICIARY, vol. 4, p. 840, said sec. 4 being also expressly repealed by Judicial Code, sec. 297, in title JUDICIARY, vol. 4, p. 1085.

In Irons v. Manufacturers' Nat. Bank. (N. D. Ill. 1883) 17 Fed. 308, it was said (obiter) concerning the text sec. 2 that "if any construction is to be given to this Act, it is that of limiting the tribunal in which proceedings are to be instituted for enforcing the stockholders' liability to a United States court, instead of allowing creditors to resort to any competent tribunal with equity power."

Venue of Act.—In Williamson v. American Bank. (C. C. A. 4th Cir. 1902) 115 Fed. 793, 52 C. C. A. 1, affirming a decree in (C. C. S. C. 1901) 109 Fed. 36 dismissing a bill on demurrer, the court said: "Whatever may have been the proper course of procedure to enforce the liability of stockholders to creditors of a national banking association in process of voluntary liquidation prior to the passage of the Act of June 30, 1876, we are clearly of the opinion that since its passage the remedy provided by that Act is exclusive in such cases, and must be strictly pursued, and that suit must, therefore, be brought in a suit arising of equity in the district in which such association may have been located or established, and not elsewhere. See Pollard v. Bailey, [1874] 20 Wall [520], 527, 22 U. S. (L. ed.) 376; New York Fourth Nat. Bank v. Francklyn, [1897] 120 U. S. 747, 7 S. Ct. 757, 20 U. S. (L. ed.) 825. It is urged by appellants that such a remedy would be ineffectual to give a personal decree against nonresident stockholders, such as the defendants in this case. We will not stop at this time to consider whether or not this is true. It is not necessary in the consideration of this case. Section 5151, creating this statutory liability, provided that the stockholders 'shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association,' and it therefore becomes essential in such a suit that the entire status of the affairs of the bank be investigated, and
a reference had to determine what proportional part of the shareholders' liability will be necessary to be enforced against them, equally and ratably to provide for the payment of the creditors. For this purpose the books of the bank are essential, the bank is a necessary party, and what provision could the Congress have made more wise than that the suit shall be brought in the district where the bank was located or established, and where the books and accounts are to be found? It may be true that some ancillary proceeding must be had to enforce the liability of nonresident stockholders by way of collection; but, before this can be enforced at all, its amounts must be accurately ascertained and determined and this, we hold, can only be done in the suit brought as provided by the Act of June 30, 1876. Kennedy v. Gibson, 476; Casey v. Galli, [1877] 94 U. S. 673, 24 U. S. (L. ed.) 168. Supposing for a moment, suits of this nature were permitted to be brought in the various jurisdictions where nonresident stockholders were found, the question of the necessity and extent of the ratable enforcement of the stockholders' liability, the settlement of the accounts, and the extent of the indebtedness of the bank would have to be determined in each case, and might possibly be determined differently in different suits brought in different jurisdictions, and a multiplicity of suits would be occasioned, involving in each the determination of facts which, in a suit properly brought under section 2 of the Act of June 30, 1876, could and would be determined once for all. In our view of this case, no suit can be brought by and on behalf of the creditors for the enforcement of this statutory liability save in the district where the bank was located or established, and, if any ancillary proceedings should become necessary for the collection from nonresident stockholders of their ratable proportion of the amount necessary to pay the creditors, such proceedings would have to be authorized by the court of original jurisdiction and brought by a receiver or other official appointed by said court, after a settlement of the accounts of the bank, and a determination of the ratable proportion necessary to be collected; and these facts would have to be averred in any suit brought to enforce the same.

No judgment at law was a prerequisite to a creditor's suit in equity to enforce statutory liability on a note by an insolvent bank where one object of the suit was to subject to the satisfaction of the debt certain property conveyed to a trustee as security therefor. Wyman v. Wallace, (1906) 201 U. S. 290, 26 S. Ct. 496, 50 U. S. (L. ed.) 738 (affirming (C. C. A. 8th Cir. 1904) 135 Fed. 286, 68 C. C. A. 40), wherein the court quoting from Case v. Beauregard, (1880) 101 U. S. 688, 25 U. S. (L. ed.) 1004, said: "Whenever a creditor has a trust in his favor or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. Teppan v. Evans, [1840] 11 N. H. 311; Holt v. Bancroft, [1857] 30 Ala. 193."

Exclusiveness of statutory remedy in equity.—In Williamson v. American Bank, (C. C. S. C. 1901) 109 Fed. 36, affirmed (C. C. A. 4th Cir. 1902) 116 Fed. 793, 52 C. C. A. 1, it was held that a trustee to whom a national bank resolving to close up its business and go into voluntary liquidation had made an assignment for the benefit of creditors, could not maintain a bill to enforce the statutory liability of stockholders in said bank, joining as plaintiff a creditor of the bank. The court said: "The statute does not give to the trustee or any other representative of the stockholders of a national bank in voluntary liquidation any authority to enforce this liability. Such trustee is only the agent of the stockholders for the purpose of liquidating the affairs of the bank. The right of the creditors to enforce this liability in proceedings independent of the comptroller being conferred by statute, it can only be exercised in conformity with its provisions." In Williamson v. American Bank, (C. C. A. 4th Cir. 1902) 116 Fed. 793, 52 C. C. A. 1, affirming (C. C. S. C. 1901) 109 Fed. 36, Keller, J., said: "It may well be that, prior to the passage of the Act of June 30, 1876, the courts of equity of the United States would have had jurisdiction to entertain a general creditors' bill in a proper case to enforce the liability of stockholders provided by section 5151, Rev. St., and for which no statutory remedy had been provided, in cases where the bank went into voluntary liquidation, and was found to be without sufficient assets for the discharge of all its debts." In King v. Pomeroy, (C. C. A. 8th Cir. 1903) 121 Fed. 287, 58 O. C. A. 209, it was held that "because there was no adequate remedy to enforce the liability of shareholders of an insolvent national bank in voluntary liquidation under the Act of 1864, and because that liability was a trust fund, or the pledge of a trust fund for the benefit of the creditors of the bank, a court of equity had plenary power to appoint a receiver, and to authorize him to enforce that liability by actions at law"; that the remedy provided by the text sec. 2 of the Act of 1876 "was cumulative, not exclusive, and that the jurisdiction and power remained after as before its passage in the federal courts to appoint receivers of national banks in voluntary liquidation in proper cases, and to em-
power these receivers to enforce by ac-
tions at law the liability of the stock-
holders—disagreeing with the conclu-
sions of the court in Williamson v.
American Bank, (C. C. A. 4th Cir. 1902)
115 Fed. 793, 52 C. C. A. 1, quoted in the
preceding paragraph, that the remedy
provided in the text sec. 2 was exclusive;
that the federal Circuit Court in the dis-
trict in which was located a national bank
which had gone into voluntary liquidation
under R. S. sec. 5220, supra, p. 843,
and was insolvent had power to appoint a
receiver of said bank in a suit against
it by a creditor, citizen of another state,
and that such receiver had plenary
power under its order to institute and
maintain the action at law in the instant
case to compel the defendant stockholder
to pay the amount of the assessment
which the court had made upon his
stock; that the statute of limitations
did not begin to run against such
receiver's action until the date fixed by
the court for the payment of the assess-
ment made against the defendant; and
that no action of the comptroller was
requisite to empower the court's receiver
to enforce the liability of the sharehold-
ers, the court having plenary power to
ascertain the necessity of enforcing the
liability and to direct its receiver to col-
cect it. In Irons v. Manufacturers' Nat.
Bank, (C. C. Ill. 1883) 17 Fed. 308.
Blodgett, J., said he "never doubted that
even if the Act of June, 1876, had not
been passed, the creditors of a national
bank could have reached the stockhold-
ers, when necessary, through the aid of
a court of equity, adapting itself by its
inflexible methods to all the necessities of
the case," and that "the Act of June 30,
1876, did not create any new liability,
nor did it even provide for enforcing such
liability against stockholders under cir-
cumstances where it could not have been
enforced before that act was passed." The

Cumulative remedy.—The bringing of
a suit by a creditor under the text sec.
2 does not bar a prior suit by the same
creditor against the bank itself to re-
cover on his claim. Central Nat. Bank
104 U. S. 54, 26 U. S. (L. ed.) 693, where
the court held that "for the purpose of
being sued, in order judicially to deter-
mine the question of disputed liability,
it continues to exist, and the remedy
against the shareholders is added as a
means of execution, in case the corporate
assets have in the meantime been other-
wise applied or shown to have been in-
sufficient"; and that "it is a cumula-
tive remedy and against other persons,
and cannot be considered as an objec-
tion to the rendition of the present de-
cree against the bank.

Pendency of a creditor's suit under this
statute abated a later action at law in
the same court against one of the same
stockholders, brought by a receiver ap-
pointed by the comptroller of the cur-
rency, the court applying the general
rules and that the defendant shall not be vexed by
two suits in the same jurisdiction for
the same cause of action. Harvey v.
Lord, (1882) 11 Biss. (U. S.) 144, (N.
D. Ill. 1882) 10 Fed. 236.

Comprehensive relief obtainable in
same suit.—A bill by a creditor against
a stockholder, brought under the text
sec. 2 was not multifarious by seek-
ing on behalf of himself and all other
creditors of the insolvent bank, the
winding up of its affairs, the determina-
tion of the amount due on his claim, the
ascertainment of all the creditors and
the amounts of their claims, the sub-
jection of the remaining assets to the
payment of those claims, and the en-
forcement of the liability of the stock-
holders Wyman v. Wallace, (1886) 101
U. S. 230, 26 S. Ct. 7, 50 U. S. (L.
ed.) 738 (affirming (C. C. A. 8th Cir.
1904) 135 Fed. 286, 68 C. C. A. 40) and
citing Richmond v. Irons, (1887) 121
U. S. 27, 7 S. Ct. 788, 30 U. S. (L.
ed.) 864, where the court said: "The
subjects of applying all the assets of
the bank and enforcing the liability of
the stockholders, however otherwise
distinct, are by the statute made con-
nected parts of the whole series of transac-
tions which constitute the liquidation of
the affairs of the bank."

Procedings under the bill.—In Rich-
mond v. Irons, (1887) 121 U. S. 27, 7
S. Ct. 788, 30 U. S. (L. ed.) 864, a
 creditor's bill under the text section, the
court said: "When any creditor ap-
ppeared during the progress of the cause
to set up and establish his claim, it was
necessary for him to prove that at the
time of filing the bill he was a creditor
of the bank; any defense which existed
at that time to his claims, either to
diminish or to nullify it, must be inter-
posed either before the master, or on the
hearing to the court. . . . The author-
ties abundantly sustain the proposition
also that a creditor who comes in under
and takes the benefit of a decree is en-
titled to contest the validity of the claim
of any other creditor, except that of the
plaintiff whose claim is the foundation
of the decree . . . . Each creditor be-
comes a party to the suit, it is true,
only when he appears to prove his claim.
His right to proceed depends upon the
fact of his being the owner of a valid
claim against the corporation; but if he
proves such a claim, then he does prove
himself to be a creditor, and as such is
entitled to come in under the decree, and
has a right to be considered as a party
containing from the beginning to the
relation to the time of filing the bill."

Defences.—In a suit in equity by a
creditor to enforce the statutory liability
of stockholders it is no defense for a
particular stockholder that he voted against the resolutions looking to a voluntary liquidation. Poppleton v. Wallace, (1906) 201 U. S. 345, 26 S. Ct. 498, 60 U. S. (L. ed.) 743, (affirming (C. C. A. 8th Cir. 1904) 135 Fed. 286, 68 C. C. A. 40), where the court said: "There is therefore, nothing of a personal estoppel to be adjudged against him, but we do not think that that is material. The requisite amount of stock was voted in favor of what was done in the way of voluntary liquidation, and he, as a stockholder, is bound by that, although personally he disented from the action."

In a suit against a bank under the text sec. 2, where a judgment creditor's judgment against the bank was rendered after the bank went into liquidation and the validity of the claim was affected by preceding transactions which also took place after the bank went into liquidation and were unknown to the stockholders, such judgment was not binding on the stockholders in the sense that it could not be examined; they were entitled to go behind the record of the judgment and raise the question of the bank's liabilities. Schrader v. Manufacturers' Nat. Bank, (1890) 133 U. S. 67, 10 S. Ct. 238, 33 U. S. (L. ed.) 564, affirmaing (N. D. Ill. 1888) 36 Fed. 843.

Limitations.—In Richmond v. Irons, (1887) 121 U. S. 27, 7 S. Ct. 785, 30 U. S. (L. ed.) 884, where a creditor's bill under this statute was filed in the federal Circuit Court in Illinois, it was held that the state statute of limitations ceased to run against the creditors entitled to the benefit of the decree at the date of filing the bill. But, said the court, "Whether or not the statute of limitations of Illinois would in any case operate to bar such a suit as the present, being a bill in equity in the circuit court of the United States, founded upon an obligation arising under an act of Congress, is a question which we are, therefore, not called upon to consider or decide."

Costs.—"Defendant stockholders all stand in the condition of any ordinary defendants as common or joint defendants, and the costs must be borne by them as if they were codefendants in any ordinary suit." Irons v. Manufacturers' Nat. Bank, (N. D. Ill. 1888) 36 Fed. 843, decree affirmed (1890) 133 U. S. 67, 10 S. Ct. 238, 33 U. S. (L. ed.) 564.

SEC. 3. [Winding up affairs — meeting of shareholders — election of agent — distribution of assets.] That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of the Revised Statutes of the United States, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller of the Currency shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims, and all expenses of the receivership and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto. At such meeting the shareholders shall determine whether the receiver shall be continued and shall wind up the affairs of such association, or whether an agent shall be elected for that purpose, and in so determining the said shareholders shall vote by ballot, in person or by proxy, each share of stock entitling the holder to one vote, and the majority of the stock in value and number of shares shall be necessary to determine whether the said receiver shall be continued, or whether an agent shall be elected. In case such majority shall determine that the said receiver shall be continued, the said receiver shall thereupon proceed with the execution of his trust, and shall sell, dispose of, or otherwise collect the assets of the said association, and shall possess all the powers and
authority, and be subject to all the duties and liabilities originally con-
ferred or imposed upon him by his appointment as such receiver, so far
as the same remain applicable. In case the said meeting shall, by the vote
of a majority of the stock in value and number of shares, determine that an
agent shall be elected, the said meeting shall thereupon proceed to elect
an agent, voting by ballot, in person or by proxy, each share of stock
entitling the holder to one vote, and the person who shall receive votes
representing at least a majority of stock in value and number shall be
declared the agent for the purposes hereinafter provided; and whenever
any of the shareholders of the association shall, after the election of such
agent, have executed and filed a bond to the satisfaction of the Comptroller
of the Currency, conditioned for the payment and discharge in full of each
and every claim that may thereafter be proved and allowed by and before
a competent court, and for the faithful performance of all and singular
the duties of such trust, the Comptroller and the receiver shall thereupon
transfer and deliver to such agent all the undivided or uncollected or other
assets of such association then remaining in the hands or subject to the
order and control of said Comptroller and said receiver, or either of them;
and for this purpose said Comptroller and said receiver are hereby severally
empowered and directed to execute any deed, assignment, transfer, or other
instrument in writing that may be necessary and proper; and upon the
execution and delivery of such instrument to the said agent the said Com-
ptroller and the said receiver shall by virtue of this Act be discharged from
any and all liabilities to such association and to each and all the creditors
and shareholders thereof. Upon receiving such deed, assignment, transfer,
or other instrument the person elected such agent shall hold, control, and
dispose of the assets and property of such association which he may receive
under the terms hereof for the benefit of the shareholders of such associa-
tion, and he may in his own name, or in the name of such association, sue
and be sued and do all other lawful acts and things necessary to finally
settle and distribute the assets and property in his hands, and may sell, com-
promise, or compound the debts due to such association, with the consent
and approval of the circuit or district court of the United States for the
district where the business of such association was carried on, and shall
at the conclusion of his trust render to such district or circuit court a full
account of all his proceedings, receipts, and expenditures as such agent
which court shall, upon due notice, settle and adjust such accounts and
discharge said agent and the sureties upon said bond. And in case any
such agent so elected shall refuse to serve, or die, resign, or be removed
any shareholder may call a meeting of the shareholders of such association
in the town, city, or village where the business of the said association was
carried on, by giving notice thereof for thirty days in a newspaper pub-
lished in said town, city, or village, or if no newspaper is there published
in the newspaper published nearest thereto, at which meeting the share-
holders shall elect an agent, voting by ballot, in person or by proxy, each
share of stock entitling the holder to one vote, and when such agent shall
have received votes representing at least a majority of the stock in value
and number of shares, and shall have executed a bond to the shareholders
conditioned for the faithful performance of his duties, in the penalty fixed
by the shareholders at said meeting, with two sureties, to be approved by a
judge of a court of record, and file said bond in the office of the clerk of
a court of record in the county where the business of said association was carried on, he shall have all the rights, powers, and duties of the agent first elected as hereinbefore provided. At any meeting held as hereinbefore provided administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians of minors and trustees of other persons may so act and sign for their ward or wards or custodiate trust. The proceeds of the assets or property of any such association which may be undistributed at the time of such meeting or may be subsequently received shall be distributed as follows: First. To pay the expenses of the execution of the trust to the date of such payment. Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent. [19 Stat. L. 65, as amended by 27 Stat. L. 345, 29 Stat. L. 600.]

This section originally read as follows: "Sec. 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty two hundred and thirty-four and other sections of said statutes, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them and for this purpose, said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and the said receiver shall, by virtue of this act, be discharged and released from any and all liabilities to such associations, and to each and all of the creditors and shareholders thereof; and such agent is hereby authorized to sell, compromise, or compound the debts due to such association upon the order of a competent court of record or of the United States circuit court for the district where the business of the association was carried on. Such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares may direct, distributing such assets and property among such shareholders in proportion to the shares held by each; and he may, in his own name or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians may so act and sign for their ward or wards." [19 Stat. L. 63.]
It was first amended by an Act of Aug. 3, 1892, ch. 390, 27 Stat. L. 345, and again to read as given in the text by an Act of March 2, 1897, ch. 354, 29 Stat. L. 600, the only change in the latter amendment consisting in the provision for the selection of a successor to the agent first named. In case he shall refuse to serve, die, resign, or be removed, and comprising all provisions after the words "the sureties upon said bond" down to and including the word "any," above quoted for "such" as appearing in the prior amendment.

R. S. secs. 5234, 5236 mentioned in the text are given supra, pp. 850, 865.

By Judicial Code §§ 289–291, in JUDICIARY, vol. 5, pp. 1082, 1083, Circuit Courts were abolished and their powers and duties conferred on the District Courts.

Effect of appointment of agent.—The substitution of an agent for a receiver appointed by the comptroller does not oust the jurisdiction of the state court in a prior suit brought by a stockholder to recover for losses caused by the mismanagement of the officers of the bank, though such agent may intervene in a suit and receive the fruits of the litigation to be administered, subject to the final approval of the federal court. In re Chetwood, (1897) 163 U. S. 443, 17 S. Ct. 385, 41 U. S. (L. ed.) 782.

Powers of agent.—The agent to wind up the affairs of the bank has practically the same powers and duties as the receiver. He may sue and be sued on the name of the bank and may intervene in suits against the bank and suits by and against him are subject to the same rules as suits by and against the receiver. Chemical Nat. Bank r. Hartford Deposit Co., (1896) 161 U. S. 1, 16 S. Ct. 439, 40 U. S. (L. ed.) 595, affirming (1895) 156 Ill. 522, 41 N. E. 225; Snohomish County r. Puget Sound Nat. Bank, (C. C. Wash. 1897) 81 Fed. 518; Chetwood r. California Nat. Bank, (1898) 113 Cal. 649, 45 Pac. 854.

Liquidiating agents, see also notes to R. S. sec. 2220, supra, p. 843.

Suits by or against agent—Federal jurisdiction.—In McConvile v. Gilmour, (S. D. Ohio 1888) 36 Fed. 277, 1 L. R. A. 498, McConvile, who commenced the suit as the "receiver" of a national bank, moved to substitute himself as the "agent" of said bank, appointed under the provisions of the federal statute, as the party plaintiff entitled to continue the suit in the latter capacity against the defendants. The court premised that its jurisdiction of cases brought by the receiver of a national bank, without regard to diversity of citizenship or the amount involved, was established in Armstrong v. Trautman, (S. D. Ohio 1888) 36 Fed. 275 (see also cases cited supra, p. 850), and then proceeded as follows: "I do not see why we have not the same jurisdiction of suits brought by the 'agents' appointed under the provisions of the national banking act to take the place of the receiver under certain circumstances named in the act .... This 'agent,' is, or was, an officer of the United States in every sense that the 'receiver' is, albeit he is somewhat differently appointed, and his duties are precisely the same, and although he takes up the business at a somewhat later stage of the winding-up proceedings; and, so far as I can see, every argument used in the reasoning of these cases to support the jurisdiction applies with equal force to the 'agent' as to the 'receiver.' Indeed, the agent is only the 'receiver' under another name. By the very terms of the act itself, defining the powers of the 'agent,' he may apply to this court for authority to sell, compromise, or compound the debts, and may be sued in his own name or that of the association, and the general scope of his duties and powers as those defined are those of the receiver and of all receivers winding up an insolvent corporation. The argument against the jurisdiction proceeds on the notion that after the depositors and creditors are paid, the United States has no further interest in the matter, and that the whole administration, being turned over to the shareholders through this 'agent,' the concern relapses into the condition existing before insolvency, and that the jurisdiction of the federal courts is thereby ousted. But this would be an unnecessary and possibly disastrous separation and division of the jurisdiction over an insolvency proceeding that should not be permitted upon any mere implication or inference, and only submitted to upon an express command of the statute. It would be a reversal of the general rule, which concentrates the jurisdiction over insolvency proceedings rather than disperses it. Moreover, the United States has no more interest in the matter before than after the appointment of this 'agent.' The legislation contemplates a more independent and exclusive control by the United States of the assets before than after this 'agent' is appointed, in the interest of creditors and depositors, no doubt, and for obvious reasons. It also contemplates a somewhat exclusive control of the shareholders of the remaining assets of the insolvent assets, also for obvious reasons. Nevertheless the interest of the United States in the matter is precisely the same, and, in both situations of the assets, is based solely on grounds of public policy equally applicable to either. Having established this national banking system upon the foundation of federal control in certain cases, among which are these useful and necessary provisions for winding up a concern in the event of insolvency, it induces...
depositors to place their money in them, creditors to deal with and trust them, the people at large to accept their circulating notes as money, and shareholders to invest in the shares of stock. Now, the latter are as much entitled to the protection arising out of the public policy manifested by the Acts of Congress for the federal scrutiny and control in their dealings inter esse, in case of insolvency, as creditors are entitled to that protection, and for the same reason precisely. The method of dealing with the assets in one case or the other may be vastly different, but this cannot affect the question of jurisdiction and the reason for it. The conclusion of the argument is in itself a non sequitur, and it does not follow because the Act of Congress grants the shareholders the privilege of controlling the further proceedings in insolvency after the debts are paid, that the federal jurisdiction does or should cease, but on the contrary the reason for continuing it is the same.

"The jurisdiction being thus established for the 'agent' who is the successor of the 'receiver' there can be no doubt about the right to substitute him as a new party to a suit commenced by the 'receiver' during his existence as such. It is the common right and practice of substituting as a new party to the record any successor in interest and representation whenever a change occurs by death, or otherwise. Each of these administrative officials—the 'receiver' and the 'agent'—represent the bank in its corporate capacity, and neither of them is more or less than the other such a representative. The 'agent' is in no sense a purchaser from the 'receiver,' and occupies no relation analogous to that of one who takes from another by purchase, but is only a successor in interest and office to the same right or title as that held by the 'receiver' and so falls within the general rule of substitution of one such representative for another whenever such shall be a change. Indeed, here there is scarcely any necessity for a substitution, except for the bare purpose of technical conformity, since the 'receiver' and the 'agent' are one and the same person, and either may, under the privileges of the statute, sue in his own name as 'receiver' or 'agent.'"

In North Dakota Guarantee Co. v. Hanway, (C. C. A. 8th Cir. 1900) 104 Fed. 369, 44 C. C. A. 312, an action at law for damages in the sum of $4,000 for the wrongful sale of a pledge, was brought in a state court against the defendant in his official capacity of shareholders' agent of a national bank, and prayed judgment against him as such agent, and not against him personally. Upon motion of the defendant the case was removed to the federal court. It held that the federal court had jurisdiction on the ground of a federal question involved. The court said: "The purpose of this suit was to control the official conduct of this shareholders' agent, and to compel him to pay to the plaintiff out of the trust fund in his hands $4,000, which the agent claimed he was required under the laws of the United States, from which he derived his appointment, to distribute to the shareholders. Since his conduct as agent must be regulated and tried by these laws, this action and every action by or against a shareholders' agent chosen under this Act of Congress invoke the consideration of, and arise under, the laws of the United States." The court also held that there was federal jurisdiction on another ground, namely: "This is clearly a case for winding up the affairs of such a bank. It is a suit to take $4,000 from the fund realized from the collection and sale of the assets of the National Bank of North Dakota in the process of winding up its affairs under the Act of Congress, and to pay it to the plaintiff instead of permitting it to be distributed to the shareholders."

Federal jurisdiction of "cases for winding up the affairs of any such bank" is given by Judicial Code, sec. 24, par. 15, in JUDICIARY, vol. 4, pp. 840, 1054. It was further held that the action was one against an officer of the United States, of which suits federal jurisdiction is given by Judicial Code, sec. 24, par. 1, in JUDICIARY, vol. 4, pp. 839, 842, the court saying: "It is now well settled that a receiver of a national bank is the 'agent and officer of the United States,' and that the federal courts have jurisdiction of actions by and against him as such an officer. . . Now, a receiver is not an officer of the United States because the nation has any pecuniary or other interest in his acts or omissions, but simply because an Act of Congress authorizes his appointment, prescribes his duties, and designates the appointing power. By the same mark, a shareholders' agent is an agent and officer of the United States. The same Act creates his office, authorizes his appointment, designates the appointing power, and imposes upon him the same duties. While at a certain stage in the proceedings for winding up the affairs of a national bank the power designated to appoint the agent may exceed its option to continue the receiver or to choose the agent, when that option has been exercised, and the agent has been appointed, he discharges the same duties as the receiver, and becomes the 'agent and officer of the United States' in every sense in which the receiver is such an agent and officer. McConville v. Gilmore, (S. D. Ohio 1893) 36 Fed. 277; 1 L. R. A. 498; Idaho County v. Puget Sound Nat. Bank, (C. C. Wash. 1897) 81 Fed. 518; Speckart v. German Nat. Bank, (C. C. Ky. 1899) 85
Fed. 12; Brown v. Smith, (C. C. Vt. 1898) 98 Fed. 565. The result is that the federal court have jurisdiction of an action by or against the agent of the shareholders of a national bank... in the absence of diverse citizenship, and such a suit may be removed from a state to a federal court.

The agent has no greater powers than the receiver and consequently cannot maintain an action for an uncollected asset of the bank after all the creditors, other than stockholders, have been paid in full, and the expenses of the receiver-ship and redemption of the circulating notes of the bank have been fully provided for. He cannot under these circumstances, maintain an action to enforce the individual liability of a stockholder.


Suit by stockholders against agent.—In Ingold v. Gilmore, (1907) 118 App. Div. 727, 103 N. Y. S. 373, the complaint alleged that the Equitable National Bank, a banking corporation organized under the National Banking Act, went into voluntary liquidation, and that one Ridgely was appointed receiver by the comptroller of the currency; that subsequently the defendant was elected by the stockholders as their agent to continue the liquidation and wind up the affairs of the bank, and that all of the depositors of said bank had been paid in full, and the defendant had in his hands a large amount of money and assets belonging to said bank undistributed to which the plaintiff and the other stockholders were entitled. The relief asked was that the defendant account as such stockholders' agent, and that a distribution of the property of the bank be made among the stockholders. Affirming a judgment overruling a demurrer to this complaint on the ground that the court had no jurisdiction of the defendant, or of the subject-matter of the action, the court said: "This agent, elected by the stockholders, occupied an entirely different position from a receiver appointed by either the United States court or the comptroller of the currency. He is elected by the stockholders, and receives the assets of the bank in trust for them. He may sue and be sued without leave of any court, and may do all other lawful acts and things necessary to finally settle the affairs of the association and distribute the assets and property in his hands among the stockholders. The Act of Congress provides how he may be appointed, but, having once been appointed, he becomes the agent of the stockholders to liquidate the affairs of the association for their benefit. But when Congress allowed the stockholders of the bank to liquidate its affairs by appointing an agent for that purpose, and by such appointment taking out of the hands of the officials of the United States the control of the unclaimed assets of the bank and intrusting such control to the agent appointed by the stockholders, it would appear that the stockholders had the right to enforce the performance of the trust by their agent in such courts as would have jurisdiction for that purpose over any trustee or agent. There is a clear distinction between an action brought to require the agent to distribute the assets and the approval of his accounts after the assets are all collected and distributed. One has relation to the discharge of the agent from his liability as agent and the release of his sureties after his duties are completed, and the other is to require the agent to perform his trust and to make the distribution. A court of equity has general jurisdiction over trustees and agents to compel them to account; and whatever the source of the agency, it assumes jurisdiction over the agent or trustee to compel him to perform his trust. I can find nothing in the Act which takes this agent out of the general jurisdiction of a court of equity. The statute expressly provides that the agent may sue and be sued, and such suits are not limited to actions brought in the federal courts. I suppose there could be no doubt that, if this agent had in his possession property belonging to a third party which he had received by transfer from the receiver or comptroller of the currency, the owner of the property could maintain an action against the agent to recover the possession of it in a state court, as well as the federal courts. The agent has in his possession all the property and assets of this association which belonged to its shareholders. An accounting is necessary so as to ascertain the amount that each shareholder is entitled to receive; and any court of equity having jurisdiction over the person of the agent has power to compel him to execute the trust and supervise its execution. It may well be that after the trust is completed under the authority of the judgment of a competent court of equity the agent will be required to file with the federal court an account of his proceedings, but that is not at all inconsistent with the jurisdiction of a court of equity to compel him to perform his duties and execute the trust. The fact that the plaintiff asks more relief than he would be entitled to is not a ground of demurrer. The court has jurisdiction to grant any relief that may be necessary to enforce the creation of the trust. In re Chetwood, (1897) 165 U. S. 443, 445, 17 S. Ct. 385, 41 U. S. (L. ed.) 782, is in line with this conclusion. It was there held that a receiver appointed by the comptroller of the currency was an
officer of any court, but an agent and
officer of the United States, and that a
state court had jurisdiction against a re-
ceiver of a national bank appointed by
the comptroller of the currency in an ac-
tion brought by a stockholder on behalf
of the bank to enforce obligations due to
the bank and to which the receiver was
a party; that the substitution of an
agent for a receiver did not oust the
jurisdiction of the state courts; that he
was no more an officer of the circuit
court in the first instance than a receiver
was. . . . The same rule was followed
by the Circuit Court of Appeals in
North Dakota Guarantee Co. v. Hanway,
[C. C. A. 8th Cir. 1900] 104 Fed. 369, 44
C. C. A. 312. As the jurisdiction of a
court of equity attaches to all trustees,
the court has power to compel any trus-
tee or agent to account. The Supreme
Court of the state has, therefore, juris-
diction both of the subject of the action
and the person of the defendant.

SUIT by creditor against agent.—Where
a shareholder's agent has been appointed
to take charge of the assets of a national
bank under this section, providing that
such agent may sue and be sued in his
own name or in the name of the associa-
tion, suit is properly instituted against
him by an alleged creditor of the bank
to recover on a guaranty collateral to a
sale to complainant of certain stock
owned by the bank. Barron v. McKinnon,
(C. C. Mass. 1910) 179 Fed. 759, where
the court said: "It must be presumed
that the contract obligations of the bank
have already been discharged, and there-
fore there appears no reason why the
plaintiff's claim, if he can establish it,
should not be satisfied as soon as
possible.

Resignation of the agent, and the sub-
stitution of a receiver in his place, pend-
ing an action properly brought against
the agent in his official capacity, does not
abate or destroy such suit. North
Dakota Guarantee Co. v. Hanway, (C. C.
A. 8th Cir. 1900) 104 Fed. 369, 44 C. C.
A. 312.

An act additional to an act entitled "An act to provide a national cur-
currency secured by a pledge of United States bonds, and to provide for
the circulation and redemption thereof," passed June third, eighteen
hundred and sixty-four.

[Act of March 29, 1886, ch. 28, 24 Stat. L. 8.]

[SEC. 1.] [Receiver may purchase property in which bank has equities
by consent of Comptroller.] That whenever the receiver of any national
bank duly appointed by the Comptroller of the Currency, and who shall
have duly qualified and entered upon the discharge of his trust, shall find
it in his opinion necessary, in order to fully protect and benefit his said
trust, to the extent of any and all equities that such trust may have in any
property, real or personal, by reason of any bond, mortgage, assignment,
or other proper legal claim attaching thereto, and which said property is
to be sold under any execution, decree of foreclosure, or proper order of any
court of jurisdiction, he may certify the facts in the case, together with
his opinion as to the value of the property to be sold, and the value of the
equity his said trust may have in the same, to the Comptroller of the Curr-
ency, together with a request for the right and authority to use and employ
so much of the money of said trust as may be necessary to purchase such
property at such sale. [24 Stat. L. 8.]

See the notes to R. S. sec. 5234, supra, p. 850.

SEC. 2. [Approval of Comptroller and Secretary of Treasury required.] That such request, if approved by the Comptroller of the Currency, shall
be, together with the certificate of facts in the case, and his recommenda-
tion as to the amount of money which, in his judgment, should be so used
and employed, submitted to the Secretary of the Treasury, and if the same
shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States. [24 Stat. L. 8.]

Sec. 3. [Payments, how made.] That whenever any such request shall be allowed as hereinafore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made: Provided, however, That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order. [24 Stat. L. 8.]

Sec. 22. [Loans, etc., to bank examiners — penalty — receipt of fees by directors — disclosures by examiners — penalty.] No member bank or any officer, director, or employee thereof shall hereafter make any loan or grant any gratuity to any bank examiner. Any bank officer, director, or employee violating this provision shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than $5,000, or both; and may be fined a further sum equal to the money so loaned or gratuity given. Any examiner accepting a loan or gratuity from any bank examined by him or from an officer, director, or employee thereof shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than $5,000, or both; and may be fined a further sum equal to the money so loaned or gratuity given; and shall forever thereafter be disqualified from holding office as a national-bank examiner. No national-bank examiner shall perform any other service for compensation while holding such office for any bank or officer, director, or employee thereof.

Other than the usual salary or director’s fee paid to any officer, director, or employee of a member bank and other than a reasonable fee paid by said bank to such officer, director, or employee for services rendered to such bank, no officer, director, employee, or attorney of a member bank shall be a beneficiary of or receive, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of the bank. No examiner, public or private, shall disclose the names of borrowers or the collateral for loans of a member bank to other than the proper officers of such bank without first having obtained the express permission in writing from the Comptroller of the Currency, or from the board of directors of such bank, except when ordered to do so by a court of competent jurisdiction, or by direction of the Congress of the United States, or of either House thereof, or any committee of Congress or of either House duly authorized. Any person violating any provision of this section shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding one year, or both.
Exempt as provided in existing laws, this provision shall not take effect until sixty days after the passage of this Act. [38 Stat. L. 272.]

This was from the Federal Reserve Act of Dec. 23, 1913, ch. 6. See the notes to section 1 of this Act, supra, p. 722.


VI. ACTIONS BY AND AGAINST NATIONAL BANKS

Sec. 380. [Conduct of suits involving national banks.] All suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.

[R. S.]


This is from title 8 of the Revised Statutes, "Department of Justice." See Justice Department, ante, p. 241.

The intent and effect of the statute are to impose upon the district attorneys the duty of conducting suits and proceedings which may be necessary to carry into full effect the provisions of the Act, whether such suits are brought in the name of the United States or in that of the comptroller of the currency, or in the name of or by the receiver of a banking corporation, and in whatever courts such suits may be prosecuted. Van Antwerp v. Hulburd, (1870) 7 Blatchf. 426, 28 Fed. Cas. No. 16,526, (1871) 8 Blatchf. 282, 28 Fed. Cas. No. 16,927.

Suits and proceedings under this Act, where the United States or its officers are parties, whether commenced before or after the appointment of a receiver, are to be conducted by the district attorney. Bethel Bank v. Palisquique Bank, (1871) 14 Wall. 383, 20 U. S. (L. ed.) 840.


Suits and proceedings instituted by a receiver of a national bank to enforce the payment of a debt fall within the provisions of this section, whether such suits may be maintained in the state courts or in the federal courts. District Attorneys, (1892) 20 Op. Atty.-Gen. 476.

Prosecution, not defense.—In general, the language employed, that such suits and proceedings "shall be conducted" imports prosecution, either civil or criminal, and not defense. Van Antwerp v. Hulburd, (1870) 7 Blatchf. 426, 28 Fed. Cas. No. 16,826.

Jurisdiction not affected.—This section neither expressly nor by implication affects the jurisdiction of any court. It assumes that suits may be brought and proceedings instituted which have their foundation in the provisions of the Act, and that the United States or its officers or agents may be parties to such suit, and declares, and only declares, that such suits and proceedings shall be conducted by the district attorney. Van Antwerp v. Hulburd, (1870) 7 Blatchf. 426, 28 Fed. Cas. No. 16,826.

This statute is merely directory, and the fact that special counsel is employed is no defense to a suit by a receiver. Kennedy v. Gibson, (1899) 8 Wall. 405, 19 U. S. (L. ed.) 476.

And an action to recover an assessment levied on national bank stock may be brought by the receiver's special attorney. McCormick v. Smith, (1913) 23 Idaho 487, 130 Pac. 999.


A district attorney conducting an action for the receiver of a national bank is not entitled to compensation therefor other than the fees authorized to be taxed and allowed, and such additional compensation as is expressly allowed by law specifically on account of services named.

In the case of District Attorneys, (1892) 20 Op. Atty-Gen. 478, it was stated that the amount of fees allowed a district attorney for services rendered under this section is a matter to be adjusted by the comptroller under the advice of the solicitor of the treasury.

With regard to fees under this section, the attorney-general expressed the opinion in the case of National Banking Ass'n, (1890) 10 Op. Atty-Gen. 633, that the fees of the district attorney should depend upon the circumstances in each case.

Sec. 5198. [Locality of actions.] • • • That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases. [R. S.]

The above provision was added to the section as originally enacted by Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 320. See the complete section given supra, p. 747.

See the following paragraph of the text and the notes thereto.

Sec. 4. [Jurisdiction of suits.] • • • That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking association may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed. [22 Stat. L. 163.]

This was a proviso of section 4 of an Act of July 12, 1882, ch. 290. The first part of this section is given supra, p. 718.

Later provisions on the same subject are set forth in the first paragraph of the annotation here following.

Jurisdiction and venue.—Section 4 of the Judiciary Act of 1887-1888 (Act of March 3, 1887, ch. 373, § 4, 24 Stat. L. 554, as corrected by Act of Aug. 13, 1888, ch. 866, 25 Stat. L. 436) provided as follows: "That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." In Levitan v. Houghton Nat. Bank, (1913) 174 Mich. 506, 140 N. W. 1019, a suit in chancery brought against the defendant bank in the state circuit court for the county in which the plaintiff resided, although the bank was located in another county, the state statute providing that "every suit in chancery shall be commenced in the circuit court for the county in which the property in dispute is situated, if the subject matter is local, and if it is not local, in the county where one of the parties in interest resides, if either is a resident of the state." It was held that the text, sec. 4 of the Act of 1882 was not repealed by the provision above quoted in sec. 4 of the Judiciary Act of 1887-1888 and that the suit was properly brought in the court of the plaintiff's residence just as if the defendant bank were a state bank located in the same county
as the defendant, the court saying:
"The language of the Act [of 1882] clearly indicates its purpose to place state and national banks similarly located in the same position as regards jurisdiction and locality for suits against them. In the absence of words of appeal in the Act of [1887-1888 above quoted] we do not think it should be said that there is a repeal by implication, but that each section of the statute was passed to take care of a contingency that was not covered by the other sections." The court also held that the text sec. 4 was not limited to jurisdiction of federal courts. The foregoing decision was controlled by laws in force prior to the enactment of the Judicial Code, which took effect Jan. 1, 1912, which is nowhere cited in the opinion. Judicial Code sec. 24, par. 16, in JUDICIARY, vol. 4, pp. 840, 1054, provides that the United States district courts shall have original jurisdiction as follows: "Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, and cases for winding up the affairs of any such bank; and of all suits brought by any banking association established in the district for which the court is held, under the provisions of title 'National Banks,' Revised Statutes, to enjoin the control of the currency, or any receiver acting under his direction, as provided by said title. And all banking associations established under the laws of the United States shall, for the purpose of all other actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the state in which they are respectively located." Section 4 of the Judiciary Act of 1887-1888, above quoted in this paragraph was expressly repealed by Judicial Code, sec. 297, in JUDICIARY, vol. 5, p. 1086, which did not specifically mention the text sec. 4 of the Act of 1882, but concluded as follows: "Also all other Acts and parts of Acts, in so far as they are embraced within and superseded by this Act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this Act had not been passed." As having some tendency to support the ruling in the Michigan case above cited that the provision in the text section 4, of the Act of 1882, is still in force as to the venue of suits against national banks, it may be observed that the provision in the concluding paragraph of section 6 of the Circuit Court of Appeals Act of March 3, 1891, ch. 517, set forth in note to Judicial Code, § 238, in JUDICIARY, vol. 5, at p. 794, that "in all cases not of the kind in which the statute, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs," was re-enacted as section 241 of Judicial Code, in JUDICIARY, vol. 5, p. 877, but the next sentence in the same paragraph of said section 6 of the Circuit Court of Appeals Act providing that "no such appeal shall be taken nor writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reversed," unquestionably remained in force despite the last paragraph of the repealing section 297 of the Judicial Code, above quoted, and is set forth in title JUDICIARY date, this volume, p. 157. And Mr. Justice Van Devanter has said: "The Code does not purport to embody all the law upon the subjects to which it relates." Street v. Atlas Mfg. Co., (1915) 231 U. S. 348, 34 S. Ct. 73, 58 U. S. (L. ed.) 262, holding that a provision limiting the appellate jurisdiction of the Supreme Court in an unpassed pre-existing statute remained in force and was not superseded by the provisions in Judicial Code, § 128, in JUDICIARY, vol. 5, p. 607.


For further consideration of the subject of jurisdiction see the notes to Judicial Code, sec. 24, par. 16, in JUDICIARY, vol. 4, p. 1064.

Construing the Judicial Code provision quoted in the preceding paragraph, in connection with the preceding legislation also there quoted, it was held that although the provision in section 4 of the Act of 1887-1888 that "in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state," was omitted in the Judicial Code provision, "in the absence of a federal controversy concerning the interpretation of some provision of the national bank act raising what might be considered by analogy a federal question in the sense of § 709, Rev. Stat. (Judicial Code, sec. 237, in JUDICIARY, vol. 5, p. 723), a mere assertion of liability on the part of directors for wrongs for which they might be responsible at common law afforded no basis for jurisdiction" of the federal district court of a suit in equity by a stockholder in behalf of himself and all other stockholders against a national bank and its directors and officers the individual defendant as well as the plaintiff being citizens of the state in which the bank was located and in which the suit was brought. Herrmann v. Edwards,
(1915) 238 U. S. 107, 35 S. Ct. 839, 59 U. S. (L. ed.) 1224, (holding that on this point the court was foreclosed by the case of Whitemore v. Amoskeag Nat. Bank, (1890) 134 U. S. 527, 10 S. Ct. 592, 33 U. S. (L. ed.) 1002) where the court said: "The decisions of this court weigh with the question for decision in this case and their significance as settled by the decisions of this court long prior to the commencement of this suit be at once stated, it will serve to clarify and facilitate the analysis of the issue to be decided" — and the court proceeded to set forth said statutes and decisions.


Concurrent jurisdiction of state courts. — Under this section the state courts have concurrent jurisdiction with the federal courts of all actions by and against national banks. CB & Rattle First Nat. Bank v. Morgan, (1889) 132 U. S. 141, 10 S. Ct. 37, 33 U. S. (L. ed.) 282; Pettillion v. Noble, (1877) 7 Biss. 449, 19 Fed. Cas. No. 11,044; New Orleans Nat. Banking Ass'n v. Adams, (1876) 3 Woods 21, 18 Fed. Cas. No. 10,184; Adams v. Daunis, (1877) 29 La. Ann. 315; Farmers' Nat. Bank v. McCoy, (1914) 42 Okla. 420, 141 Pac. 791, Ann. Cas. 1916D 1243, wherein the court said: "We construe this section to mean that suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

It is well established that the state courts have concurrent jurisdiction in all matters wherein the jurisdiction of the federal courts is not made exclusive by the Constitution or acts of Congress. But jurisdiction is expressly conferred on state courts by the latter part of section 5198 (see supra, p. 928). McCormick v. Smith, (1913) 23 Idaho 457, 130 Pac. 999.


This section expressly confers jurisdiction upon all state courts which, under the state law, already have jurisdiction "in similar cases." The limitation to courts having jurisdiction in similar cases does not mean that only state courts may have jurisdiction, where the state imposes the same penalty; nor does it limit the jurisdiction to cases where the penalty provided by the state law is alone involved. What the United States statutes under the act mean is that any state court that has jurisdiction of actions involving the question of usury shall have jurisdiction of actions arising under them. Ingraham v. Merchants' Nat. Bank, (1911) 153 Ia. 408, 132 N. W. 869.

Where both plaintiff and defendant are citizens of another state the court will not take jurisdiction. Missouri River Tel. Co. v. Sioux City First Nat. Bank (1874) 74 Ill. 217, Thomp. Nat. Bank Ca. 401. Procedure in actions.—The design of Congress was to confer jurisdiction upon the proper state courts and to leave such courts after the action is begun to be governed solely by the state statutes as to their mode of proceeding. Kinser v. Farmers' Nat. Bank, (1882) 58 La. 728. 13 N. W. 59.

Permission or mandatory.—The following may hold that such provisions are permissive, not mandatory, and do not deprive the state courts of jurisdiction of an action by or against a national bank,
located and doing business in another state or in a district or county other than that in which the district is located. The court held that the exemption of the national bank from suit in a state court elsewhere than in the county or city in which the association was located was a personal privilege and waived by appearing and making a defense without claiming the immunity granted by the Act of Congress. The court, per Harlan, J., said: "This exemption of national banking associations from suits in state courts established elsewhere than in the county or city in which such associations were located was, we do not doubt, prescribed for the convenience of those institutions, and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state courts. Bethel Bank v. Pahquioque Bank, (1871) 14 Wall. 383, 20 U. S. (L. ed.) 840; Crocker v. Marine Nat. Bank, (1889) 101 Mass. 240, 3 Am. Rep. 336. But without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and if it had been claimed by the defendant when appearing . . . must have been recognized. . . . Considering the object as well as the words of the statute authorizing suit against a national banking association to be brought in the proper state court of the county where it is located, we are of opinion that its exemption from suits in other courts of the same state was a personal privilege that it could waive, and which in this case the defendant did waive by appearing and making defense without claiming the immunity granted by Congress."

The laws of the United States do not restrict the jurisdiction wherein the national banks created by them can be sued to courts within the states and districts where they are severally located, in a case where the bank sought the forum or venue to bring a suit itself, and in order to sue there voluntarily gave a bond as a condition precedent to bringing that suit, and broke such bond, and is sued for that breach. Continental Nat. Bank v. Folsom, (1887) 78 Ga. 449, 3 S. E. 269.

Foreign corporations.—A national bank located in another state is a corporation created under the laws of another government within the provision of a state law (Code Pro. N. Y., art. 427), giving the court jurisdiction in such cases. Cadle v. Tracy, (1873) 11 Blatchf. 101, 4 Fed. Cas. No. 2,279.

VII. THE COMPTROLLER OF THE CURRENCY

Sec. 324. [Bureau of the Comptroller of the Currency.] There shall be in the Department of the Treasury a bureau charged with the execution
of all laws passed by Congress relating to the issue and regulation of national currency secured by United States bonds and, under the general supervision of the Federal Reserve Board, of all Federal reserve notes, the chief officer of which bureau shall be called the Comptroller of the Currency and shall perform his duties under the general directions of the Secretary of the Treasury. [R. S.]

As originally enacted this section was as follows:
"Sec. 324. There shall be in the Department of the Treasury a Bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds; the chief officer of which Bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general direction of the Secretary of the Treasury."


It was amended to read as given in the text by the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 10, 38 Stat. L. 261. The amendment consisted in the addition of the words: "and, under the general supervision of the Federal Reserve Board, of all Federal Reserve Notes."

Sections 324–333 constitute chapter 9 (entitled "The Comptroller of the Currency") of title 7 (entitled "The Department of the Treasury") of the Revised Statutes.

Powers of the comptroller of currency.—Extensive powers of control and visitation have been given to the comptroller of the currency and his acts within the law are not subject to review by the courts. Capitol Hill First Nat. Bank v. Murray, (C. C. A. 8th Cir. 1914) 212 Fed. 140, 128 C. C. A. 652.

Appointment of receiver.—By this section the comptroller of the currency is the chief officer of a bureau of the treasury department, charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency, secured by United States bonds. This officer, in cases of the insolvency of the association, appoints a receiver, through whose instrumentality the assets are turned into the treasury of the United States; but the comptroller performs this, as well as all other duties, under the general direction of the secretary of the treasury. Frelinghuysen v. Baldwin, (D. C. N. J. 1882) 12 Fed. 395. See also Price v. Abbott, (C. C. Mass. 1883) 17 Fed. 606.

Sec. 325. [Comptroller of the Currency.] The Comptroller of the Currency shall be appointed by the President, on the recommendation of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate; and he shall be entitled to a salary of five thousand dollars a year. [R. S.]


The Federal Reserve Act of Dec. 23, 1913, ch. 6, § 10, supra, p. 826, provided that the Comptroller of the Currency should be an ex officio member of the Federal Reserve Board and should, in addition to his salary as Comptroller, receive the sum of $7,000 annually for his services on said board.

The "Reserve Bank Organization Committee" was to consist of the Secretary of the Treasury, the Secretary of Agriculture, and the Comptroller of the Currency by a provision of the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 2, supra, p. 817, which section prescribed the duties of said committee.

The courts cannot control the administration of the duties of the comptroller or of the treasurer of the United States in respect to bonds deposited with the treasurer to secure the redemption of the circulating notes of the bank. Van Antwerp v. Huburd, (1870) 7 Blatchf. 426, 28 Fed. Cas. No. 16,826.

Sec. 326. [Bond and oath of office of Comptroller of the Currency.] The Comptroller of the Currency shall, within fifteen days from the time of notice of his appointment, take and subscribe the oath of office; and he shall give to the United States a bond in the penalty of one hundred thousand dollars, with not less than two responsible sureties, to be approved by
the Secretary of the Treasury, conditioned for the faithful discharge of the duties of his office. [R. S.]


Sec. 327. [Deputy Comptroller of the Currency.] There shall be in the Bureau of the Comptroller of the Currency a Deputy Comptroller of the Currency, to be appointed by the Secretary, who shall be entitled to a salary of two thousand five hundred dollars a year, and who shall possess the power and perform the duties attached by law to the office of Comptroller during a vacancy in the office or during the absence or inability of the Comptroller. The Deputy Comptroller shall also take the oath of office prescribed by the Constitution and laws of the United States, and shall give a like bond in the penalty of fifty thousand dollars. [R. S.]


An additional Deputy Comptroller of the Currency was authorized by the Act of March 4, 1909, ch. 297, § 1, infra, p. 935.

The salary of the Deputy Comptroller of the Currency has varied with different Appropriation Acts. The Legislative, Executive, and Judicial Appropriation Act of March 4, 1915, ch. 141, 38 Stat. L. 1013, provided as follows: "deputy comptrollers—one $3,500, one $3,000."

See the notes to R. S. sec. 329, infra, this page.

The court will presume, in the absence of any showing to the contrary, that the deputy comptroller in acting for the comptroller acted in conformity to law. Young v. Wempe, (N. D. Cal. 1891) 46 Fed. 354.

A certificate is sufficient which is signed by the deputy comptroller as "Acting Comptroller of the Currency."

Sec. 328. [Clerks.] The Comptroller of the Currency shall employ, from time to time, the necessary clerks, to be appointed and classified by the Secretary of the Treasury, to discharge such duties as the Comptroller shall direct. [R. S.]


See further EXECUTIVE DEPARTMENTS, vol. 3, p. 244; TREASURY DEPARTMENT.

Sec. 329. [Interest in national banks.] It shall not be lawful for the Comptroller or the Deputy Comptroller of the Currency, either directly or indirectly, to be interested in any association issuing national currency under the laws of the United States. [R. S.]


The members of the Federal Reserve Board were rendered ineligible, during the time they are in office, and for two years thereafter, to hold any office, position, or employment in any member bank, and were forbidden to be an officer or director of any bank, banking institution, trust company, or federal reserve bank, or to hold stock in any bank, banking institution, or trust company by virtue of the Federal Reserve Act of Dec. 23, 1913, ch. 6, § 10, supra, p. 826. As the Comptroller of the Currency is a member of said board, he is affected by these provisions, and the same restrictions would appear to apply to the Deputy Comptroller.

For R. S. sec. 330, relating to the seal of the Comptroller of the Currency, see SEALS.

Sec. 331. [Rooms, vaults, furniture, etc., for Currency Bureau.] There shall be assigned, from time to time, to the Comptroller of the Currency, by the Secretary of the Treasury, suitable rooms in the Treasury building for conducting the business of the Currency Bureau, containing safe and secure fireproof vaults, in which the Comptroller shall deposit and safely keep all the plates not necessarily in the possession of engravers or printers,
and other valuable things belonging to his Department; and the Comptroller shall from time to time furnish the necessary furniture, stationery, fuel, lights, and other proper conveniences for the transaction of the business of his office. [R. S.]


Sec. 332. [Banks in District of Columbia.] The Comptroller of the Currency, in addition to the powers conferred upon him by law for the examination of national banks, is further authorized, whenever he may deem it useful, to cause examination to be made into the condition of any bank in the District of Columbia organized under act of Congress. The Comptroller, at his discretion, may report to Congress the results of such examination. The expense necessarily incurred in any such examination shall be paid out of any appropriation made by Congress for special bank examinations. [R. S.]

This section has been incorporated in the Code of the District of Columbia and has been several times amended.

Sec. 333. [Annual report of Comptroller.] The Comptroller of the Currency shall make an annual report to Congress, at the commencement of its session, exhibiting —

First. A summary of the state and condition of every association from which reports have been received the preceding year, at the several dates to which such reports refer, with an abstract of the whole amount of banking capital returned by them, of the whole amount of their debts and liabilities, the amount of circulating notes outstanding, and the total amount of means and resources, specifying the amount of lawful money held by them at the times of their several returns, and such other information in relation to such associations as, in his judgment, may be useful.

Second. A statement of the associations whose business has been closed during the year, with the amount of their circulation redeemed and the amount outstanding.

Third. Any amendment to the laws relative to banking by which the system may be improved, and the security of the holders of its notes and other creditors may be increased.

Fourth. A statement exhibiting under appropriate heads the resources and liabilities and condition of the banks, banking companies, and savings-banks organized under the laws of the several States and Territories; such information to be obtained by the Comptroller from the reports made by such banks, banking companies, and savings-banks to the legislatures or officers of the different States and Territories, and, where such reports cannot be obtained, the deficiency to be supplied from such other authentic sources as may be available.

Fifth. The names and compensation of the clerks employed by him, and the whole amount of the expenses of the banking department during the year. [R. S.]

R. S. sec. 333, as originally enacted, was amended by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 317, by inserting after the word "Congress" in the initial clause of the section the words "at the commencement of its session," as above given.

See the following paragraph of the text.
[Sec. 1.] [Report expenses of in liquidation of failed banks.] * * *
That the Comptroller of the Currency is hereby directed to include in his Annual Report to the Speaker of the House of Representatives, expenses incurred during each year, in liquidation of each failed national bank separately. [32 Stat. L. 138.]

This is from the Legislative, Executive, and Judicial Appropriation Act of April 28, 1902, ch. 594, and is a proviso to the paragraph making an appropriation for expenses of the national currency.

[Sec. 1.] [Additional Deputy Comptroller of the Currency.] * * *
Office of the Comptroller of the Currency: For Comptroller of the Currency, five thousand dollars; Deputy Comptroller, three thousand five hundred dollars; Deputy Comptroller, three thousand dollars, who shall be appointed by the Secretary of the Treasury, and shall possess the power and perform the duties attached by law to the office of Comptroller during a vacancy in the office of Comptroller and Deputy Comptroller or during the absence or liability of the Comptroller and the Deputy Comptroller, and said Assistant Deputy Comptroller shall give a like bond in the penalty of fifty thousand dollars; [35 Stat. L. 867.]

This was from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1909, ch. 297.
A Deputy Comptroller of the Currency was authorized by R. S. sec. 327, supra, p. 933. See the notes to said section. See also the notes to R. S. sec. 329, supra, p. 933.

Appointment of second comptroller.—The Secretary of the Treasury had no power, under section 189, Revised Statutes, to appoint a person to fill the office of Second Deputy Comptroller of the Currency created by the Act of May 22, 1908, (35 Stat. 203), no such authority being expressly granted in the act creating that office. (1908) 26 Op. Atty.-Gen. 827.

NATIONAL BUREAU OF STANDARDS
See Weights and Measures

NATIONAL CEMETERIES
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NATIONAL DEBT
See Public Debt
NATIONAL DEFENSE SECRETS

Act of March 3, 1911, ch. 226, 936.


2. Punishment for Communication to Foreign Governments, etc., 936.

3. Jurisdiction for Offenses on High Seas—In the Philippines, 937.

An Act To prevent the disclosure of national defense secrets.


[Sec. 1.] National defense—offenses specified—obtaining unlawful information—receiving unlawful information—communicating information—disclosing plans, etc.—punishment.] That whoever, for the purpose of obtaining information respecting the national defense, to which he is not lawfully entitled, goes upon any vessel, or enters any navy-yard, naval station, fort, battery, torpedo station, arsenal, camp, factory, building, office, or other place connected with the national defense, owned or constructed or in process of construction by the United States, or in the possession or under the control of the United States or any of its authorities or agents, and whether situated within the United States or in any place noncontiguous to but subject to the jurisdiction thereof; or whoever, when lawfully or unlawfully upon any vessel, or in or near any such place, without proper authority, obtains, takes, or makes, or attempts to obtain, take, or make, any document, sketch, photograph, photographic negative, plan, model, or knowledge of anything connected with the national defense to which he is not entitled; or whoever, without proper authority, receives or obtains, or undertakes or agrees to receive or obtain, from any person, any such document, sketch, photograph, photographic negative, plan, model, or knowledge, knowing the same to have been so obtained, taken, or made; or whoever, having possession of or control over any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and without proper authority, communicates or attempts to communicate the same to any person not entitled to receive it, or to whom the same ought not, in the interest of the national defense, be communicated at that time; or whoever, being lawfully intrusted with any such document, sketch, photograph, photographic negative, plan, model, or knowledge, willfully and in breach of his trust, so communicates or attempts to communicate the same, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both. [36 Stat. L. 1084.]


Sec. 2. [Punishment for communication to foreign governments, etc.] That whoever, having committed any offense defined in the preceding section, communicates or attempts to communicate to any foreign government,
or to any agent or employee thereof, any document, sketch, photograph, photographic negative, plan, model, or knowledge so obtained, taken, or made, or so intrusted to him, shall be imprisoned not more than ten years. [36 Stat. L. 1085.]

SEC. 3. [Jurisdiction for offenses on high seas — in the Philippines.] That offenses against the provisions of this Act committed upon the high seas or elsewhere outside of a judicial district shall be cognizable in the district where the offender is found or into which he is first brought; but offenses hereunder committed within the Philippine Islands shall be cognizable in any court of said islands having original jurisdiction of criminal cases, with the same right of appeal as is given in other criminal cases where imprisonment exceeding one year forms a part of the penalty; and jurisdiction is hereby conferred upon such court for such purpose. [36 Stat. L. 1085.]

NATIONAL GUARD
See Militia

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS
See Hospitals and Asylums

NATIONAL MONUMENT PRESERVATION ACT
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NATIONAL PARKS
See Public Parks

NATIONAL SOLDIERS’ HOME ACT
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I. BUREAU OF NATURALIZATION

Sec. 3. [Bureau established — Commissioner and Deputy Commissioner — duties.] * * * The Bureau of Immigration and Naturalization is hereby divided into two bureaus, to be known hereafter as the Bureau of Immigration and the Bureau of Naturalization, and the titles Chief Division of Naturalization and Assistant Chief shall be Commissioner of Naturalization and Deputy Commissioner of Naturalization. The Commissioner of Naturalization or, in his absence, the Deputy Commissioner of Naturalization, shall be the administrative officer in charge of the Bureau of Naturalization and of the administration of the naturalization laws under the immediate direction of the Secretary of Labor, to whom he shall report directly upon all naturalization matters annually and as otherwise required, and the appointments of these two officers shall be made in the same manner
as appointments to competitive classified civil-service positions. [37 Stat. L. 737.]

This is part of an Act of March 4, 1913, ch. 141, entitled "An Act To Create a Department of Labor." For other sections of this Act see LABOR DEPARTMENT, ante, p. 285.

[SEC. 1.] [Former Immigration and Naturalization Bureau — registry of aliens — certificates of registry.] That the designation of the Bureau of Immigration in the Department of Commerce and Labor is hereby changed to the "Bureau of Immigration and Naturalization," which said Bureau, under the direction and control of the Secretary of Commerce and Labor, in addition to the duties now provided by law, shall have charge of all matters concerning the naturalization of aliens. That it shall be the duty of the said Bureau to provide, for use at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this Act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof. [34 Stat. L. 596.]

This is the first section of the Naturalization Act of June 29, 1906, ch. 3592. See the notes to section 3 of this Act, infra, p. 952. Section 2 of this Act may be regarded as temporary and is as follows: "Sec. 2. That the Secretary of Commerce and Labor shall provide the said Bureau with such additional furnished offices within the city of Washington, such books of record and facilities, and such additional assistants, clerks, stenographers, typewriters, and other employees as may be necessary for the proper discharge of the duties imposed by this Act upon such Bureau, fixing the compensation of such additional employees until July first, nineteen hundred and seven, within the appropriations made for that purpose." [34 Stat. L. 596.]

[SEC. 1.] [Division of Naturalization — report.] SPECIAL EXAMINERS, DIVISION OF NATURALIZATION: For compensation, to be fixed by the Secretary of Commerce and Labor, of examiners, interpreters, clerks and stenographers, for the purpose of carrying on the work of the Division of Naturalization, Bureau of Immigration and Naturalization, provided for by the Act of Congress approved June twenty-ninth, nineteen hundred and six, entitled "An Act to establish a Bureau of Immigration and Naturalization and to provide for a uniform rule for the naturalization of aliens throughout the United States," and for their actual necessary traveling expenses while absent from their official stations, subject to such rules and regulations as the Secretary of Commerce and Labor may prescribe; and for the actual necessary traveling expenses of the officers and employees of the Division of Naturalization in Washington while absent on official duty outside of the District of Columbia, one hundred and twenty-five thousand dollars. A detailed report of the expenditures under the appropriations for this
service shall be annually submitted to Congress at the beginning of each regular session thereof. [35 Stat. L. 982.]

This is a provision of the Sundry Civil Appropriation Act of March 4, 1909, ch. 299. The appropriation made by this provision obviously relates to the fiscal year only, but the last sentence, relating to a report, would seem to be permanent.

II. NATURALIZATION GENERALLY

Sec. 2166. [Aliens honorably discharged from military service.] Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or the volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States. [R. S.]

Sections 2165-2174 constituted title 30 of the Revised Statutes entitled "Naturalization." Of these sections 2165, 2167, 2168, and 2173 were repealed by the Act of June 29, 1906, ch. 3592, § 26, infra, p. 998.

Various sections of the Revised Statutes relating to offenses against the naturalization laws were embodied in the Penal Laws of 1909 and repealed therein. See Penal Laws.
By the Act of June 30, 1914, ch. 130, § 1, infra, p. 1001. provisions were made for the naturalization, without declaration of intention of aliens receiving an honorable or an ordinary discharge from the United States Navy or Marine Corps. See the notes to said Act.

R. S. sec. 2167, repealed by the Act of June 29, 1906, ch. 3592, § 26, infra, p. 998, was as follows:

"Sec. 2167. [Minor residents.] Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section twenty-one hundred and sixty-five; but such alien shall make the declaration required therein at the time of his admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his bona-fide intention to become a citizen of the United States; and he shall in all other respects comply with the laws in regard to naturalization."


Apparently no substitute provision has been enacted for this section.

I. R. S. sec. 2166 construed, 941
II. Repealed R. S. sec. 2167 construed, 943

I. R. S. Sec. 2166 CONSTRUED


The Naturalization Law of June 29, 1906, sec. 4, clause fourth (see infra, p. 967), in so far as it provides for proof of residence as therein required, does not operate as a repeal of this section. That law is inapplicable to the petition of an honorably discharged soldier applying under this section on proof of one year's residence within the United States. In re Leichtag, (W. D. Pa. 1914) 211 Fed. 681.

Scope.—All the privilege given by this section is to do away with the declaration
of intention and residing five years in the
country. Berry v. Hull, (1892) 6 N. M. 643, 30 Pac. 936.

Compliance with R. S. sec. 2169—In
general.—Service in and an honorable dis-
charge from the military service of the
United States does not extend the right
of naturalization to those persons who are
beyond its provision under R. S. sec. 2169.

Act of March, 1907, sec. 2 (see vol. 2,
p. 122), providing that any American
citizen shall be deemed to have expatriated
himself by the act either of becoming
naturalized by any foreign state under its
laws, or of taking an oath of allegiance
to a foreign state or in the case of a
naturalized citizen by residing for two
years in the foreign state from which he,
came, or for five years in a foreign state
has no application to an alien seeking
naturalization under this section. The
Act of 1907 only applies to citizens. In re
508.

Mongolian soldiers.—This section be-
cause of R. S. sec. 2169, infra, p. 944, by
providing that “the provisions of this
title shall apply to aliens being free white
persons and to aliens of African nativity,
and to persons of African descent,” does
not extend the right of naturalization to
a person of the Japanese race, although
having an honorable discharge from the
army of the United States. In re Bun-
taro Kusmai, (W. D. Wash. 1908) 163
Fed. 925.

A person of the Mongolian race, either
Chinese or Japanese, cannot be naturalized
even with honorable service in the army or
navy. In re Knight, (E. D. N. Y.
1907) 171 Fed. 299.

"Armies."—The phrase “armies” does
not include “marine corps.” In re Bailey,
(1872) 2 Sawy. 200, 2 Fed. Cas. No. 728.
Sawyer v. Hull, (1892) 6 N. M. 643, 30
Pac. 936.

Nor does it include the navy. In re
Chamayas, (1892) 21 N. Y. S. 104.

Proof "as now provided by law."—This
section requires that the court shall, in
addition to such proof of residence and
good moral character as "now" provided
for by law, be satisfied by competent proof
of the applicant having been honorably discharged from service of the United
States. It has been held that the word
"now" is limited to the laws existing at
the enactment of the statute, and does not
include subsequent enactments. In re
Loftus, (S. D. N. Y. 1908) 165 Fed. 1002; In re McNabb, (D. C. Ore. 1909) 175
Fed. 611.

"Honourably discharged."—A certificate
made in the year 1916 by the proper army
officer, that the petitioner for naturaliza-
tion having completed three years' service
with the colors had been furloughed to the
Reserve of the Army of the United States
and that his service had been honest and
faithful, does not show an honorable dis-
charge within the meaning of this section
in view of section 1342, art. 4, of the
Articles of War (see vol. 1, p. 447). In re

"One year's residence within the United
States." It is one year's residence within
the United States and not within the state
that is required under this section. In re

Forfeiture of privilege by residence
abroad before naturalization.—An honor-
ably discharged soldier of the United
States army, who before his naturalization
returned to a foreign country and held
public office there did not thereby, in
virtue of section 2, Act of March 2, 1907,
ch. 2534 (see Citizenship, vol. 2, p. 125),
forfeit his right to become a citizen as
provided by this section. In re Wildber-

Proof of residence and character.—The
naturalization law in so far as it provides
for proof of residence is inapplicable to
the petition of an honorably discharged
soldier applying under this section on
proof of one year's residence within the
United States. In re Leichtag, (W. D.
Pa. 1914) 211 Fed. 681, following In re

Where a considerable period of time has
elapsed between the honorable discharge
and the filing of the petition the usual
posting must be made, and while honor-
able discharge may be proof of good moral
character during the period of service,
supplemental proof of good moral charac-
ter during the subsequent period should
also be required, as well as proof of res-
idence within the United States and
within the state during the subsequent
period. In re Sterbeck, (D. C. Minn 1914)
224 Fed. 1013, wherein the court said:
"In the present instance the petitioner
has provided such proof. He has shown
proof of proper residence subsequent to his honor-
able discharge, and has shown one year's
residence within the state next prior to the
filing of his petition. His petition has
been posted for the usual length of time.
He has also shown good moral character
during the period subsequent to his honor-
able discharge and down to the time of
hearing. It is true that the proof shows
only four years' service in the Navy in-
stead of five years as required by the
law in force at the time he filed his peti-
tion. Inasmuch, however, as between the
time when he filed his petition and the
time of the hearing the law was changed,
making proof of four years' service suf-
cient, I see no reason why the petitioner
may not take advantage of this change
in the law, at the time of the hearing, in
testing the quantum of proof necessary to be
furnished, and that quantum of proof, in my
opinion, is to be measured at the time of the hearing, rather than at the time when the petition was filed."

Number of witnesses as to residence and character.—Notwithstanding the provisions in the Act of 1906, sec. 4 (see infra, p. 956), requiring two witnesses as to residence and character it is sufficient under this section that one appear. In re Loftus, (S. D. N. Y. 1908) 185 Fed. 1002, wherein the court said: "The section does not say that the proof of residence and character shall be as provided by law, or as now or hereafter provided by law, but as now provided by law. . . . All the other provisions of the act of 1906, not being otherwise expressly regulated in the section, will be applicable to honorably discharged soldiers, viz., the form and contents of the petition, the oath in open court, the public notice of the petition, and hearing on a stated day, not less than 90 days after filing, the exclusion of anarchists and polygamists, etc."

II. REPEALED R. S. SEC. 2167 CONSTRUED

In general.—By this section special provision was made for the naturalization of alien minor residents on attaining majority by dispensing with the previous declaration of intention and allowing three years of minority on the five years' residence required; but such alien was obliged, at the time of his admission, to take the oath to support the Constitution and of renunciation of all allegiance and fidelity to any foreign sovereign, in court, and also to declare on oath and prove to the satisfaction of the court that for two years next preceding it has been his bona fide intention to become a citizen of the United States; and in all other respects to comply with the laws in regard to naturalization. Conzen v. U. S. (1900) 179 U. S. 191, 21 S. Ct. 98, 45 U. S. (L. ed.) 148.

Any day after the applicant arrives at the age of twenty-one years, without his having made a previous declaration, application might be made for naturalization under this section. "A construction of the statute that would make a residence of two years, after he arrives at the age of twenty-one necessary, would be in conflict with the language of the section, which provides that he may be admitted to citizenship "after he arrives at the age of twenty-one years."

"Residence."—In In re An Alien, (1842) 1 Fed. Cas. No. 201a, it was held that the term "residence" in the Act of 1824 was used in its general sense without the specification of a restriction as to the manner of the use or enjoyment; it meant a residence of a continuous character; but absence from the domicile in the regular transaction of a man's vocation or business, as that of a sailor, did not divest his residence. A person who was called upon by an applicant for naturalization to testify as to the fact of residence for three years could not defend against an accusation of having made a false oath in that regard, upon the ground that the oath was not required by the naturalization laws inasmuch as the applicant might have established the fact by his own oath. An oath so taken was at least an "authorized" oath within the meaning of R. S. sec. 5424, (embodied in Penal Laws, § 76, and repealed by section 341 thereof; see Penal Laws). U. S. v. Lehman, (E. D. Mo. 1889) 29 Fed. 49.

Proof of intention to become a citizen.—This section required that every applicant should establish the existence of the requisite intention to become a citizen, as in the case of other aliens, for at least two years prior to his admission to citizenship, but might do this by any relevant and competent evidence which should "prove to the satisfaction of the court" the truth of his own deposition. The vague oral statement of a single witness which was commonly offered under this section in substitution for the documentary evidence required by R. S. sec. 2165 (repealed as noted under R. S. sec. 2166, supra, p. 941), could not safely be relied upon. In re Fronascone, (E. D. Pa. 1900) 99 Fed. 48. See also In re Randall, (1880) 14 Phila. (Pa.) 224, 37 Leg. Int. (Pa.) 377.

In addition to the proof required by R. S. sec. 2166 (repealed as noted under R. S. sec. 2166, supra, p. 941), applicants under this section had to prove the particular facts in respect to residence and age which this section required to be established; and inasmuch as a declaration of intention two years prior to admission was dispensed with only on condition that a like declaration should be made at the time of admission, and that the applicant should then further declare on oath, and prove to the satisfaction of the court, that for two years next preceding it had been his bona fide intention to become a citizen of the United States, it was necessary, not only that these declarations should be made under oath, but also that they should be supplemented by proof that the applicant had, for the designated period, actually purposed to become a citizen of this country. In re Bodek, (E. D. Pa. 1894) 63 Fed. 813.

When the application was made under this section it was not necessary to make the declaration required in the first condition of R. S. sec. 2165 (repealed as noted under R. S. sec. 2166, supra, p. 941); but it was necessary to make the declaration required therein, that is, in said R. S. sec. 2165, at the time of admission. By this was meant the declaration required by section 2165 to be made at the time of ad-
mission; that is, the declaration required by the second condition of section 2165. State v. Macdonald, (1877) 24 Minn. 48.

Merely making the declaration of intention, without a compliance with any of the other conditions prescribed by law, did not make a party a citizen. That he had resided within the United States, as boy and man, long enough to qualify him to become a citizen, is not material. Minneapol. v. Reum, (C. C. A. 8th Cir. 1893) 56 Fed. 576, 12 U. S. App. 446, 6 C. C. A. 31. See also Maloy v. Duden, (S. D. N. Y. 1885) 25 Fed. 673; Berry v. Hull, (1892) 6 N. M. 643, 30 Pac. 936.

The declaration had to be under oath, as was required by section 2165 (1). U. S. v. Walah, (C. C. Mass. 1884) 22 Fed. 644.

Conclusiveness of record.—When the record shows that a court having jurisdiction upon evidence required by this section adjudged him to be a citizen, it was a judicial fact and had the force and effect of a judgment. (1874) 14 Op. Atty.-Gen. 510. See also U. S. v. Walah, (C. C. Mass. 1884) 22 Fed. 644; State v. Macdonald, (1877) 24 Minn. 48.

Proceedings in a court of record under this legislation were judicial and resulted in a judgment which could be impeached only as other judicial judgments might be. "The fundamental principle that, in the absence of a statute of authorization, only the United States can proceed judicially to recall or rescind franchises granted by them, has peculiar force with reference to citizenship, as to which so great a variety of interests, political and individual, of high importance, is concerned that the jurisdiction of inquiry should be especially fixed and limited." Pintoch Compressing Co. v. Bergin, (C. C. Mass. 1897) 84 Fed. 140.

A judgment in naturalization proceedings was conclusive and could not be set aside on the ground that the petition for naturalization was false. U. S. v. Gleason, (E. D. N. Y. 1897) 78 Fed. 396, affirmed (C. C. A. 2d Cir. 1898) 90 Fed. 778, 82 U. S. App. 311, 33 C. C. A. 272.

Amending proceedings nunc pro tunc.—The record of naturalization proceedings upon a proper application and showing might be amended nunc pro tunc by the court which rendered the judgment, and make the record conform to the truth. State v. Macdonald, (1877) 24 Minn. 48.

Relation to R. S. sec. 2172, infra, p. 947.—This section did not embrace the case of a minor who became invested with citizenship by virtue of the marriage of his mother to a naturalized citizen of the United States, but only such minors as were aliens when they reach their majority. U. S. v. Kellar, (S. D. Ill. 1882) 13 Fed. 82.

Sec. 2169. [Aliens of African nativity and descent.] The provisions of this Title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent. [R. S.]


This section was amended by Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 318, by adding after the word "aliens," where it first appears in such section, the words "being free white persons, and to aliens," so as to make the section read as above given. "This title," above referred to, is title XXX. of the Revised Statutes, "Naturalization."


"Aliens."—Until the passage of Act of June 29, 1906, § 37 (see infra, p. 1001), only persons described in this section could be naturalized. R. S. sec. 2169, supra, p. 944, extended the benefit of the naturalization laws only to aliens, but section 30 of the Act of June 29, 1906, broadened the laws to include persons owing allegiance to the United States, it being aimed at persons from Porto Rico and the Philippine Islands who are not aliens. In re Mallari, (D. C. Mass. 1916) 239 Fed. 416.

"Free white persons."—In general.—In the original Naturalization Act the expression "free white persons" was doubtless primarily intended to include the white emigrants from Northern Europe, with whom the Congress of that day was familiar, and to exclude Indians and persons of African descent or nativity. Beyond this, perhaps, Congress had no definite object in view. It could not have foreseen the vast immigration problems with which the government is now confronted, or the difficulties which might happen and embarrass courts in the administration of the law. But, whatever the original intent may have been, it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon all persons of Caucasian race only. It is likewise true that certain of the natives of India belong to
that race, although the line of demarcation between the different castes and classes may be ascertainable in the statute as it would appear to have been intended at the time of its passage, and understand it as restricting the words 'free white persons' to mean persons as then understood to be of European habitancy or descent. By persons of African nativity or African descent presumably the statute means the negro races of Africa or their descendants by intermixture with the races before defined as being the races constituting free white persons. The negro races of Africa presumably referred to are those races from which the emancipated slaves in the United States (who were made citizens by the 14th amendment to the United States Constitution) descend. This construction of the statute would exclude from naturalization all inhabitants of Asia, Australia, the South Seas, the Malaysian Islands and territories, and of South America, who are not of European descent, or of mixed European and African descent. Under this definition the inhabitants of Syria would be excluded.

Armenians.—The word "white" was used in this section to classify the inhabitants and to include all persons not otherwise classified, not as synonymous with "European", there being in fact no "European" or "white" race as a distinctive class, or "Asiatic" or "yellow" race including substantially all the people of Asia; and hence the term "free white persons" includes Armenians born in Asiatic Turkey and on the west side of the Bosporus. In re Haladjian, (C. C. Mass. 1900) 174 Fed. 834.

A native of Burmah is not a free white person. Matter of San C. Po, (1894) 7 Misc. 471, 28 N. Y. S. 383.

Filipino.—In the case of In re Lampio-te, (S. D. N. Y. 1916) 232 Fed. 382, the facts were stated as follows: The petitioner was the son of a Filipino mother and of a father whose mother was a Filipino and whose father was a full-blooded Spanish, resident in Manila. He had served one full term of enlistment in the United States Navy and was at the time of the proceeding serving another. He was in every way qualified for citizenship, unless his race prevented. On these facts the court said: The case falls exactly within In re Alverto, (E. D. Pa. 1919) 198 Fed. 688, and needs no other consideration. There may be doubt about such cases as In re Camille, (C. C. Ore. 1880) 6 Fed. 256, or In re Knight, (E. D. N. Y. 1899) 171 Fed. 290; but where the Malay blood predominates, it would be a perversion of language to say that the descendant is a 'white person.' Certainly any white ancestor, no matter how remote, does not make all his descendants white.

Hawaiian.—A native of the Hawaiian Islands is a Polynesian and belongs to one of the Malay races. He is, therefore, not within the scope of this section and cannot obtain citizenship. In re Kanaka Nian, (1889) 6 Utah 299, 21 Pac. 903, 4 L. R. A. 728.

Indian.—A person of half Indian blood, whose father was a white Canadian and his mother an Indian woman, is not a "white person" within the meaning of the statute. In re Camille, (C. C. Ore. 1890) 6 Fed. 256.

An Indian, native of British Columbia, is not entitled to naturalization. In re Burton, (1900) 1 Alaska 111.

In an early opinion of the Attorney-General it was said that the general statutes of naturalization did not apply to Indians of the United States. (1866) 7 Op. Att'y-Gen. 746.

Mexican.—A native of Mexico, whatever may be his status viewed solely from the point of the ethnologist, is embraced within the spirit and intention of our laws upon naturalization, and his application should be granted if he is shown by the testimony to be a man attached to the principles of the Constitution and well disposed to the good order and happiness of society. In re Rodriguez, (W. D. Tex. 1897) 81 Fed. 337.

Mongolian.—Mongolians and persons belonging to the Chinese race are not included in this Act, and a certificate of naturalization obtained by such a person is void on its face. In re Gee Hop, (N. D. Cal. 1895) 71 Fed. 274. See also In re Hong Yen Chang, (1890) 84 Cal. 163, 24 Pac. 156.


Parsee.—"Free white persons" includes members of the white or Caucasian race, as distinct from the black, red, yellow, and brown races; and hence a Parsee is entitled to admission to citizenship. U. S. v. Balsea, (C. C. A. 2d Cir. 1910) 180
and the other free; and, treating a slave as any other animal property and following the civil law, they have held that the child took the status of the mother. In cases involving the jurisdiction of the court, as where the court had no jurisdiction to try an Indian for a crime committed against an Indian, and it was considered necessary to ascribe the defendant's status to one or the other parent, Indians being freemen, the common law has been followed, and the child has been held to take the status of the father. These decisions arose from the necessity for the adoption of an artificial rule. There is no such necessity in the case at bar. It is not necessary to determine the exact status of the petitioner. All that is necessary is to determine whether he is a 'white person' within the meaning of the law. Counsel for petitioner chiefly rely upon the case In re Rodriguez, [W. D. Tex. 1897] 81 Fed. 337. In that case the petitioner was a Mexican. It appears that the case was controlled by the fact that the natives of Mexico had for over 300 years been mixing their blood with that of the natives and descendants of Spain; indulging in the presumption that after that length of time the dominant race would have established itself. Further, the court was controlled by the treaty with Mexico of 1868, expressly recognizing the right of Mexicans to become naturalized citizens of the United States. This treaty had, prior to the decision, been abrogated; but, as showing the government's construction of the law limiting the right to citizenship, applied to natives of Mexico, it was considered persuasive. If this decision goes further than here indicated, it is opposed to what this court considered the light of authority."

**African** — In general.—"Originally it was intended to limit naturalization to free whites, but under the stress of feeling generated by the late war, Congress (in 1870) granted the boon of American citizenship to all native-born Africans from the Mediterranean to the Cape of Good Hope." Matter of San C. Po, (1894) 7 Misc. 471, 28 N. Y. S. 383.


**Military service.** — Service in and honorable discharge from the military service of the United States does not extend the right of naturalization to those persons who are beyond its provision under this section. In re Alverto, (E. D. Pa. 1912) 198 Fed. 688. And see supra, p. 941, and infra, p. 1004.

The alien wife of an alien man cannot be naturalized. It is plain from the Expiration Act of March 2, 1907, § 3 (see vol. 23, this volume) that Congress did not intend that the wife should have the nationality of her husband. In re Rionda, (S. D. N. Y. 1908) 164 Fed. 368;
NATURALIZATION


In the early case of In re Langtry, (C. C. Cal. 1887) 31 Fed. 879, on a report that the applicant's husband was living in England as a British subject, the court said in a note: "If this be so, the question will arise, on her application for final naturalization papers, whether she can be naturalized in this country. No person can be a citizen of two countries; and a wife is by law a citizen of her husband's country."

Sec. 2170. [Residence of five years in United States.] No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States. [R. S.]


A similar requirement as to residence was made by the fourth paragraph of section 4 of the Act of June 29, 1906, ch. 3592, infra, p. 956, and authorities applicable to this section will be found there.

Sec. 2171. [Alien enemies not admitted.] No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States; but persons resident within the United States, or the Territories thereof, on the eighteenth day of June, in the year one thousand eight hundred and twelve, who had before that day made a declaration, according to law, of their intention to become citizens of the United States, or who were on that day entitled to become citizens without making such declaration, may be admitted to become citizens thereof, notwithstanding they were alien enemies at the time and in the manner prescribed by the laws heretofore passed on that subject; nor shall anything herein contained be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien. [R. S.]


This section was not repealed by the Act of 1908 set out infra, p. 952. Bessho v. U. S., (C. C. A. 4th Cir. 1910) 178 Fed. 245, 101 C. C. A. 605.

Declaration of intention by alien enemy.

— In Ex p. Newman, (1813) 2 Gall. 11, 18 Fed. Cas. No. 10,174, it was said that the Act of July 30, 1813, enabled persons who before the war had made the preparatory declaration to become citizens in the same manner as if war had not intervened, but conferred no privilege on other persons to make the declaration of intention to become citizens. See contra Little's Case, (1812) 2 Browne (Pa.) 218.

Sec. 2172. [Children of persons naturalized under certain laws to be citizens.] The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a
citizen without the consent of the legislature of the State in which such person was proscribed. [R. S.]

Subsequent provisions relating to the citizenship of children born without the limits of the United States were made by the Citizenship Act of March 2, 1907, ch. 2334, § 5, 34 Stat. L. 1229. See CITIZENSHIP, vol. 2, p. 114.

I. First clause, 948
II. Second clause, 950

I. FIRST CLAUSE


Religious test, 1873.—This section should not be construed as changing the rule prescribed in R. S. sec. 1993 (see vol. 2, p. 116). It should be read and construed with that section, that the father of such child must have been, at the time of its birth, a citizen of the United States. "We cannot suppose that with the provisions of section 1993 before it, Congress intended in section 2172 to alter the rule prescribed in the former section, and to make the child of one who had renounced his citizenship in the United States, and assumed allegiance to another power, born after such renunciation and assumption, a citizen of the United States—in other words, to make a child born abroad, of an alien, a citizen of this country." Browne v. Dexter, (1884) 66 Cal. 39, 4 Pac. 913.

Effect of immigration laws.—Under Act of March 2, 1907, ch. 2534 (see vol. 4, p. 697), providing that a child born without the United States of alien parents shall be deemed a citizen by virtue of the naturalization of the parent, taking place during the minority of the child, provided that the citizenship of such child shall begin when he begins to reside permanently in the United States, until a minor child of a naturalized parent has begun to reside permanently in the United States he is an alien, and he cannot begin so to reside if he belongs to a class of aliens debarred from entry, and the naturalization of a father will not permit his minor child born abroad, and remaining in the country of his nativity until after the naturalization, to come into the United States if prohibited from entering by Act Feb. 20, 1907, excluding from admission into the United States persons belonging to enumerated classes. U. S. v. Rodgers, (C. C. A. 3d Cir. 1911) 185 Fed. 334, 107 C. C. A. 452.

An alien minor child who had never dwelt in the United States was not, when coming to join a naturalized parent, except from the provision of the Act of March 3, 1903 (repealed by the Act of Feb. 20, 1907, ch. 1134, given in IMMI-
geration, vol. 3, p. 637), debarred aliens from landing if they were afflicted with a dangerous contagious disease, on the theory that she was invested with citizenship by virtue of the declaration of this section that minor children of naturalized citizens shall, if "dwelling in the United States", be considered as citizens thereof. Zartarian v. Billings, (1907) 204 U. S. 170, 27 S. Ct. 182, 51 U. S. (L. Ed.) 428; U. S. v. Williams, (S. D. N. Y. 1904) 132 Fed. 804; In re Camaras, (D. C. R. I. 1913) 202 Fed. 1019.

Naturalization of father—In general.


Of course if an alien father is not naturalized until after the children have arrived at twenty-one years of age such naturalization does not make the children citizens. Berry v. Hull, (1892) 6 N. M. 643, 30 Pac. 936; In re Conway, (1963) 17 Wis. 526.

By this section if a father be naturalized, while the son is under the age of twenty-one years, and while the son is residing in the United States, the son will be considered a citizen of the United States; but if at the time of the naturalization of the father the son is over twenty-one years of age, such son cannot be considered a citizen though the father was naturalized prior to the first day of December, 1873, when said Revised Statutes of the United States went into operation. Dryden v. Swinburne, (1882) 20 W. Va. 89.

A residence by a father, within the United States, and an adherence to its government, from the commencement of the Revolutionary War till after the definitive treaty of peace in 1783, conferred all the rights of citizenship, both
upon himself and upon his minor child residing in his family. Calais v. Marshfield, (1849) 36 Me. 511.


42. Illegitimate child.—A foreign born person, who was alleged to be illegitimate, came to this country as a member of the family of his reputed father, whose wife was the mother of the boy. The reputed father was naturalized while the alleged illegitimate child was an infant. It was held that as the child was a member of his reputed father's family when his father was naturalized, and he was an infant, by virtue of the Act of Congress he became naturalized, and that the order of his legitimacy would not be inquired into in a proceeding to contest an election. Dale v. Irwin, (1875) 78 Ill. 170.

43. Stepchildren.—"When the husband of an alien woman becomes a naturalized citizen, she, as well as her infant son by a former marriage if dwelling in this country, become citizens of the United States as fully as if they had become such in the special mode prescribed by the naturalization laws." U. S. v. Rodgers, (D. D. Pa. 1906) 144 Fed. 711; People v. Newell, (1886) 38 Hun (N. Y.) 78.

44. Where an alien woman residing in the United States marries a citizen her infant children by a former husband become by that act citizens also by virtue of Section 1004, Revised Statutes, and Court of 1894 (see vol. 2, p. 117). U. S. v. Kellar, (S. D. Ill. 1882) 13 Fed. 82.

45. In Gumm v. Hubbard, (1888) 97 Mo. 311, 11 S. W. 61, 10 A. S. R. 312, the court said: "The record discloses a case where a widow and her son, both of foreign birth, came to the United States; and while the son was yet a minor, the mother married a citizen of the United States. Section 1004, Revised Statutes, United States [see vol. 2, p. 117] declares that: 'Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.' The marriage of the mother with a citizen made her a citizen, and her minor son became a citizen by operation of law of section 2172, Revised Statutes, United States. U. S. v. Kellar, [1882] 11 Biss. (U. S.) 314."


47. Male or female minors.—Citizenship may be conferred upon foreign-born persons, male or female, through the naturalization of the father during the minority of such persons. Dorsey v. Brigham, (1898) 177 Ill. 250, 52 N. E. 303, 99 A. S. R. 228, 42 L. R. A. 809. See Schuster v. State, (1891) 80 Wis. 107, 49 N. W. 30.

48. "Law of the United States."—Under the clause providing that "the children of persons daily naturalized under any of the laws of the United States, etc., being under the age of twenty-one years at the time of their parents being so naturalized, etc., shall, if dwelling in the United States, be considered as citizens of the United States," the minor child of one who became a citizen under Jay's treaty, if residing in the United States at the time, would thereby become a citizen; a treaty in just as much a "law of the United States," within the meaning of this provision, as an Act of Congress. Crane v. Reeder, (1872) 25 Mich. 303.

49. "If dwelling in the United States."—A "dwelling in the United States" after the naturalization of the father and not at the time thereof is sufficient to make a minor child a citizen. Conover v. Old, (1910) 80 N. J. L. 535, 77 Atl. 1070, wherein the court, commenting on the words "if dwelling in the United States," said: "The mooted question on the construction of these words is whether the child must dwell in the United States at the time the parent is naturalized or whether, if the child is then a minor, he can profit by the parent's naturalization by subsequently dwelling himself in the United States. This question was not decided by the Supreme Court of the United States in the early case of Campbell v. Gordon, (1810) 6 Cranch 176, [3 U. S. (L. ed.) 190], for in that case the child was dwelling in the United States at the time the act of 1802 was passed; nor was it decided in the very recent case of Zar- tarian v. Billings, [1907] 204 U. S. 170, [27 S. Ct. 182, 51 U. S. (L. ed.) 428], for in that case the child, while actually in the port of Boston, was detained there as an alien under our Immigration act. She was, as the court said, debarred from entering the United States by the action of the authorized officials, and never having legally landed, of course, could not have dwelt within the United States. The Supreme Court of Illinois has held that the child did not become a citizen by virtue of the naturalization of the parent, unless the child was under twenty-one years of age and dwelt in the United States at the time of the naturalization. Behrensmeier v. Kleitz, (1891) 135 Ill. 501, 628, [26 N. E. 704]. The view of the Supreme
Court of Illinois is adverse to the view which is taken by the department of state. The language is that the children 'shall, if dwelling in the United States, be considered as citizens thereof;' and the words 'if dwelling in the United States' may be referred with as great propriety to the period covering the non-age of the child or to the time when the privileges of citizenship are claimed, or both, as to the time when the father is naturalized; and such construction would be in harmony with the well-settled construction that holds that the section is prospective in its operation and not limited to the time of the passage of the act in 1892.' Compare State v. Andriano, (1887) 92 Mo. 70, 4 S. W. 263.

Intent to return to country of birth.—By the naturalization of the father the right of citizenship may be regarded as having been conferred by virtue of this section upon his son, who was in his minority at the time of such naturalization, and was then, and had been for some five years previous, residing or dwelling in the United States. The right of the son to a passport is not affected by the circumstance that he contemplates taking up a residence and engaging in business in the country of his birth. (1876) 15 Op. Atty.-Gen. 116.

Minors acquire an inchoate status by the declaration of intention on the part of their parents. Such a person is entitled to claim that though his father did not complete his naturalization before he had attained majority he cannot be held to have lost the inchoate status he acquired by his father's declaration of intention, and that subsequent acts as a citizen of a territory entitled him to insist upon the benefit of his father's act, and placed him within the intent and meaning, effect, and operation of the Acts of Congress in relation to the citizens of the territory, and that he was made a citizen of the United States and of the state under the organic and enabling acts and the Act admitting the territory as a state. Boyd v. Nebraska, (1892) 143 U. S. 135, 12 S. Ct. 375, 36 U. S. (L. ed.) 103. (1891) 31 Neb. 652, 48 N. W. 739, 51 N. W. 692.

A minor by the declaration of his parents acquires an inchoate status, but on attaining his majority he has an election and may repudiate the status, and his application for naturalization many years after he attained his majority negatives the presumption of an earlier election to become a citizen. Trabing v. U. S., (1897) 32 Ct. Cl. 440.

Proofs of citizenship.—Proof of the naturalization of the parents must be made by the record of the naturalization proceedings, but parol evidence may be received to prove the minority and residence of the children. Belcher v. Parren, (1891) 39 Cal. 73, 26 Pac. 791. See also Prentice v. Miller, (1890) 82 Cal. 570, 23 Pac. 189.

"The proof in this case shows that the plaintiff was the son of a person who was duly naturalized under the laws of the United States, and a minor dwelling therein at the time of the naturalization of his father. He thus became, by virtue of law, a citizen." Gribble v. Pioneer Press Co., (C. C. Minn. 1883) 15 Fed. 689.

Order nunc pro tunc.—No court has any power or authority in naturalizing an alien to declare in its order that such alien shall be held to be a citizen from a time preceding the making of the order; and if it makes such declaration its act is unauthorized and void, so far as this declaration is concerned, and he is a citizen only from the time when such order was made. Dryden v. Swinburne, (1892) 20 W. Va. 80.

A right or privilege under a statute of the United States, within the meaning of R. S. sec. 729, now section 277 of the Judicial Code (see vol. 3, p. 1070) is raised under this section. Missouri v. Andriano, (1891) 138 U. S. 496, 11 S. Ct. 395, 34 U. S. (L. ed.) 1072.

II. SECOND CLAUSE

The second clause of this section, providing that "the children of persons who now are, or have been, citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States," does not apply to those whose parents at the time of their birth were aliens. This clause, however, is not restricted to the cases only of the children of natural-born citizens, and citizens who were original actors in our Revolution; but embraces also the case of children of naturalized citizens. Crane v. Reeder, (1872) 28 Mich. 303.
admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant-vessel of the United States, anything to the contrary in any act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen. [R.S.]

By the Act of June 30, 1914, ch. 130, § 1, infra, p. 1004, provisions were made for the naturalization, without declaration of intention, of aliens receiving an honorable or ordinary discharge from the United States Navy or Marine Corps.


Extension of section to naval service.—"It is quite plain that this Act does not extend to the naval service. It was doubtless passed as an inducement and encouragement to foreigners to enter our merchant service to answer the wants of that service only." In re Gormly, (1880) 14 Phila. (Pa.) 211, 37 Leg. Int. (Pa.) 346.

Limited citizenship. — In U. S. v. Lengyl, (W. D. Pa. 1915) 220 Fed. 720, the court said: "Referring now to section 2174 of the Revised Statutes, which, as we have seen, is not repealed, we find it gives a status to foreign seamen, who have declared their intention to become citizens, provided they shall have served three years on board of a merchant vessel of the United States subsequent to the date of such declaration. By that Act, after such declaration and during such service, he shall, for all purposes of protection as an American citizen, be deemed such. There is no limitation in said section of the Revised Statutes after which such declaration shall cease to avail the seaman of the privileges therein given him. That section must be deemed to have been intended by Congress, when it passed the Naturalization Act [of 1906 (see infra, p. 952)], to be and remain in full force, because Congress repealed by express words many other sections, among them 2175."

By this section a seaman, being a foreigner, after declaring his intention to become a citizen of the United States, and after serving three years on board merchant vessels of the United States shall be deemed a citizen of the United States for certain purposes, to wit, for the purpose of manning and serving on board any merchant vessel of the United States and for all purposes of protection as an American citizen. This, however, is far from being full citizenship. For all other rights and privileges of United States citizenship, including that of being eligible to the position of an officer of a United States vessel, this alien seaman must wait until he has complied with the conditions prescribed by the laws to make him a citizen generally and for all purposes. (1883) 17 Op. Atty.-Gen. 534. See also (1896) 21 Op. Atty.-Gen. 415. See (1901) 23 Op. Atty.-Gen. 403.

A "merchant vessel" does not of course include a private yacht. In re Cook, (D. C. N. J. 1917) 239 Fed. 782.

Seamen on coastwise steamers are entitled to naturalization under the provisions of this section. In re Lind, (N. D. Cal. 1911) 192 Fed. 209.

Seamen on lake-going steamers are entitled to naturalization under the provisions of this section. In re Sutherland, (N. D. Ohio 1912) 197 Fed. 641.

"Certificate of declaration of intention to become citizen."—This phrase refers to what is popularly known as "first papers." Dolan v. U. S., (C. C. A. 8th Cir. 1904) 133 Fed. 440, 69 C. C. A. 274.

A petition under the provisions is sufficient though "unsupported by other evidence than 'the production of his certificate of discharge and good conduct' (during the term of his service in the merchant marine), 'together with the certificate of his declaration of intention to become a citizen,' and his own oath." In re Tancr el, (E. D. Pa. 1915) 227 Fed. 329, wherein the court said: "The objection urged by the Bureau of Naturalization is to the effect that the conditions of naturalization apply to the applicant, except that service on board a merchant ship for three years after the filing of his declaration is accepted as the equivalent of residence. This leaves the fourth condition enumerated in the act to be still applicable (except as to residence), and in consequence the testimony of two witnesses, in addition to the oath of the applicant, is required to establish all the facts (except residence), and the names and residences of the witnesses must be posted. The objection is in accord with the general
purposes of the naturalization law, and the object in excepting from some of its provisions this favored class. The law, therefore, might have been made to conform to the grounds of this objection. Congress, however, has declared its will to be otherwise, and that the certificate of discharge, following a declaration of intention, admits the applicant to citizenship."

Sufficiency of certificate.—A certificate of discharge signed by the master of the vessel satisfies the statute. *In re Lind*, (N. D. Cal. 1911) 192 Fed. 209.

In the case of *In re Sutherland*, (N. D. Ohio 1912) 197 Fed. 841, it appeared that the petitioner for citizenship under this section offered together with his declaration of intention five certificates of discharge, all of which were made signed by masters of American vessels, and showed service on lake-going steamers for a period subsequent to the date of his declaration, aggregating three years and nineteen days. These certificates showed good conduct during the period of such service. It was held that the certificates were sufficient.

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An Act To establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States.


SEC. 3. [Naturalization of aliens — courts given jurisdiction — restricted to residents of district — blank forms.] That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

United States circuit and district courts now existing, or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

That the naturalization jurisdiction of all courts herein specified, State, Territorial, and Federal, shall extend only to aliens resident within the respective judicial districts of such courts.

The courts herein specified shall, upon the requisition of the clerks of such courts, be furnished from time to time by the Bureau of Immigration and Naturalization with such blank forms as may be required in the naturalization of aliens, and all certificates of naturalization shall be consecutively numbered and printed on safety paper furnished by said Bureau. [34 Stat. L. 596.]

Section 1 of this Act relating to the Bureau of Naturalization is given, supra, p. 940, and section 2, being temporary only, is noted thereunder.

Sections 16, 17 and 19 of this Act were incorporated in sections 74–77 of the Penal Laws of 1909 and repealed by section 341 thereof. See Penal Laws.

Section 29 made an appropriation for the purpose of carrying out the provisions of the Act, and is omitted as temporary only.

By an Act of June 25, 1910, ch. 401, § 2, 36 Stat. L. 830, provisions were made for the payment for additional clerical assistance from Sept. 27, 1906, to June 30, 1907. Inclusive, employed by the clerks authorized by section 3, given in the text. Section 1 of said Act of June 25, 1910, ch. 401, amended section 13 of the Act of June 29, 1906, ch. 3592, infra, p. 984, and section 3 amended section 4, paragraph 2, of the last cited Act, infra, p. 959.

As to the Bureau of Immigration and Naturalization, subsequently divided and designated the Bureau of Immigration and the Bureau of Naturalization, see subdivision 1 of this title. supra, p. 939.
NATURALIZATION

By the Judicial Code of March 4, 1911, ch. 13, §§ 289–291, the Circuit Courts were abolished and their powers and duties conferred on the District Courts. See JUDICIAL.

R. S. sec. 2165, repealed by section 26 of this Act, infra, p. 998, provided that the declaration of intention should be made "before a circuit or district court of the United States, or a district or supreme court of the Territories, as a court of record of any of the States having common-law jurisdiction, and a seal and a clerk." By an Act of Feb. 1, 1876, ch. 5, 19 Stat. L. 2, this section was amended so that the declaration therein required might be made "before the clerk of any of the courts named in said section," and all such declarations theretofore made before any such clerk were declared "as legal and valid as if made before one of the courts named in said section."

R. S. sec. 2173, likewise repealed by section 26 of this Act, infra, p. 998, provided that "The Police Court of the District of Columbia shall have no power to naturalize foreigners."

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I. INTRODUCTORY

Powers of Congress.—Under Const. U. S., art. I., sec. 8, giving Congress power to establish uniform rule of naturalization and to make all laws necessary and proper for carrying the power into execution, Congress has exclusive jurisdiction over the subject of naturalization. Hampden County v. Morris, (1911) 207 Mass. 167, 93 N. E. 579, Ann. Cas. 1912A 815.

Scope of Act.—This Act "was obviously intended to cover fully the subject of naturalization" and it repealed various sections in the Revised Statutes, but not all. In re Mallari, (D. C. Mass. 1916) 239 Fed. 416.

As an aid to the construction of this Act the court may consider the reports of committees, the introduction of amendments, and the opposition made to the passage of the Act in its various forms. In re Valhoff, (S. D. Cal. 1916) 238 Fed. 406.

II. COURTS HAVING JURISDICTION

1. United States Courts

The jurisdiction of the United States District Court, in matters of naturalization, does not depend upon the facts stated, but is derived from the statutes of the United States. U. S. v. Walsh, (C. C. Mass. 1884) 22 Fed. 644.

2. State Courts

In general.—"Article I, § 8, clause 4, of the Constitution of the United States vests in Congress the power to establish a uniform rule of naturalization. Acting under this constitutional authority from the earliest history of the government, Congress has passed acts regulating the naturalization of aliens, admitting them to citizenship in the United States, and has authorized such proceedings in the state, as well as federal, courts. The validity of such proceedings by virtue of the power conferred by acts of Congress has been recognized from an early day. Campbell v. Gordon, (1810) 6 Cranch 176, 19 R. 3 U. S. (L. ed.) 101; Stark v. Chesapeake Ins. Co., (1813) 7 Cranch 420, 3 U. S. (L. ed.) 391. The naturalization acts of the United States, from the first one in 1790 have conferred authority upon state courts to admit aliens to citizenship. Van Dyne on Naturalization, p. 11, and the following. It is undoubtedly true that the right to create courts for the states does not exist in Congress. The Constitution provides (Art. III, § 1) that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. But it does not follow that Congress may not constitutionally authorize the magistrates or courts of a state to enforce a statute providing for a uniform system of naturalization, and defining certain proceedings which, when complied with, shall make the applicant a citizen of the United States. This Congress had undertaken to do in making provision for the naturalization of aliens to become citizens of the United States in a certain class of state courts—all those of record having common law jurisdiction, a clerk and a seal. Rev. Stat. U. S., § 2165 (since superseded by the act of June 29, 1906, c. 3392, 34 Stat. 506)." Holmgren v. U. S., (1910) 217 U. S. 509, 30 S. Ct. 588, 54 U. S. (L. ed.) 841, 19 Ann. Cas. 778. See further on this subject Cresson Min., etc., Co. v. Colorado Land, etc., Co., (C. C. Colo. 1884) 19 Fed. 78; State v. Penney, (1850) 10 Ark. 621; Morgan v. Dudley, (1857) 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735; State v. Libby, (1907) 47 Wash. 481, 92 Pac. 350.

Though naturalization cases arise under the Constitution and laws of the United States, yet, because these are part of the law of the land, and merely give the rule for an admitted state function, state courts
may entertain this jurisdiction. Rump v. Com. (1858) 50 Pa. St. 475.

"The authority of state courts to naturalize aliens, as well as that of the federal courts, emanates from Congress. All are, for the purpose of the naturalization acts, federal courts, and one set of courts is not foreign to the other." U. S. v. Askervik, (D. C. Ore. 1910) 180 Fed. 137. See to the same effect Matter of Cristern, (1878) 43 Super. Ct. (N. Y.) 523; People v. Sweetman, (1857) 3 Park. Crim. (N. Y.) 355.

The courts of a state may, with the consent of the legislature, exercise the jurisdiction conferred by this Act, but the jurisdiction must be exercised under and in conformity with the federal statutes, not only in matters entering directly into the subject of naturalization, but also in matters of congressional legislation fairly incidental to the exercise of the constitutional power to deal with naturalization. Hampden County v. Morris, (1911) 207 Mass. 167, 32 N. E. 579, Ann. Cas. 1912A 815.

The federal government in authorizing state courts to act in naturalization proceedings selects such courts and the clerks thereof as government agencies through whom the government is discharging a function of sovereignty; and, while Congress may confer power on the state courts to act in naturalization proceedings and the state courts may constitutionally exercise the same when authorized to do, Congress may not make their acts in that regard a part of their duties as state courts, and the power conferred and the duties imposed by the Naturalization Act are not "ex officio" powers and duties belonging to and devolving on a state office as such. Eldredge v. Salt Lake County, (1910) 37 Utah 158, 106 Pac. 939.

Courts of record.—Under the Act of Congress of 1892 conferring jurisdiction upon state courts of record for the purpose of naturalization, only courts of record for general, and not for special purposes were intended to be embraced within its provisions. Mills v. McCabe, (1867) 44 Ill. 194.

Common-law jurisdiction.—Under the above section, it is not indispensable to the qualification of a court that it should have all the common-law jurisdiction, or even that it should have a general common-law jurisdiction. U. S. v. Nechman, (E. D. Mich. 1910) 18 Fed. 788.

Another statute on the same subject provided that aliens might be admitted as citizens by a court of record of any of the states having "common-law jurisdiction," and a seal and a clerk. Under the former statute it was well settled that to constitute a court of "common-law jurisdiction," it was not necessary that it should be one possessing a general common-law jurisdiction, but that if any part of the jurisdiction answered the designation the requirement of the statute was fulfilled. Levin v. U. S., (C. C. A. 8th Cir. 1904) 128 Fed. 826, 63 C. C. A. 476; In re Wolf, (M. D. Tenn. 1911) 188 Fed. 519; State v. Weber, (1905) 96 Minn. 422, 105 N. W. 490, 113 A. S. R. 630. See, however, Knox County v. Davis, (1872) 63 Ill. 405.

"We apprehend the state courts mentioned in the act of Congress as having common-law jurisdiction are such as exercise their powers according to the course of the common law. It was not meant they should have all common-law jurisdiction over every class of subjects, including all civil and criminal matters. If this were so, it is apprehended but few courts could be found in any of the states that would possess the requisite common-law jurisdiction." People v. McGowan, (1875) 77 Ill. 641, 20 Am. Rep. 234.

Under the same Act of Congress mentioned above, giving to state courts having common-law jurisdiction power to naturalize, it was held that a state court having only statutory jurisdiction could not grant naturalization. Ex p. Knowles, (1833) 6 Cal. 300.

Presumption of jurisdiction of court of sister state.—When a court of record of another state has assumed jurisdiction of a controversy or proceeding, and pronounced judgment therein, it will be presumed in the courts of this state, upon the production of a certified copy of the judgment, authenticated as required by the Act of Congress, that the court had jurisdiction of the subject matter and authority to render the judgment. State v. Weber, (1905) 96 Minn. 422, 105 N. W. 490, 113 A. S. R. 630, wherein it was held that the Common Pleas Court of Meigs county, Ohio, a court having a judge, clerk, and seal, having entertained an application for the admission of an alien to citizenship in the United States, and ordered a judgment granting the same, was presumed to have been of record that the court was one of record exercising common-law jurisdiction, with authority to hear and determine the application.

Rules governing state courts.—In naturalization proceedings the United States Government exercises certain functions which exclusively belong to that government, and in authorizing the state courts to act in such proceedings the national government selects such courts and the clerks thereof as government agencies through whom said government is discharging some of its peculiar functions of national sovereignty. This power being one to be exercised as a function of the national government, and governed by rules required by the federal constitutional provision to be uniform, it follows that the state courts must of necessity be controlled in their method of procedure, as well as in their determination of the rights of applicants for citizenship, by laws enacted by Congress. Upon no other theory could
the rule of uniformity be maintained. State v. King County Superior Ct., (1913) 75 Wash. 259, 134 Pac. 916, Ann. Cas. 1915c 128.

County courts in some states have been held to have power to naturalize aliens. In re Conner, (1870) 30 Cal. 98, 2 Am. Rep. 427; Dale v. Irwin, (1875) 78 Ill. 170; People v. Pease, (1860) 30 Barb. (N. Y.) 586. People v. Sweiman, 3 Park. (N. Y.) 358; Ex p. Burkhardt, (1856), 16 Tex. 470. But County Courts do not have such power in all states. In re Wolf, (M. D. Tenn. 1911) 188 Fed. 519.

Prior to the adoption of the Illinois constitution of 1870, the County Courts in the state had no jurisdiction to admit aliens to citizenship. Knox County v. Davis, (1872) 63 III. 405.

The New York Supreme Court has ample jurisdiction over naturalization as any other court. In re Guliano, (S. D. N. Y. 1907) 156 Fed. 491.

But the old Marine Court of the city of New York had no power to naturalize, not being a court of record. Mills v. McCabe, (1887) 44 Ill. 194.

The Supreme Court of South Carolina, which is for most purposes an appellate court, cannot naturalize aliens. Ex p. McKenzie, (1897) 51 S. C. 244, 28 S. E. 468.

The St. Louis Court of Appeals has common-law jurisdiction, and is empowered to admit qualified aliens to citizenship, because it has common-law jurisdiction to issue, hear, and determine writs of habeas corpus, quo warranto, mandamus, and certiorari, and in the determination of actions at law it is generally governed by the principles, rules, and usages of the common law.

The Court of Insolvency of Cuyahoga county, Ohio, has been held to have jurisdiction of aliens seeking citizenship by reason of the fact that it has "some common-law jurisdiction." U. S. v. Nechman, (E. D. Mich. 1910) 183 Fed. 788.

The Probate Court of Shelby county, Tennessee, was held to have no common-law jurisdiction empowering it to naturalize aliens. Ex p. Tweedy, (W. D. Tenn. 1884) 22 Fed. 84. But the contrary was held concerning the Surrogates' Courts of New York, Matter of Harstrom, (1879) 7 Abb. N. Cas. (N. Y.) 391: and also the Probate Courts of Ohio, Ex p. Smith, (1859) 22 Fed. Cas. No. 12,969.

The Court of Nisi Prius of Pennsylvania was a court having power to naturalize. Com. v. Lee, (1809) 1 Brews. (Pa.) 271; Moran v. Rennard, (1870) 3 Brews. (Pa.) 601.

The Court of Criminal Correction of the city of St. Louis was held to have the power to naturalize. U. S. v. Lehman. (E. D. Mo. 1889) 39 Fed. 49.

But the Criminal District Court of Louisiana was without power to naturalize. State v. Baker, (1899) 51 La. Ann. 1243, 26 So. 102.

The Criminal Court of the county of St. Louis was held in an early case to have jurisdiction to admit aliens to citizenship. People v. McGowan, (1875) 77 Ill. 644, 20 Am. Rep. 254.

The Police Court in Lowell was held authorized to naturalize. Ex p. Gladhill, (1844) 3 Metc. (Mass.) 182.

The City Court of Yonkers was held to have power to naturalize. U. S. v. Power, (1877) 14 Blatchf. 223, 27 Fed. Cas. No. 16,680.


The Lexington City Court being a court of record, having a clerk and seal, and being vested with a limited common-law jurisdiction, has authority to admit aliens to citizenship. Morgan v. Dudley, (1857) 18 B. Mon. (Ky.) 693, 68 Am. Dec. 735.

3. Porto Rico District Court

It was held, under former R. S. sec. 2165, that a judgment of naturalization obtained in the District Court of Porto Rico could not properly be questioned on the ground that the court did not have jurisdiction over naturalization of aliens. (1912) 29 Op. Atty.-Gen. 521.

4. "Court Having Clerk"

A court of record, without any clerk or other recording officer distinct from the judge of such court, is not competent to naturalize aliens. Ex p. Cregg, (1854) 2 Curt. 98, 6 Fed. Cas. No. 3,380; Dean, Petitioner, (1891) 83 Me. 489, 22 Atl. 385, 13 L. R. A. 229; State v. Webster, (1878) 7 N. H. 409; State v. Whitemore, (1870) 30 N. H. 245, 9 Am. Rep. 104.

III. AUTHORITY OF CLERKS TO NATURALIZE

Clerks of courts have no power to grant citizenship to aliens, as such power is judicial in its nature and not clerical, though in early times the practice was for clerks of state courts to issue certificates of citizenship without any application being made to the court. In re Clark, 18 Barb. (N. Y.) 444.

IV. "RESPECTIVE JUDICIAL DISTRICTS"

In general. — "Within the respective judicial districts of such courts," in the above provision, has been construed to mean "within the territorial jurisdiction of such courts." Under this construction an alien residing in a given county of a state judicial circuit cannot be admitted to citizenship by the state Circuit Court of another county within that circuit which has no territorial jurisdiction outside of

But where a state District Court has determined that while sitting in one county it may entertain a petition for naturalization presented by a resident of another county of such district, a federal court, to which is presented a petition for the cancellation of the certificate issued by the state court, will not pass upon the jurisdiction of the state court where dependent upon the construction to be given to the state law. U. S. r. Andersen, (D. C. Idaho 1909) 169 Fed. 201.

This section confers naturalization jurisdiction on the courts of the various states extending to aliens resident within the respective judicial districts of such courts. The Washington constitution, art. 4, § 6, conferred general jurisdiction on the Superior Courts of that state within their judicial districts, not limited to the counties composing the same, and by statute Klickitat and Clarke counties were in the same judicial districts, the courts of those counties being presided over by the same judge. It has been held that, where an alien resident of such district was naturalized by such Superior Court while sitting in Clarke county, it was not a fatal objection to the naturalization that the alien was a resident of Klickitat county. U. S. r. Stoller, (E. D. Wash. 1910) 160 Fed. 910.

Under the provision in this section that "the naturalization jurisdiction of all courts herein specified, state, territorial, and federal, shall extend only to aliens resident within the respective judicial districts of such courts," it has been held that a District Court of the state of Kansas has jurisdiction to naturalize aliens resident in the county where it is sitting only, its territorial jurisdiction while so sitting being restricted to that county by state statute. (Dasseler's Gen. Stat. Kan. 1905, sect. 1010.) U. S. r. Johnson, (C. C. Kan. 1906) 181 Fed. 429.

Determination of jurisdiction as of what time.—It has been said that the first step in the judicial proceeding of admission is the petition and not the declaration of intention and the jurisdiction of a court, therefore, is to be determined as of that time. U. S. r. Breen, (1909) 135 App. Div. 824, 120 N. Y. S. 304.

On the other hand, there is authority that the alien is required to be a resident of the judicial district wherein he files his declaration of intention and seeks to have the court naturalize him. In re Pearlman, (W. D. Tenn. 1915) 226 Fed. 66, wherein the court said: "The facts substantially are these: Philip Pearlman, the petitioner, arrived in the United States, at the port of New York, May 14, 1906, and came to Memphis, Tenn., in June, 1906. He stopped here with a relative until July, 1906, when he left Memphis, Tenn., for Sunflower, Miss., where he obtained employment, and remained until March, 1908, in which latter month he returned to Memphis, Tenn.; to attend a business college, and remained there until September, 1908. Immediately upon the completion of his course at the business college, he returned to Sunflower, Miss., where he again secured employment, and remained until January, 1911. Except from March, 1908, to September, 1908, he spent the whole of his time at Sunflower, Miss., from July, 1906, until January, 1911, with the further exception that occasionally he would visit, for a few days at a time, his relatives at Memphis. Petitioner states that Memphis was his domicile and that he considered it his home. . . From the petitioner's own statement, I am satisfied that he was not a resident of Memphis, Tenn., at the time he filed his declaration of intention, within the meaning of the act of Congress, and therefore this court is without jurisdiction to entertain the petition."

A change of residence of the petitioner the acquisition of jurisdiction will not affect jurisdiction, or where he made the change before the hearing on the petition, but subsequent to the filing. U. S. r. Breen, (1909) 135 App. Div. 824, 120 N. Y. S. 304; Matter of Burke, (1908) 36 Misc. 3, 110 N. Y. S. 36.

V. RECORD AS SHOWING JURISDICTION

The jurisdiction of the courts to naturalize aliens is conferred by special statute, and is to be exercised in a special and summary manner, and not according to the rules governing courts in plenary proceedings. Usually these proceedings are ex parte, and the declaration of intention almost invariably ex parte. The law is well settled that in such cases a judgment can only be supported by a record which shows that all the facts necessary to confer jurisdiction existed, as no presumptions as to jurisdiction will be indulged. Ex p. Lange, (E. D. Mo. 1912) 197 Fed. 769.

SEC. 4. [Proceedings.] That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

Similar provisions were contained in R. S. sec. 2165, repealed by section 26 of this Act, supra, p. 989.

Power to naturalise vested in national government.—A state cannot make a subject of a foreign government a citizen of the United States. This can only be done
NATURALIZATION

Practically the same language appeared in the second Naturalization Act passed by Congress on the 29th of January, 1796. See 1 Stat. at Large, 414. That act was entitled: 'An act to establish an uniform rule of naturalization, and to repeal the act heretofore passed on that subject.' The following quotation therefrom is sufficient:

'For varying its complete effect, the power given by the Constitution, to establish an uniform rule of naturalization throughout the United States: Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions, and not otherwise. The prior act, which was that of March 26, 1790 (1 Stat. at Large 103), did not contain the words last above quoted. In many instances, at the same time many of the states, notwithstanding the constitutional provision that Congress should have power 'to establish an uniform rule of naturalization,' had been exercising a supposed right of admitting aliens to citizenship in the respective states. At April term, 1792, in the United States Circuit Court for the Pennsylvania District, in the case of Collet v. Collet, [1792] 2 Dall. (Pa.) 294, 1 U. S. (L. ed.) 387, [6] Fed. Cas. No. 3,001, the court say: 'The question now agitated depends upon another question: Whether the state of Pennsylvania, since the 26th of March, 1790 (when the act of Congress was passed), has a right to naturalize an alien? And this must receive its answer from the solution of a third question: whether, according to the Constitution of the United States, the authority to naturalize is exclusive or concurrent? We are of opinion, then, that the states, individually, still enjoy a concurrent authority upon this subject, but that their individual authority cannot be exercised so as to contravene the rule established by the authority of the Union.' The true reason for investing Congress with the power of naturalization has been assigned at the bar. It was to guard against too narrow, instead of too liberal, a mode of conferring the rights of citizenship. Thus, the individual states cannot exclude those citizens who have been adopted by the United States, but they can adopt citizens upon easier terms than those which Congress may deem it expedient to impose.' That decision is still operating. The acts of 1790 and 1793, seems to have required that the language in the act of 1793 should indicate an exclusive method of naturalizing foreigners. Since Chirac v. Chirac, [1817] 2 Wheat. 239, [5] 200, 269, 4 U. S. (L. ed.) 234, where Chief Justice Marshall, writing his language, 'That the power of naturalization is exclusively in Congress does not seem to be,
and certainly ought not to be, controverted; the meaning of the constitutional provision never seems to have been seriously doubted. That every variation from the exact language of the act should have the effect of rendering illegal the section of the court would be a strained construction, especially in view of section 27, which sets forth forms to be used in the proceedings to which they relate. That section does not say, The following forms shall be used in the proceedings to which they relate, but it says 'Substantially' the following forms shall be used in the proceedings to which they relate.'

First. [Declaration of intention—qualifications, etc.—previous declarations.] He shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, That no alien, who in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

The former provisions relating to the declaration of intention were contained in R. S. sec. 2165, which was repealed by section 26 of this Act, infra, p. 908. This section provided that the applicant should declare on oath before the court having jurisdiction (see the note to section 3 of this Act, supra, p. 952) "that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may, at the time, be a citizen or subject."

Nature of declaration.—A declaration of intention to become a citizen is in no sense a complete and binding act, and carries no full rights of citizenship before the final act of admission. In re Polson, (N. D. Cal. 1908) 159 Fed. 283.

Form of declaration of intention.—A declaration of intention must be filed on the form furnished for that purpose by the government (see infra, p. 908), otherwise it is a legal nullity. In re Brefo, (E. D. Ky. 1914) 217 Fed. 131, wherein the court dismissed a petition for naturalization on the ground that the declaration of intention, although filed in good faith and otherwise correct, was not a valid declaration, and could not be used as the basis for the petition, because it was not filed on a form furnished by the government.

Taking declaration is a ministerial act. — No judicial duty is to be performed by the court till the time of the taking of the second oath. The first one is taken and filed merely to be a public and recorded notice of the intention to become a citizen. In re Butterworth, (1846) 1 Woodb. & M. 323, 4 Fed. Cas. No. 2,251.

Declaration by whom made.—A declaration is not sufficient unless it is by the alien himself in conformity with the law at the time it is made. In re Poirier, (S. D. N. Y. 1909) 169 Fed. 456.

Declaration of intention by minor.—By this section a minor may declare his intention to become a citizen after reaching the age of eighteen years. In re Symansowski, (N. D. Ill. 1909) 168 Fed. 978.

Under the former statute which was silent concerning age it was held that a minor who had reached years of discretion could make a declaration of intention. In re Polson, (N. D. Cal. 1908) 159 Fed. 283: In re Gross, (E. D. N. Y. 1908) 160 Fed. 730; U. S. r. George, (C. C. A. 2d Cir. 1908) 164 Fed. 45, 90 C. C. A. 403: In re Symansowski, (N. D. Ill. 1909) 168 Fed. 978; In re Shapiro, (C. C. Ore. 1911) 180 Fed. 606.

Contr. — In re Spitzer, (N. D. Ill. 1908) 160 Fed. 137.

A minor over nineteen years of age may declare his intention to become a citizen. In re Kennedy, (1910) 4 Alaska 34.

A certificate of citizenship will be granted to a petitioner who more than five years previously, and at a time when he was a minor over eighteen years of age,
made declaration of intention to become a citizen, under the former statute which was repealed by this Act. In re Gross, (E. D. N. Y. 1908) 160 Fed. 739.

Renunciation of allegiance. In general.—It has been held that a declaration which does not comply with this section in that it fails to renounce forever all allegiance and fidelity, particularly by name, to the prince, etc., to whom the applicant owed allegiance is insufficient. Ex p. Lange, (E. D. Mo. 1912) 297 Fed. 769; In re Stack, (W. D. Mo. 1912) 200 Fed. 330; In re Friedl, (E. D. Wis. 1913) 202 Fed. 300. But by what seems to be the better authority, a mistake made in a declaration of intention, in the name of the sovereign to whom the declaration renounced allegiance, is not so vital that it may not be amended by order of the court, or so material as to invalidate the certificate of naturalization procured thereon. U. S. ex c. exornatos, (W. D. Pa. 1916) 229 Fed. 485; U. S. v. Orved, (W. D. Pa. 1916) 221 Fed. 777; In re Markowitz, (E. D. Pa. 1916) 233 Fed. 715; In re Denny, (S. D. N. Y. 1917) 240 Fed. 845.

In the case of In re Schwarz, (E. D. Pa. 1916) 236 Fed. 148, leave to amend a declaration of intention so as to show the declarant’s real name was refused. The facts and conclusions reached on such facts were stated by the court as follows: "The applicant is found to have complied with all the preceding conditions of admission to citizenship, except that he was not able to show the required preliminary declaration of intention to become a citizen. He met this with the explanation that he had in fact duly filed such declaration, but through an error the name of Charles Summer was written as the signatory instead of his proper name, Karl Schwarz, and that the error was due to his then inability to read or write English characters, and he affixed his mark appearing as the fixing it to his own name and not to the name there written. To make this explanation effective, he now files his petition to have the declaration amended. . . . The record asked to be changed was made March 14, 1911. The evidence we have on which to change it is the statement of the applicant himself. The question presented in such a case is not one of the truth or sincerity of the applicant, but whether it is a wise or safe rule to change a record without requiring at least as high a measure of proof as would be required to reform any writing. Inconvenience to the applicant is to be regretted, but this consequence cannot be avoided."

In an early case it was held that the omission of the name of the potentate was immaterial when the declaration follows the language of the statute and the sovereign is referred to by title. Ex p. Smith, (1847) 8 Blackf. (Ind.) 365.

Time of renunciation.—This section did not require a renunciation of allegiance to the foreign sovereign, or the actual declaration of allegiance to the United States, at the time of the applicant’s declaration of intention to become a citizen. In re Symanowski, (N. D. Ill. 1909) 168 Fed. 978.

Renewal of old declaration.—The language of the paragraph to the effect that an alien making a "declaration" under the old law shall not "be required to renew such declaration" means that he shall not be required to renew—i.e., make anew—any declaration for the purpose of petitioning for citizenship; in other words, that the declaration already made by him shall be sufficient in form whenever he chooses to make such petition. In re Valhoff, (S. D. Cal. 1916) 238 Fed. 405.

Date of arrival and name of vessel.—The requirement of section 4, par. first, that an application for naturalization shall state in his petition the date of his arrival in the United States and the name of the vessel on which he came must be given practical effect, and where such statement is disproved prima facie by proof that the appellant’s name does not appear among the passengers on the vessel named, the burden of proof is shifted to him to explain such fact to the satisfaction of the court, and his testimony that he came under a fictitious name which he cannot remember will not be accepted as satisfactory. In re Keitelman, (E. D. Pa. 1908) 185 Fed. 285.

Amendment.—Declarations of intention are part of the records of the court and may be amended but no record of the court should be changed unless the fact of error in the record as it stands clearly appears, and the stated record as it should be has been shown with like clearness. In re Markowitz, (E. D. Pa. 1916) 235 Fed. 715; In re Schwarz, (E. D. Pa. 1918) 236 Fed. 146. And we see further the authority cited supra under the catchline "Renunciation of allegiance."

Proof of declaration.—The essential fact of declaration is always decisively shown by the production of the record or by due certificate thereof. In re Frongone, (E. D. Pa. 1900) 89 Fed. 48. See State r. Barrett, (1889) 40 Minn. 65, 41 N. W. 450.

The certificate of an intention to become a citizen is the only proof received of that fact. Berry v. Hull, (1892) 6 N. M. 643, 30 Pac. 936.

Second. [Petitions for citizenship certificates.—requirements—verification—certificates of arrival and intention.] Not less than two years nor more than seven years after he has made such declaration of intention he
shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife, and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: Provided, That if he has filed his declaration before the passage of this Act he shall not be required to sign the petition in his own handwriting.

Provided further, That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred and ten, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their [sic] intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application. The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at
least five years continuously, and of the State, Territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States. At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrives in the United States after the passage of this Act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

See the notes at the end of this section, infra, p. 974.

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I. CONTENTS AND SUFFICIENCY OF PETITION

Residence of petitioner.—Under this section, providing that a naturalization petition shall contain every fact material to the petitioner’s naturalization required to be proved on the final hearing, and clause 4 declaring that the petitioner shall prove, among other things, that he has resided immediately preceding his application continuously within the state or territory where the court is at the time held, for one year at least, petitioner’s prior residence within the state or territory for a year is a necessary allegation of a petition for naturalization, and hence perjury may be assigned on a false allegation thereof. U. S. r. Dupont, (D. C. Ore. 1910) 176 Fed. 823.

Name of petitioner.—Section 76 of the Penal Law (see Penal Laws) makes it an offense for anyone to apply for naturalization in a fictitious or assumed name. In view of this statute a petition for naturalization which does not contain the petitioner’s right name cannot be amended but he must be left to make a new declaration in his right name. In re Boorvis, (S. D. N. Y. 1913) 205 Fed. 401.

Name of child.—A mistake in the name of a child is not ground for denying a petition for naturalization, there being an absence of any evidence of bad faith. In re Camaras, (D. C. R. I. 1913) 202 Fed. 1019.

II. SIGNATURE AND VERIFICATION.

1. Signature

In the case of In re Martinovsky, (W. D. Pa. 1908) 171 Fed. 901, it was held that a petition made Sept. 8, 1906, was insufficient because it was not signed in the handwriting of the petitioner as required by the statute. The court said: “It is true the thirty-first section of the act provides that the act shall take effect and be in force from and after 90 days from the date of its passage, with the proviso that certain sections, not including section 4, should go into effect immediately upon the passage of the act; and it is true that the declaration of the applicant’s intention was made within the 90 days from the date of the passage of the act. But the act clearly means what it says, and that the declaration of intention was made before the act should take effect, but subsequent to its passage, is no reason why the provisions of the act should be ignored. Let an order be drawn accordingly.”

2. Verification

Qualification of witnesses.—A witness who had surrendered his certificate of citizenship for cancellation is incompetent to verify a petition for naturalization because he is not a citizen of the United States as required by the above provision. In re O’Dea, (S. D. N. Y. 1908) 158 Fed. 703.

Acquaintance with the applicant five years before the final hearing does not qualify a voucher, as this provision expressly requires the witnesses to have known the applicant to be a resident for five years before filing the petition. Nor is a person having such knowledge qualified as a witness at the final hearing, the reason being that the fourth subdivision of this section requires proof of residence for five years preceding the date of the application, and such date under the present paragraph of the Act impliedly is fixed at the time of filing the application. But the applicant in such a case will be given leave to amend his petition and to have the same reported. In re Welsh, (E. D. Pa. 1908) 159 Fed. 1014.

By admitting at the final hearing that he has not known the petitioner for five years antedating the filing of the petition, a witness deprives of any probative force
the statement in his affidavit that he has known the petitioner for such period, and the petition will not be accepted because it does not comply with the spirit of the statute although meeting the letter thereof. *In re Aprua.* (S. D. N. Y. 1908) 158 Fed. 702.

**Time of verification.**—A petition for naturalization is void because not verified by each witness on the same day. *In re Frenze.* (D. C. Ore. 1911) 190 Fed. 1022, wherein the court said: "I can conceive of no theory of law or in reason why a petition may not be partly filled out on one day and completed on the next, provided requisite notice of the application is immediately given. It is no doubt the better practice for both witnesses to sign and verify at the same time, and such should ordinarily be required; but circumstances may arise where it is impossible or impracticable to do so. Where a petition in due form, purporting to be verified by two witnesses, is filed, one of whom is in fact incompetent, it has been held that it cannot be amended by being verified by another witness, and should be dismissed. *U. S. v. Martorana.* 65 C. A. 2d Cir. 1948 171 Fed. 397, 96 C. C. A. 335. But where the petition is properly verified by the requisite number of competent witnesses prior to the posting of notice, there is no occasion for amendment; for the petition is complete and conformable to the law before any official action is taken thereon.*

**Proof of residence.**—While the verification provided for in this clause must show that petitioner has resided continuously in the country for at least five years, such showing need not be made by the same witnesses for the entire period, and so long as there are at least two credible witnesses testifying as to each fraction of the period, so as to cover the whole, the statutory requirement is satisfied. *In re Adler.* (D. C. Ore. 1914) 161 Fed. 608.

**Effect of insufficient verification.**—A petition which is not verified by at least two persons who are not parties to the petition, and cannot be amended. *U. S. v. Barto.&quot; (N. D. C.C. 1916) 222 Fed. 213.

A petition for naturalization must be verified in advance of the hearing unless it will be signed and verified by each witness at the time of the petition as in a court of record. *In re M. F.* (D. C. Ore. 1916) 184 Fed. 764.

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**Proving Petitions**

**Not less than two years.**—In order to

**Except in cases of compelling necessity, a petition for naturalization shall not be heard if the petition has not been filed within a period of two years from the issuance of the warrant of arrest.**
is no reason why there should be any distinction in this regard between old and new applicants. The purpose of the act in this respect was to require that the applicant should move within a reasonable time, and the Congress fixed seven years as such a reasonable time. It seems fair to assume that the time limit was established in order to give the appropriate officials of the government a fair opportunity to make such investigations as would inform the court in respect of the admissibility of the applying alien. The question under consideration was referred to by Judge Triber in the case of In re Wehrli, [E. D. Ark. 1907] 157 Fed. 938, and he interpreted the statute in this respect concisely as follows: "The true intent of Congress was that aliens declaring citizenship to be naturalized after the passage of the act must file their final application within seven years after the filing of the declaration of intention, and as to those who filed the declaration before the enactment of the statute they must make their final application within seven years from the enactment of the act."

Realizing that a decision of this question will involve the status of a considerable number of aliens, I have conferred with Judge Hough and Judge Hand, and they authorize me to say that they concur in the conclusion herein expressed. I am of the opinion that where the petition for admission is made more than seven years after the act went into effect, to wit September 28, 1906, it is not valid for any purpose. In affirming the judgment of the District Court the Circuit Court of Appeals through Coxe, Circuit Judge, said: "The question presented is an interesting one and is not free from doubt, but we are inclined to the opinion that the construction of the law adopted by the District Judges gives effect both to the provisions of the act of 1906 and to the law as it existed prior thereto, without interfering improperly with the rights of applicants for citizenship. It puts all aliens upon a par as to the time in which their declaration is to be made. A declaration made prior to the act of 1906 is valid, no matter how long prior thereto it may have been made, but after the date of the passage of that act the person who made the declaration becomes a superior right to one who declares thereafter. In both cases action must be taken within seven years. It seems to us that this is what Congress intended. In effect the act says to the alien who has made his declaration prior to 1906: 'Your declaration is in all respects valid, but if you wish to become a citizen you cannot delay your application for a period of over seven years from the passage of the act.' The cases sustaining this view are In re Wehrli, [E. D. Ark. 1907] 157 Fed. 938; In re Goldstein, [E. D. N. Y. 1914] 211 Fed. 183. The opposing view is clearly stated by Judge Orr in Elchhorst v. Lindsey, [W. D. Pa. 1913] 209 Fed. 708, and by Judge Maxey in In re Anderson, [W. D. Tex. 1914] 214 Fed. 632."


In the case of In re Lee, (E. D. Mich. 1916) 236 Fed. 987, the court said: "The effect, and, in my opinion, the only purpose, of this proviso is to give to a declaration filed such a status as became a law, and in conformity with the law in force at the date of such declaration, the same force and effect as if it had been filed in conformity with, and therefore subsequent to, the passage of such act. The alien seeking citizenship was still required to file a declaration of intention, but if such declaration had already been filed in conformity with the former law, that declaration would take the place, and be accepted in lieu of, the particular kind of a declaration otherwise required, notwithstanding the fact that such aforementioned declaration was a different kind of declaration than that described and prescribed in said act. This, in my opinion, is the meaning of such proviso."

Excluding date of application in computing time.—Where the declaration of intention was filed October 16, 1912, a petition bearing date October 15, 1914, was held not too early to satisfy the statutory proviso that "no less than two years should elapse between the filing of the declaration and the filing of the petition. In re Puglisi, (E. D. Pa. 1916) 230 Fed. 188, wherein the court said: "On the whole the computation to be adopted is that applied by Judge Orr in the case of In re Babjak, [W. D. Pa. 1914] 211 Fed. 551, application. It is that the date of filing is to be included or rejected in the count with a view to the entertaining of jurisdiction by the court. He, therefore, admitted as in time an application which otherwise would have been a day late. By the same rule we are constrained to admit an application which otherwise would be a day too soon."

2. Filing in Duplicate

The provision of this section requiring a naturalization petition to be filed in duplicate is directory only, so that a failure to comply therewith will not render the proceedings void. U. S. v. Stoller, (E. D. Wash. 1910) 150 Fed. 910. In U. S. v. Erickson, (W. D. Mich. 1910)
188 Fed. 747, the court said: "The requirement of a duplicate petition as distinguished from a mere copy cannot be for any purpose excepting for the convenience and permanence of record, and I do not think the absence of one duplicate, under the conditions for which it was created, is vital. The department desires to be advised of all the particulars specified in the petition, so that it can make the necessary inquiry and opposition, if there is reason thereof. This substantial purpose was fully satisfied by what was done in this case."

3. Calendar Entries

The absence of a filing indorsement, or a calendar entry by a clerk concerning a naturalization petition actually filed, is immaterial if the fact of filing sufficiently appears. U. S. v. Erickson, (W. D. Mich. 1910) 186 Fed. 747.

IV. Subsequent Petitions

Repeated applications for naturalization may not be made, it seems. In In re Guliana, (S. D. N. Y. 1807) 156 Fed. 420, it appeared that the applicant had within a few months been denied final papers by a state court. Hough, J., said: "The letter of the present Act seems to place no limit upon the number of applications that an alien may make for naturalization; but I cannot think it follows that a man who has fully submitted his case to a court of competent jurisdiction and had judgment against him can propound a new application the next day in another court, and repeat the operation as long as his courage dictates or his pocket permits. It is inconceivable that, should Guliano's application be entertained in this court, and his final petition come on for hearing (as it would) within a few months after the decision above noted, such decision would be wholly disregarded, and a certificate granted upon substantially the same facts as had induced its denial a few months earlier."

In the case of In re Centi, (W. D. Tenn. 1914) 217 Fed. 833, the question raised by a plea in bar to a petition for naturalization was, what length of time must elapse from the date of an order denying, on the merits, a petition of an alien for naturalization, before he may properly file a second petition for naturalization. The court said: "The statute requires that it should be made to appear to the satisfaction of the court that an alien, applying for naturalization, immediately preceding the date of his application has resided continuously within the United States for five years, at least, and that during that time he had been held as a man of good moral character, etc. This statute does not impose a permanent disability, but it does impose a disability for the five-year period expressly stated, and I am of the opinion that in this case the five-year period begins to run from the date the order was entered denying his former application, and that he cannot file and maintain a petition for naturalization in this court until the expiration of five years from the date of the former adjudication, and then upon proof that satisfies the court that he has complied with section 4 of the naturalization act, during that five-year period. To hold otherwise would seem to stamp former adjudications wherein an alien has been denied naturalization as a nullity, and an alien might file a petition as often as he is denied citizenship, and that, too, one following hard upon the heels of the other. Either the order denying citizenship should be of some consequences, or it should not be made."

V. Certificate

In general.—It has been held that the certificate from the Department of Commerce and Labor must be filed at the time the petition is filed, otherwise the petition will be denied. In re Liberman, (W. D. Wash. 1912) 193 Fed. 301.

But in In re Titone, (E. D. N. Y. 1916) 233 Fed. 175, the court said: "Under the authority of U. S. v. Ness, [C. C. A. 8th Cir. 1916] 230 Fed. 950, [145 C. C. A. 144], affirming (N. D. In. 1914) 217 Fed. 109] it would seem that the failure to file a certificate of landing may be cured as an irregularity, and hence in this case the actual presentation and filing of a proper certificate before the original date of hearing would be sufficient."

Where on an application of an alien for citizenship, it appeared that the certificate required from the Department of Commerce and Labor had been mislaid and the applicant presented a copy for use on the hearing the court said: "Upon the situation presented, the copy now filed may be added to the record, in lieu of the one which has been lost, and the applicant may be admitted to citizenship. The paper is sufficient under the law, and no regulation specifying any particular form of certificate can be insisted upon, if not necessary for compliance with the requirements of the statute." In re Pick, (E. D. N. Y. 1913) 209 Fed. 999.

Nature of certificate.—"There is no provision in the act that the certificate required to be attached to the petition is the same certificate of registry that the commissioners of immigration should cause to be given to the alien. The certificate to be filed with the petition for naturalization provides only that it shall set forth the 'date, place, and manner of his arrival.' The certificate of registry would include, in addition, occupation, personal description in detail, place of birth, last place of residence and the in-
tended place of residence in the United States.' In re Schmidt, (W. D. Pa. 1913) 207 Fed. 678.

Certificate made up from records.—The certificate mentioned in this section should be made up from records mentioned in section 1 of this Act after proper inspection by the proper immigration officer from the statement made by the appellant. In re Hollo, (N. D. Ohio 1913) 206 Fed. 862.

But where it appeared that at the time an alien came to this country, he was not registered at the immigration office but afterwards, for the express and announced purpose of securing naturalization papers, he presented himself for examination before the United States inspector at the port of entry and made a satisfactory showing that he had resided continuously in the United States from the date of his first landing, and made a report to the Department of Commerce and Labor at Washington, which department thereupon issued a certificate showing that the petitioner had arrived at the port on the day claimed, it was held that the certificate was sufficient under this section, the court saying: "This certificate complies with the requirements of the law. This ruling of the court cannot in any way work to the detriment of the rigid enforcement of the immigration laws by the Department of Commerce and Labor. They were not required to issue the certificate; and, having issued it in this case, there is no reason why they must do so in a similar case in the future. The Naturalization Act requires records of entry to be kept by the Emigration Department. The court is of the opinion that they would be warranted in refusing a certificate of entry unless such entry was shown by their records. However, that question is not before this court at this time. If proceedings are ever brought by an alien to compel the issuance of a certificate of entry upon other showing than the records of the immigration office, it will be time enough for the court to pass upon that question. When the Department of Commerce and Labor see fit to issue a certificate showing the entry of an alien, they ought not to be heard to say in opposition to the admission of the alien to citizenship that, while the certificate is genuine and states the truth, the court ought not to give any weight to it because the official issuing it did not have proper proof before him." In re Paige, (E. D. Mich. 1913) 208 Fed. 1004.

VI. SECOND PROVISO CONSTRUED

The "five years" referred to in the latter part of this proviso has been held to mean five years before the hearing. In re Ross, (E. D. Pa. 1915) 223 Fed. 360; In re Fleury, (E. D. N. Y. 1915) 223 Fed. 803. But see contra In re Urdang, (E. D. Ky. 1913) 212 Fed. 557; In re Peters, (W. D. Wash. 1914) 213 Fed. 541; In re Horsecany, (D. C. Idaho 1918) 238 Fed. 446.

In the case of In re Horsecany, (D. C. Idaho 1918) 238 Fed. 446, the court said: "The real question which has been argued, and which is not free from difficulty, is whether or not the qualifications prescribed by the amendatory act relate to the period beginning with May 1, 1905, and extending up to the date of the application, or whether, aside from the mere requirement of residence, which it must be and is conceded relates in the first instance to the period beginning with May 1, 1905, the qualifications are required only for a period of more than five years immediately preceding the date of the application. The language of the act is ambiguous, and the legislative intent is elusive; but analysis and reflection tend to confirm my first impression, which was that all of the prescribed qualifications must have existed during the period intervening between May 1, 1905, and the date of the application. By just what specific cases or peculiar circumstances the provision was originally suggested to the legislative mind I am not advised, but doubtless it was intended to be remedial and to give relief to individuals or a class of individuals, the actual status of whom was brought to the attention of Congress. The act does not look to the future, but is concerned with a condition existing when the bill was introduced for passage. If the past tense had been used instead of the perfect, and if therefore the language were, 'who resided constantly in the United States,' instead of, 'who has resided constantly in the United States,' and 'labored and acted' instead of 'has labored and acted,' and 'exercised the rights or duties of a citizen' instead of 'has (in good faith) exercised a class of rights or duties of a citizen,' and 'was for a period of more than five years entitled, etc.' instead of 'has been for a period of more than five years entitled, etc.,' little doubt would be left touching the meaning of the section. But it will be noticed that the same tense has been carried throughout the section, and where it is first used it undoubtedly refers to the period beginning with May 1, 1905, a fact which tends to weaken the argument that its use in the subsequent clauses necessitates the view that the period relates back from the time of the filing of the application or of the hearing. The Act, while not approved until June 25th, is to be deemed to be a legislative declaration as of the first day of May, 1910. The view I have taken seems to find support in In re Urdang, (E. D. Ky. 1913) 212 Fed. 557, and In re

In the case of In re Joseph, (W. D. Tex. 1914) 214 Fed. 815, it appeared that the petitioner made application for letters of citizenship under this section without making a previous declaration of intention. Dismissing the petition without prejudice the court said: "It may be that, under the act above quoted, a minor alien, above the age of 18 years, would be entitled to letters of citizenship upon filing his declaration of intention and by otherwise complying with the requisites of the statute. But it is thought that, prior to the enactment of the statute of 1906, although children could become citizens through the naturalization of their parents, yet letters could issue to those only who had attained their majority, except in respect to the petition for information relevant to the present inquiry. See Mutual Ben. Life Ins. Co. v. Tisdale, [1876] 91 U. S. (258) 245, 23 U. S. (L. ed.) 314, and Boyd v. Nebraska, [1892] 143 U. S. 135, 12 S. Ct. 375, 36 U. S. (L. ed.) 105. In the case at bar the applicant was about seven months after the passage of the present law, and the court is of the opinion that he was not entitled to naturalization, either five years prior to May 1, 1910, or five years prior to the date of filing his petition. . . . To authorize the court to grant him letters of citizenship, he should first make his declaration of intention, and thereupon proceed according to the provisions of the naturalization statutes."

"Misinformation."—An applicant under the second proviso must have received the "misinformation" from a source which in the ordinary course of events might be considered authentic. In re Mondelli, E. D. Ky. 1913 225 Fed. 920, wherein the court said: "It is the opinion of the court that this petitioner lacked information, was ignorant of the laws relative to the naturalization of aliens, made no particular attempt to discover the requirements of the law in this regard, and did not therefore belong to the class of persons referred to in the aforesaid proviso. The petition is therefore dismissed, without prejudice."

In U. S. v. Soculak, S. D. Ia. 1917 214 Fed. 787, the court said: "On November 12, 1915, a suit was brought in the district court of Scott county, Iowa. On September 7, 1916, a petition was filed by the county attorney to set aside the order of naturalization. It appeared that the petition was presented by the petitioner, who had not yet attained the legal age of 18 years, and for other reasons. Defendant admits that he never filed any prior intention to become a citizen of the United States, but claims that he never made application or declaration of intention, because of misinformation in regard to citizenship, or the requirements of the law concerning the naturalization of citizens, and has labored and acted under the impression that he was or could become a citizen of the United States, and in good faith exercised the rights and duties of a citizen or intended citizen of the United States, because of such wrongful information, and for this reason he claims that he was entitled to citizenship by reason of the provisions of section 3 of the act of Congress approved June 25, 1910. . . . In order to be admitted under this section without previous declaration, it was necessary that defendant be a person who because of misinformation in regard to his citizenship, or the requirements of the law governing the naturalization of citizens, has labored and acted under the impression that he was or could become a citizen of the United States, and in good faith exercised the rights or duties of a citizen or intended citizen of the United States. The petition for information and belief. The defendant in this case did not come within the intent and meaning of this amendment to the act. This amendment was intended for special cases, which may be illustrated by those cases, which are not uncommon, where a man for years has exercised the rights and duties of citizenship, voting and serving upon juries, and holding office, believing himself to be a citizen, basing such belief upon the assumption in good faith that his father was naturalized, and that by reason of such naturalization his children, under twenty-one years of age at the time of such naturalization, thereby became citizens, and who then ascertain that his father never was in fact naturalized. This erroneous belief as to naturalization of the parents frequently has its origin in the laws of certain states, which permit an alien, after some declaration of citizenship, to become a citizen to exercise the privilege of voting, and his children, knowing that he is voting and exercising the rights of citizenship, assume that he has been naturalized. But the statute certainly does not mean that the person who claims the right of citizenship under the second proviso must have exercised the rights and duties of citizenship. There is no claim in this case that the defendant ever exercised any of the rights and duties of citizenship to his life has been the life of the country, and there is no claim of any evidence whatever, or because of any fact that he had the right to exercise the duties of citizenship. The act is based upon the fact that before
filling his petition for naturalization, he was advised by counsel that he had the right to be naturalized under the facts; but the advice of counsel cannot be of greater force than the decision of the court before whom the facts were presented. Under the law, the decision of the court, if erroneous, confers no rights. It would be unjust to assume that there is not ambiguity and uncertainty about the construction of this statute; but, under the authorities and under the facts, I am compelled to hold that the defendant was not a person entitled to naturalization without previous declaration, and that the judgment of the District Court of Scott county, admitting him to citizenship, was erroneous, and therefore it becomes my duty to set aside and annul the order of said court admitting the defendant to citizenship, and to set aside and cancel the certificate of citizenship granted to the defendant."

Third. [Declaration in open court.] He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

By R. S. sec. 2165, repealed by section 26 of this Act, infra, p. 998, similar provisions were made, except that the oath was required to be made at the time of application for admission, and the proceedings were required to be "recorded by the clerk of the court."

Fourth. [Evidence of residence, etc., required — additional testimony.] It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

By R. S. sec. 2165, repealed by section 26 of this Act, infra, p. 998, it was provided in part as follows: "It shall be made to appear to the satisfaction of the court admitting such alien, that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held, one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; but the Oath of the Applicant shall in no case be allowed to prove his residence."

The text makes the additional requirement of "continuous residence, and proof by two good witnesses." See section 10 of this Act, infra, p. 992, providing for proof of residence when it has not been continuous.

I. "Satisfaction of court." 967
II. "Continuously resided." 968
III. "Good moral character," 971
IV. "Two witnesses," 974

I. "SATISFACTION OF COURT"

By the provision that the facts mentioned shall appear to the satisfaction of the court, there is vested in the judge discretion to determine whether an alien is fit for admission. But this discretion is not arbitrary; it must be a sound judicial discretion, and if abused, is subject to review. U. S. v. Hranksy, (1909) 240 Ill. 560, 88 N. E. 1031, 130 A. S. R. 288, 16 Ann. Cas. 279.
II. "Continuously Resided"

In general.—"The Naturalization Act of 1790 (Act March 26, 1790, c. 3, 1 Stat. 103), and that of 1795 (Act Jan. 29, 1795, c. 20, 1 Stat. 414), and that of 1802 (Act April 14, 1802, c. 58, 2 Stat. 153), did not require aliens applying for citizenship to maintain a 'continuous' residence within the country for the prescribed period. But Act March 3, 1813, c. 42, § 12, Stat. 809, first provided that the alien must have resided in the United States 'for the continued term of five years next preceding his admission,' and added, 'without being at any time during the said five years, out of the territory of the United States.' The last-mentioned clause was repealed by Act June 26, 1848, c. 72, 9 Stat. 240. But since the act of 1813 the law has required residence for the continuous term of five years, or, as the act now reads, 'for the continued term of five years.' The fact that in the earliest acts a 'continuous' residence was not required, while in the latter acts and in the existing law it must be for a 'continuous term,' is significant. It is also significant that, while retaining 'the continuous term' of the act of 1813, there has been eliminated the clause 'without being at any time during the said five years out of the territory of the United States.'", U. S. v. Mulvey, (C. C. A. 2d Cir. 1916) 232 Fed. 613, 146 C. C. A. 471.

"The act of Congress conferred the judicial power and imposed the judicial duty upon the court which heard the application of this alien to consider all the evidence and arguments presented to it, and to decide and find whether or not he had resided in the United States continuously for five years immediately preceding his application." U. S. v. Deans, (C. C. A. 8th Cir. 1918) 230 Fed. 957, 145 C. C. A. 151, affirming (W. D. Ark. 1913) 208 Fed. 1018.

"Continuously" is not used in this paragraph literally as requiring the applicant to remain at all time physically within the jurisdiction, but applies to change of domicile only. U. S. v. Shamsan, (E. D. Pa. 1916) 232 Fed. 169; In re Reichenburg, (M. D. Pa. 1917) 238 Fed. 859.

In U. S. v. Cantini, (C. C. A. 3d Cir. 1914) 212 Fed. 925, 129 C. C. A. 445, the court said: "It is scarcely to be doubted, we think, that the phrase 'resided continuously' would be unreasonably restricted if it should be confined to the precise and literal meaning of the words. The continuous character of an alien's residence would thus be fatally interrupted by the briefest visit of pleasure, or friendship, or business, beyond the boundaries of the United States; and the rules of construction admonish us that we are not to suppose that Congress intends any statute to produce an unreason-
not that a temporary absence of a day, or a month, or of a few months, during the five years, is necessarily fatal to the continuity of the residence. It is that such an absence presents to the trial court the question of fact whether or not that absence and all the evidence before that court of the intention of the applicant, of the purpose and effect of his absence, and of all the facts and circumstances of the case, prove a breach in the continuity of his residence." U. S. v. Deans, (C. C. A. 8th Cir. 1916) 230 Fed. 957, 145 C. C. A. 151, affirming (W. D. Ark. 1913) 208 Fed. 1018.

"Resided."—The word "resided" has the meaning of "lived." The applicant must be seen to have been a "resident" in the sense of "inhabitant" of, and bodily present in the United States continuously for five years immediately preceding application for final papers. Such an interpretation affords opportunity for deliberate and temporary absences from the country for social or business reasons, while at the same time leaving none for a substantial interruption of that continuity of inhabitancy necessary to secure the effect of the provision. U. S. v. Griminger, (N. D. Ohio 1916) 236 Fed. 285. See to the same effect U. S. v. Cantini, (W. D. Pa. 1912) 199 Fed. 867.

It is familiar knowledge that the word "reside" is capable of different meanings and when employed in a statute must be construed in the light of the context and the purpose of such statute; generally, however, it signifies nothing more or less than domicile. Some light is thrown upon the intent of Congress by the history of the statute. As originally enacted April 14, 1892 (2 Stat. 155, c. 28), the requirement was simply of five years' residence in the United States, and as then construed the term "residence" meant "domicile." In re An Allen, (1842) 1 Fed. Cas. No. 201a. By the amendment of March 3, 1893 (2 Stat. 811, c. 42), the requirement was lengthened to seven years. No person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of the five years from the time of his arrival as aforesaid have resided within the United States, without being at any time during the said five years out of the territory of the United States." Through the change thus wrought Congress very clearly evinced its intention of requiring continuous physical presence. But, upon the other hand, the fact that in the revision the clause, "without being at any time during the said five years out of the territory of the United States," was omitted would seem to indicate a purpose rather than to abandon this requirement. It has been held that under the present law continuity of physical presence is not required. In re Schneider, (S. D. N. Y. 1908) 164 Fed. 335; U. S. v. Cantini, (W. D. Pa. 1912) 199 Fed. 857. This we believe to be a correct interpretation both of the new law and of section 2170 of the Revised Statutes. To establish a residence there must doubtless be a concurrence of act and intent; but, when once established, temporary absences from time to time, unaccompanied by an intent to abandon or change the residence, do not operate to interrupt the continuity thereof. There is nothing in the naturalization act, other than the phrase itself, "has resided continuously within the United States," to indicate a purpose upon the part of Congress to require continuous physical presence, and in the practical administration of the law such a construction would entail consequences harsh in the extreme. Within reasonable limits, therefore, it is a question of fact, to be determined in the light of all the attendant circumstances of each particular case, what the continuity of residence has been broken by temporary absences. U. S. v. Rockteschell, (C. C. A. 9th Cir. 1913) 208 Fed. 530, 125 C. C. A. 592.


A traveling salesman may "reside continuously" within the United States, notwithstanding that he makes business trips abroad from time to time for his employer. In re Reichenburg, (M. D. Pa. 1917) 238 Fed. 859.

Absence at sea.—An alien who acquired a domicile in a state of the Union more than five years prior to the date of his application does not lose his right to naturalization, under this subdivision, by the fact that he has spent a large portion of the five years at sea, where he was in the habit of returning to his domicile whenever opportunity offered and in other ways manifested his intention to abandon it. The word "continuously" in the above provision is not to be construed literally. And the witnesses required by this subdivision need only be persons whose knowledge is appropriate to the applicant's employment—for example, in the case of a sailor, persons who knew of his residence in the state where he applies before he went to sea, corresponded with him during such period, and knew of his return to his domicile from time to time at the termination of his voyages. In re Schneider, (S. D. N. Y. 1908) 164 Fed. 335.

In the case of In re Cook, (D. C. N. J. 1917) 239 Fed. 782, the court said: "The petitioner, who is a sailor and a native of Scotland, filed his declaration of intention to become a citizen of the United States on February 13, 1906. He was then and for some time prior
thereto had been employed, as he has been since, on a yacht belonging to a citizen of the United States. On March 16, 1916, he filed his petition for naturalization. He first came to the United States in the year 1902 as an officer on the yacht before mentioned. When the latter was in New York Harbor, as it has been for a comparatively short part of nearly every year since then, except as hereinafter set forth it was tied up to a dock in Hoboken, in this state. The petitioner has never lived ashore in this country. His family, consisting of a wife and five children, all of whom were born in Scotland, have never been in the United States. While, as before mentioned, he has been in American waters aboard the yacht for parts of each year from 1907 to 1913, inclusive, he was not here during the years 1914, 1915, and 1916. Except when he came here expressly for the purpose of filing his petition for naturalization, after which he returned immediately to Scotland, and again when he came to attend the hearing upon his petition. At the outbreak of the present European war the yacht was taken possession of by the British government, and since that time the petitioner has been in Scotland, with the exception of the two trips to the United States before mentioned, taking care of certain fittings of the yacht, which were removed when she was chartered by the British government. As the vessel upon which the petitioner has served was in no sense a merchant vessel of the United States, but merely a private yacht, the petitioner does not come within the provisions of section 2174 of the Revised Statutes. I am called upon to decide, therefore, whether, under the circumstances before detailed, the petitioner has, within the meaning of Act June 29, 1906, (34 Stat. 506), immediately preceding the date of his application, resided continuously within the United States for five years and within the state of New Jersey one year. I entertain no doubt at the hearing that the petitioner's alleged 'residence' in either was not sufficient to entitle him to be admitted to citizenship, but at the urgent request of his attorney took the matter under advisement, for the purpose of examining certain cases which he desired to submit. I have since examined all of them, and my original opinion is in no respect shaken."

One who deserted from a British ship of war, enlisted on board an American frigate, continued in the United States navy through the war of 1812 and for several years subsequently, and since that time had followed the sea constantly, sometimes in the merchant and at other times in the United States service, was held not to have acquired a residence in the United States to entitle him to naturalization. "His being on board a public vessel would not constitute a residence which, if allowed to go on, because, as has already been indicated, under the Act of 1802, the residence must have its commencement within the territory of the country." Anonymous, (1846) 4 N. Y. Leg. Obs. 98, 1 Fed. Cas. No. 485.


And it is very clear that one who while a resident of the United States for one year immediately preceding the filing of an application for admission to citizenship was out of the country for the twenty years prior to the one year is not entitled to admission. In re Braab, (W. D. Wash. 1916) 235 Fed. 1003, wherein the court said: 'For the applicant, it is contended that he believed himself to be a citizen of the United States, and always held his allegiance to the Constitution of the United States, and that it was his intention to return to the United States when the business in which he was engaged was ended, and that pursuant to such determination he did return to the United States, and this mental condition or determination should be the controlling factor. In re Deans, (W. D. Ark. 1913) 208 Fed. 1018, and U. S. v. Deans, (C. C. A. 8th Cir. 1916) 230 Fed. 957 [145 C. C. A. 151], are cited to the court as sustaining this view, as well as a number of other authorities bearing upon legal, as contradistinguished from actual, residence, which I do not think have application here. I think this case is clearly distinguishable from the last case, in this, that Deans was only absent from the United States two months when he was in Scotland and four months when he was employed in the Panama Canal Zone, where he was discharged because he was not a citizen, and the court in that case, and I think properly, held that the residence contemplated by the act of Congress was not interrupted by the absence under the circumstances detailed. The court in that case merely held that it was not the intention of Congress that an alien must be actually and physically within the United States, actually present every day for the five-year period. Precise and reason show that each case must be determined upon its own facts, and that temporary residence of short intervals does not destroy the continuity of residence, constructively, at least, continued.'

In the case of In re Timourian, (S. D. N. Y. 1915) 225 Fed. 570, the court said:
"I think the opinion of Judge Betta, in re An Alien, [1842] 1 Fed. Cas. No. 201a, that of Judge Ward in the recent case of In re Schneider (S. D. N. Y. 1908) 164 Fed. 335, and the language of Judge McPherson in U. S. v. Cantini, [C. C. A. 3d Cir. 1914] 212 Fed. 925, 129 C. C. A. 445, indicate that a man is not to be deprived of citizenship for lack of continuous residence for five years when he has established and kept a legal domicile in the United States for that time and been out of the country less than one-third of the period and then only by reason of unforeseen business exigencies.

While one's residence under this section, which requires an applicant for citizenship to have resided in the United States for five years next preceding his admission, depends largely on his intention, such intention is to be gathered from his acts rather than from his declaration. Thus an alien who returned to and remained in his native country for more than four years, where his family always lived, he resuming his regular occupation there, cannot claim residence in the United States during that period. U. S. v. Aakervik, (D. C. Ore. 1910) 180 Fed. 137.

III. "GOOD MORAL CHARACTER"

In general.—One of the essential qualifications for admission to citizenship is that the applicant shall be a man of good moral character. This must not only be alleged, but proved, before a certificate of citizenship may be granted. U. S. v. Leles, (N. D. Cal. 1916) 236 Fed. 784.

Where an alien applying for admission to citizenship has not behaved as a man of good moral character while residing in the United States, the court, in the exercise of a sound discretion, will refuse his petition, though his behavior has been good during the five years preceding the petition; and the court must determine, taking into account the whole conduct of the petitioner, whether he possesses the necessary qualifications for citizenship. In re Ross, (M. D. Pa. 1911) 188 Fed. 685.

The behavior of the applicant during all the time of his residence within the United States is material. The fact that he has behaved as a man of good moral character during the five years immediately preceding his application, but has not so behaved during his residence prior thereto, does not entitle him to citizenship. In re Spenser, (1878) 5 Savy. 105, 22 Fed. Cas. No. 13.234.

Where it has been decided by a court of competent jurisdiction that an applicant for naturalization is not entitled to his papers because he has not been of good moral character for the statutory period, it appearing that he pleaded guilty to an indictment, a subsequent application will not be granted until the applicant can show that he has behaved himself as a person of good moral character for five years after the plea of guilty. In re Guliano, (S. D. N. Y. 1907) 156 Fed. 420.

Test of good moral character.—In U. S. v. Raverat, (D. C. Mont. 1916) 222 Fed. 1018, which was a proceeding by the United States for cancellation of a certificate of citizenship, the court said: "Behavior is taken as sufficient evidence of a good moral character, but it is not believed, as indicated in Hopp's Case, [E. D. Wis. 1910] 179 Fed. 561, 562, that Congress intended it should be conclusive evidence, precluding inquiry into the alien's actual moral character. Surely substance, and not shadow, was the ultimate qualification and test. (Under the present law even beliefs, thoughts, internal acts, may disqualify.) Be that as it may, however, it needs no analysis and no argument to demonstrate that when admitted to citizenship, and for years prior thereto, defendant neither was nor had behaved as a man of a good moral character. His business and conduct violated ethics and law, and were of long-continued immorality. He was an accessory of outcasts of society in their offenses against morals and law. If, as he testifies, he told the court his business and his location, 'answered all questions truthfully, and concealed nothing,' it is nevertheless clear that he must have satisfied the court as to the statute commands, and as we must presume until the contrary appears, that his behavior was that of a man of a good moral character. Therein the evidence was false, the court was deceived, defendant in conduct and character was not qualified for and entitled to citizenship, and so the decree and certificate were fraudulently procured. The result would be the same if the court received no evidence in relation thereto, but in a non-adversary proceeding, as it was, perfunctorily decreed admission. See Johannesen's Case, (1912) 225 U. S. 227, 32 S. Ct. 613, 56 U. S. (L. ed. 1066) Alberini's Case, (D. C. Mont. 1913) 296 Fed. 135. So likewise, if the evidence was truthful, and as herein, and the court accepted it as demonstrative of behavior like unto a man of a good moral character; for in such proceedings, more administrative than judicial, and as a part of the government is not concluded by the court's errors. This suit is long delayed. Circumstances might exist wherein reformation might be a defense, or might serve to invoke laches, even against the sovereign's suit. Had they existed, doubtless the suit would not have been brought, for it would serve no good purpose, or they would have been pleaded herein."

Character "as synonymous with reputation."—The word "character" as used in the above provision is not identical with "reputation." It means what a person really is, not what he is supposed to be. U. S. v. Hrasky, (1909) 240 Ill.
Maintaining place of bad repute.—An applicant for admission to citizenship does not possess a good moral character where the evidence shows that for some time prior to his admission to citizenship the applicant had been conducting a place of bad repute in the community, a sort of combination saloon, restaurant, and lodging or rooming resort, some of the rooms being situated over the saloon and restaurant, and others in adjacent cottages in the rear; that the place was frequented by people of bad repute, both men and women, for evil and illicit purposes; and that the applicant himself was fully aware of the bad character of his resort and the class of people frequenting it. U. S. v. Leles, (N. D. Cal. 1916) 538 Fed. 784.

Use of naturalization papers fraudulently procured.—One who knowingly and wilfully has made use of naturalization papers fraudulently procured, instead of surrendering them for cancellation, is not a person of good moral character as required by this provision. In re Di Clerico (E. D. N. Y. 1906) 156 Fed. 905.

Violation of liquor law.—Anyone who habitually, knowingly, and wilfully has violated the law requiring saloons to be closed on Sunday, and who states that he intends to continue to violate the law in case he is naturalized, is not a person of good moral character, and hence should be refused naturalization. U. S. v. Hrasky, (1909) 240 Ill. 560, 88 N. E. 1031, 130 A. S. R. 288 (16 Ann. Cas. 279) which has been pressed upon our attention.

But that the applicant for citizenship keeps his saloon open in violation of a state Sunday closing act does not show want of the good moral character essential under the Naturalization Act, where the law has never been enforced in his city of residence, and where the proper authorities have refused to obey the law if insisted upon by the proper authorities. In re Hopp, (E. D. Wis. 1910) 170 Fed. 561, wherein the court said: "What is meant by good moral character, as the terms are used in this Act? What standard does the statute contemplate? It is plain that it does not require the highest degree of moral excellence. A good moral character is one that measures up as good among the people of the community in which the party lives; that is, up to the standard of the average citizen. Ordinary care is the test of liability in every case of negligence. This standard is arrived at, not by the overcautious or the reckless man, but by the average man, representing the great mass of men. So here, when the law says a good moral character, it means such a reputation as will pass muster with the average man. It need not rise above the level of the common mass of people. Applying this test to the particular case, we find that the views and behavior of the applicant are in accord with the overwhelming majority of the people in this community. It is not contended that the applicant must be able to rise to such moral elevation that he may analyse, criticise, and reject the prevailing opinions and settled convictions of his fellowmen, and in the clear blue of righteousness choose for himself a course of action dictated by his quickened conscience. To meet such a test a man must be a philosopher, while the statute is satisfied with a citizen whose behavior is up to the level of the average citizen. There is nothing in the mental attitude of the applicant, as disclosed by his examination, which would brand him as a deliberate lawbreaker. His willingness to obey the law, if insisted upon by the constituted authority, distinguishes this case from the Illinois case (U. S. v. Hrasky, (1909) 240 Ill. 560, 88 N. E. 1031, 130 A. S. R. 288 (16 Ann. Cas. 279)) which has been pressed upon our attention.

In the case of In re Trum, (W. D. Mo. 1912) 190 Fed. 361, a bartender in the state of Kansas, which had a prohibitory law, was held not to be a person of good "moral character," he having been arrested and sentenced to imprisonment for selling liquor illegally. The fact that he had been paroled following his conviction was held not sufficient again to give him a good character. The court said: "It is fundamental that every state has, in general, the right to prescribe the terms upon which it will admit aliens to citizenship, and compliance with these terms is a
condition precedent to the power of the court to enter its decree. As governing this latter question, he provided that it shall be made to appear to the satisfaction of the court that during the five years immediately preceding the date of application the applicant shall have behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. What, then, constitutes good moral character, within the meaning of the Naturalization Act? The question has been infrequently discussed by the courts. Cases involving conduct evil in itself would present little difficulty. Discussion arises where the offense is merely malum prohibita. In the case of In re Spenser, [1878] 5 Sawy. 153, [22] Fed. Cas. No. 13,234, perjury is cited as falling within the former class, and an isolated case of the prohibited sale of intoxicating liquors belonging to the latter. Concerning this, however, the court says: 'And yet it is clear that anything like habitual gaming or vending of liquors under such circumstances would constitute bad behavior—immoral behavior—and be a bar under the statute to admission to citizenship.' Such, I think, must be the thoughtful view of any court. The laws of the state of Kansas prohibit the local sale of spirituous liquors. The courts of that state, when appealed to, enjoin such sales upon specific premises. The applicant, by engaging in such business in that state and upon such premises, exhibited a willful disregard, not only for the laws of the state, but the orders of the court. His act was that of the lawbreaker—not of one well disposed to the good order and happiness flowing from attachment to the principles of the Constitution of the United States. The court was not satisfied that such is the behavior of a man of good moral character. Defiance of the established order, and of the mandates of legal tribunals declaratory thereof, constitutes bad citizenship, bad behavior, and, if willfully persisted in, indicates a perverted moral character. It may well be doubted if a tendency in this direction would not menace the public welfare more than individual cases of immoral conduct as commonly understood. No court would directly set the seal of its approval or condonation upon such behavior, nor should it do so by indirection. A subsequent parole, like a subsequent pardon, does not obliterate the offense, but merely abates the penalty imposed under the law that has been violated.”

An alien having pleaded guilty to murder in the second degree will not be admitted to citizenship, though before the offense, and for more than five years after the commission of the offense, his conduct reveals no cause for exception. In re Ross, (M. D. Pa. 1911) 188 Fed. 685.

Violation of election laws.—In In re Conti, (W. D. Tenn. 1914) 211 Fed. 559, it appeared that the applicant had habitually violated the election laws by voting, with full knowledge that he was not qualified. In denying the application for naturalization the court said: "I am unable to bring my mind to the conclusion that an alien, who is shown by his testimony to have been an habitual violator of the election law, is attached to the principles of the Constitution of the United States, and is well disposed to the good order and happiness of the same. Without naturalization an alien can exercise and enjoy all the privileges and blessings of a citizen except the franchise and the right to hold office. It cannot be truthfully said that one is well disposed to the good order and happiness of a government whose laws he habitually and knowingly violates. Voting and holding office are amongst the very highest and most sacred rights exercised by the citizen, and, if an alien shall exercise such rights knowing that he is not entitled to do so, it would seem that he is not attached to the principles of this government, in the sense that I understand the term is used in the statute.”

False answers to questions asked by clerk.—An applicant who made false answers to question of the clerk of the court as to whether he had ever been arrested cannot be said to have behaved himself as a man of good moral character. In re Talarico, (W. D. Pa. 1912) 197 Fed. 1019.

Failure to include name of daughter in petition.—In the case of In re Camaras, (D. C. R. I. 1913) 202 Fed. 1018, the court said: "It is further suggested that in his petition the petitioner gave the names of all his children as residing at Providence, but that the name Celia was not included and the name Ida was given instead. It does not appear, however, that any attempt was made to conceal the parentage or identity of this daughter Celia when she came to this country, and I am unable to find in this discrepancy alone, in the absence of any attempt to conceal the identity of this daughter, evidence of bad faith, or of such a lack of good moral character as to justify denial of the petition on this ground alone.”

One who has committed perjury has so far behaved as a man of bad moral character as to disqualify him for citizenship. In re Spenser, (1876) 5 Sawy. 155, 22 Fed. Cas. No. 13,234.

Socialist.—In Ex p. Sauer, (D. C. Tex. 1891) 81 Fed. 355 note, the court refused to grant naturalization to a socialist, native of Germany, whose views, as expressed to the court, were held to be antagonistic to the principles of the Constitution of the United States.
IV. "Two Witnesses"

In general.—This section provides for the testimony of two witnesses as to the facts of residence, etc.

Discharged soldiers.—The section, however, is reconcilable with the earlier Act (Act July 17, 1862, ch. 200, R. S. sec. 2166, supra, p. 941) so as to permit an honorably discharged soldier to prove his case by one witness. In re Lofts, (S.D. N. Y. 1905) 165 Fed. 1002. See also In re Leichtag, (W. D. Pa. 1914) 211 Fed. 681.

Fifth. [Former titles, etc., to be renounced.] In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

Similar provisions were made by R. S. sec. 2165, repealed by section 26 of this Act, infra, p. 968.

Sixth. [Widows and minor children.] When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this Act, be naturalized without making any declaration of intention. [34 Stat. L. 596, as amended by 36 Stat. L. 830.]

This section was amended by an Act of Jan. 25, 1910, ch. 401, § 3, by inserting in the second paragraph, supra, p. 959, after the first proviso, a further paragraph, beginning "Provided further," down to and including the words "such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens." For a reference to the other sections of said amendatory Act see the notes to section 3 of this Act, supra, p. 952.

R. S. sec. 2168, repealed by section 26 of this Act, contained provisions somewhat similar to those of the text, being as follows:

"Sec. 2168. When any alien, who has complied with the first condition specified in section twenty-one hundred and sixty-five, dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oath prescribed [sic] by law."

Act of March 28, 1894, ch. 47, 2 Stat. L. 293.

Generally.—Under this provision an alien, whose father declared his intention of becoming a citizen, but died before being naturalized and during the minority of the child, may acquire naturalization upon complying with the other provisions of the act, without making a declaration of intention. In re Schmidt, (S. D. N. Y. 1908) 161 Fed. 231.

Stepchildren.—In In re Robertson, (M. D. Pa. 1910) 179 Fed. 131, it appeared that the applicant was born in England, where his father died, and his mother was again married to an alien, who emigrated to the United States when the applicant was about four years of age. When the applicant was about seventeen years old and residing with his stepfather as a member of his family, the stepfather made a declaration of intention, but died without having been naturalized. It was held that the applicant was entitled to naturalization on the strength of the stepfather’s declaration.

Widow of soldier.—This clause does not entitle the widow of an alien, who never declared his intention, to naturalization without previously making a declaration because the husband was an honorably discharged soldier of the United States and as such entitled to naturalization without making any declaration, under R. S. sec. 2166 (see supra, p. 941). U. S. v. Meyer, (E. D. Wash. 1909) 170 Fed. 983.

Time of filing petition after death of father.—Where an alien declared his intention to become a citizen July 31, 1889, and died March 6, 1892, without having been admitted to citizenship, it was held that his son, who came to the United States April 25, 1891, when between eight and nine years of age, and filed a petition for naturalization on April 22, 1909, three years after the passage of this Act, was not guilty of such laches as barred his right to citizenship, though he delayed his application for six years and
five months after he became of age, and for nine years and five months after he became eighteen, when he could have first taken the required oaths. U. S. c. Poshuay, (C. C. A. 2d Cir. 1910) 179 Fed. 836, 103 C. C. A. 324.

Declaration made under previous statute.—The right of a minor to avail himself of his father's declaration made under the earlier statute (R. S. sec. 2165, noted under R. S. sec. 2166, supra, p. 941) was not taken away by this Act, but was preserved and continued by the above clause. Consequently, a minor whose father made a declaration of intention under the previous law, and died before the passage of the present Act, succeeds to the benefit of such declaration and may apply for citizenship without making a declaration in his own behalf and waiting the prescribed period. In re Shearer, (E. D. Pa. 1908) 168 Fed. 839.

SEC. 5. [Public notice of petition, hearing, etc.—subpoenas to witnesses.] That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned. [34 Stat. L. 598.]

The "witnesses" referred to need not be the same as those verifying the petition. In re Schatz, (C. C. Oreg. 1908) 161 Fed. 237.

Posting of names of substitute witnesses.—Whether where new witnesses are substituted their names must be posted, and for the length of time provided for the original witnesses as shown in section 6, there is a conflict of authority. The authorities are collected and considered in the case of In re Giaquinto, (S. D. N. Y. 1918) 230 Fed. 1004, the question of opinion being as follows: "It seems that there has been a conflict of authority in reference to this question. Some courts have held that the posting is not necessary: In re Schatz, 161 Fed. 237 (C. C. Oreg., April 7, 1908); U. S. c. Doyle, 179 Fed. 687, 103 C. C. A. 235 (C. C. A. 7th Cir., April 19, 1910); In re Neugebauer, 172 Fed. 943 (W. D. Pa., Oct. 11, 1909); U. S. c. Ojala, 182 Fed. 51, 104 C. C. A. 491 (C. C. A. 8th Cir., Oct. 11, 1910). In addition I am informed that the posting of the names of substitute witnesses is not required in the United States District Court for the Eastern District of New York and also is not required in certain cases in the northern counties of the state of New York, in which naturalization hearings are held at infrequent intervals, and where such posting would result, at times, in delaying an applicant's admission to citizenship for many months. The authorities which have held that such posting is necessary are U. S. c. Daly, (1909) 32 App. Cas. (D. C.) 525, and Matter of O'Dea, decided by Judge Lacombe sitting as a circuit judge, 158 Fed. 703 (S. D. N. Y. Feb. 25, 1908). Judge Lacombe's view has been consistently followed in this district, and the question is whether that practice shall be departed from in accordance with the opinions above cited and because of the inconvenience to the applicant for naturalization. I am authorized by my Associates, Justicees Hough, Judge Learned Hand, and Judge Augustus N. Hand, to state that in view of the conflict of opinion, and in the absence of a holding to the contrary by the Circuit Court of Appeals for the Second Circuit or the Supreme Court, the ruling of Judge Lacombe will be followed in this district."

Presumption as to posting.—In the absence of a contrary showing, names of witnesses for an applicant for naturalization are presumed to have been posted for the time required by law. U. S. c. Erickson, (W. D. Mich. 1910) 188 Fed. 747.

SEC. 6. [Filing and docketing — hearings — election day restriction—change of name.] That petitions for naturalization may be made and filed during term of office or vacation of the court and shall be docketed the same
day as filed, but final action thereon shall be had only on stated days, to be
fixed by rule of the court, and in no case shall final action be had upon a
petition until at least ninety days have elapsed after filing and posting the
notice of such petition: Provided, That no person shall be naturalized nor
shall any certificate of naturalization be issued by any court within thirty
days preceding the holding of any general election within its territorial
jurisdiction. It shall be lawful, at the time and as a part of the naturaliza-
tion of any alien, for the court, in its discretion, upon the petition of such
alien, to make a decree changing the name of said alien, and his certificate
of naturalization shall be issued to him in accordance therewith. [34
Stat. L. 598.]

Petitions, when "docketed."—This sec-
tion is mandatory upon clerks of United
States courts in requiring them to receive,
file, and enter application for citizenship
immediately upon the receipt thereof,
whether the judge is present or not; and
this entitles a clerk to the per diem com-
 pensation allowed by law for such specific
Cl. (D. D.) 125. See also Jaynes v. U. S., (1912)
47 Ct. Cl. 523.

"Final action."—The evident purpose
of Congress in requiring that final action
in naturalization cases shall be had only
on stated days to be fixed by a rule of
the court, and that in no case shall final ac-
tion be had upon a petition until at least
ninety days have elapsed after filing and
posting notice of such petition, was to
prevent the granting of certificates of
naturalization unless due notice is given
to the United States and an opportunity
afforded to oppose the application. (1908)

The provision that in no case shall final
action be had upon a petition until at least
ninety days have elapsed after filing
and posting the notice of such petition is
mandatory but the remedy for a failure
to comply with the provision is not a
suit to cancel the certificate under section
15 but by objection in the proceedings
5th Cir. 1916) 231 Fed. 928, 146 C. C. A.
124, affirnng (E. D. La. 1918) 291 Fed.
461.

"General election."—A municipal elec-
tion held through the State of Pennsyl-
vania does not constitute a general elec-
tion within the meaning of this section.

Hearings within thirty days before
election.—The proviso to this section for-
bidding the issuing of any certificate of
naturalization by any court within thirty
days preceding the holding of any gen-
eral election within its jurisdiction does
not confer jurisdiction on petitions for nat-
uralization within such time, but merely
forbids the issuing of such certificates
within that time. (1908) 26 Op. Atty.-
Gen. 611.

Changing name of alien.—The court is
not given the discretion to change at any
time the name of a naturalized citizen
where either inadvertently or deliberately
he failed to make the application at the
time and as a part of his naturalization.
In re Holland, (E. D. Pa. 1916) 237
Fed. 735.

Where the declaration of intention was
made by the alien under an assumed
name and in his petition he asked to be
made a citizen under his real name the
court would not grant his application for
an amendment of the record. In re Boo-
vis, (S. D. N. Y. 1913) 206 Fed. 401,
wherein the court said: "If the error in
the original declaration had been clerical,
or had been innocent, I think it would be
within the power of the court to amend
it, so as to make it speak the truth. The
difficulty is that section 76 of the Penal
1102) [see PENAL LAWS] makes it an of-
fense for anyone to apply for naturaliza-
tion in a fictitious or assumed name. In
view of this statute, I think the petitioner
must be left to make a new declaration in
his right name."

Adjournments.—Where the rule day is
fixed by order of the court and the United
States attorney has an opportunity to be
present and be heard, the judge may, in
his discretion, adjourn the hearing to
such time as may suit his convenience,
and the convenience of the parties to the

SEC. 7. [Naturalization forbidden to anarchists or polygamists.] That
no person who disbelieves in or who is opposed to organized government, or
who is a member of or affiliated with any organization entertaining and
teaching such disbelief in or opposition to organized government, or who
advocates or teaches the duty, necessity, or propriety of the unlawful
assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States. [34 Stat. L. 598.]

By the Immigration Act of March 3, 1903, ch. 1012, § 39, 32 Stat. L. 1222, repealed by section 28 of this Act, infra, p. 986, somewhat similar provisions were made.

For provisions relating to the exclusion of anarchists, etc., see IMMIGRATION.

SEC. 8. [Speaking English required — physical incapacity — not applicable to prior declarations — homestead entrymen.] That no alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language: Provided, That this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: And provided further, That the requirements of this section shall not apply to any alien who has prior to the passage of this Act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: Provided further, That the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands. [34 Stat. L. 599.]

See the Act of Feb. 24, 1911, ch. 151, infra, p. 1004.

Speaking English.—Prior to this section one who was unable to read and write was eligible for naturalization if it was shown that he was a man of good moral character. In re Rodriguez, (W. D. Tex. 1897) 81 Fed. 337.

A foreigner who could not read and write the English language, but stated that he had lived in the United States six years and had read the Constitution of the United States in his own language, and did not know the name of the President of the United States, but spoke of George Washington as President, was held not qualified for citizenship. In re Kanaka Nian, (1889) 6 Utah 259, 21 Pac. 993, 4 L. R. A. 726.

SEC. 9. [Final hearings — record of orders, etc.] That every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court. [34 Stat. L. 599.]

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I. HEARING "IN OPEN COURT"

This section is specific and mandatory in requiring that the hearing be in open court, and that the applicant and witnesses be examined under oath "before the court and in the presence of the

In U. S. v. Leles, cited above, the suit was to cancel a certificate of naturalization, and it appeared that on the final hearing, after examining in open court certain witnesses produced by the defendant as to his good character, the court appointed its stenographer as commissioner to take the depositions or evidence of certain other witnesses on the subject not then present, but residing in a neighboring town in the county, which was accordingly done, and the evidence thus taken out of court, and in the presence of the judge, was thereafter reported to and considered by the court before awarding the certificate. It was held that the facts shown made the issuance of the certificate illegal. The court said: "The only provision for taking evidence by deposition in such proceedings is found in section 10, which has no relation to the circumstances of this case. The method pursued was therefore directly in contravention of the requirements of the statute; and a like departure was held in U. S. v. Nisbet, (W. D. Wash. 1909) 168 Fed. [1905], 1006, to be fatal to the validity of the proceedings and the certificate issued in pursuance thereof. It is true that the judge granting the certificate was called as a witness for defendant at the trial, and testified in substance that his finding as to the fact of defendant's good character was not affected by the depositions of the witnesses taken out of court; that there was sufficient evidence on the question without their aid. But assuming as we do the perfect truth of these statements, obviously, the opinion or declaration of the judge that his mind was unaffected by the evidence illegally taken and considered cannot cure the vice or defect, any more than could the certificate or declaration of a trial judge, in a bill of exceptions, that evidence admitted or excluded under objection did not affect the result be held to cure an otherwise erroneous ruling. The purpose of the statute is to prevent such methods, and its requirements are mandatory."

Residence and good moral character must be proved by testimony in open court, and not by affidavits. In re (1845) 7 Hill (N. Y.) 137.

II. BURDEN OF PROOF

The burden rests upon the petitioner to establish the allegations of a petition for naturalization by such evidence as the law has made requisite. In re Bodek, (E. D. Pa. 1894) 63 Fed. 813.

III. APPLICANT AS WITNESS

Scope of examination.—"The naturalization act makes the applicant for citizenship a witness in his own behalf. His testimony as to being attached to the principles of the Constitution of the United States and his disposition with relation to our theory of government, and his position in and relation to society and beliefs pertaining to organized government, and disposition as to public officers, is the very essence of the inquiry. These are matters of growth and development, and a conclusion as to some of these requirements can only be arrived at by a discovery of the mental relation and bearing as to these functions and institutions; and any condition or practices of the applicant during his previous life would be material as bearing upon the truthfulness of the statements made. The examination, since the applicant is a witness in his own behalf, should not be limited to the time within which he may have resided in the United States, but should cover a broader period of his life, as that would be a very material criterion by which the court could judge his present and probable future conduct. It would be material to know the sacredness with which human life is regarded, his relation to organized society pertaining to governmental functions, and, if such examination should develop a standard of life and living at some time which would be considered outside the limits which religion and society and the law have long established for the best welfare of government, it would be of the most material character to guide the court in its conclusions in determining whether a person who had ruthlessly violated that standard upon which good qualities are dependent should be the recipient of the highest privilege this government can confer—citizenship." U. S. v. Bressi, (W. D. Wash. 1913) 208 Fed. 369.

IV. JUDGMENT OR ORDER

1. Signature

An alien is not naturalized until the order divesting him of his former nationality and making him a citizen of the United States has been signed by a judge of a court having jurisdiction of such cases. (1906) 26 Op. Atty.-Gen. 611.

2. Recordation

In a naturalization proceeding the court has power to admit to citizenship or not, depending upon whether the essential facts are proved, and, in either event, the judgment should be recorded. Rockland v. Hurricane Isle, (1909) 106 Me. 168, 76 Atl. 295.
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3. Sufficiency

A naturalization record need not show jurisdiction, or that all the legal requisites have been complied with, nor contain the alien's previous declaration of intention to become a citizen, in order to import validity. In re Symanowski, (N. D. Ill. 1909) 186 Fed. 973.

Where a decree of naturalization issued by a state court of original jurisdiction recited that the alien naturalized was then twenty-five years of age, and that it appeared to the court that he had made his declaration of intention to become a citizen of the United States according to law, it should be construed as finding that all other requirements necessary to sustain his application were found to exist; and hence the order could not be attacked on the ground that he had not declared his intention at least two years prior to his admission to citizenship, under the rule that a judgment may not be impeached for any facts, whether involving fraud, collusion, or perjury, which were necessarily before the court entering the judgment and passed upon. U. S. v. Nechman, (E. D. Mich. 1910) 183 Fed. 788.

Under the section, requiring a declaration of intention two years before admission to citizenship, an oath when application for admission is made, and a showing to the court of certain residence in the United States and the particular state, and of good moral character, etc., such prerequisites were matters of proof, and not of jurisdiction, and hence a record of naturalization did not need to show residence in the state for the required time. Rockland v. Hurricane Isle, (1909) 106 Me. 169, 76 Atl. 228.

Inaccurate statements in the recitale do not impair the validity and efficiency of the record. In re McCoppen, (1869) 5 Sawy. 630, 15 Fed. Cas. No. 8,713.

4. Conclusiveness

An order admitting to citizenship, being a judgment with the ordinary attributes of a court of record importing verity, is as conclusive as such judgments.


Inaccurate statements in the recitale do not impair the validity and efficiency of the record. In re McCoppen, (1869) 5 Sawy. 630, 15 Fed. Cas. No. 8,713.


5. Res Judicata

The foundation of the doctrine of res judicata or estoppel by judgment is that both parties have had their day in court. A certificate of naturalization, procured ex parte in the ordinary way, has no conclusive effect as against the public. Such a certificate, indicating the judgment upon which it is based, is in its essence an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land, or of the exclusive right to make, use and vend a new and useful invention. Johanneson v. U. S., (1912) 225 U. S. 227, 32 S. Ct. 613, 56 U. S. (L. ed.) 1066. See to the same effect U. S. v. Leese, (N. D. Cal. 1915) 227 Fed. 189.

But in the case of In re Hartman, (N. D. Ia. 1916) 232 Fed. 797, it was held that a proceeding under the statutes of the United States for the admission of an alien to citizenship was a case, suit, or cause of action within the meaning of article 3, § 2, of the Constitution of the United States and that a determination of the question involved in such a proceeding, whether favorable to or adverse to the petitioner, was an adjudication which determined the rights of the parties in such a proceeding, and until set aside on appeal or some other method of review, or by direct action to annul the same upon the ground of illegality or fraud in procuring the same, was a bar to another action upon the same facts determined in the prior proceeding.

Where the state court has undoubted jurisdiction to hear a petition for naturalization as presented to it, its judgment thereupon is res adjudicata. U. S. v. Ness, (N. D. Ia. 1914) 217 Fed. 169, wherein the court said: "Congress has conferred upon certain state courts undoubted jurisdiction to hear the applications of aliens to become citizens, and grant or deny such applications, subject to the exceptions as the facts may warrant. If their judgments are not reviewable under the state practice, Congress has not provided for a review of them by some appellate court. If citizenship is granted, and the judgment is not tainted with any fraud or misconduct of the party in whose favor they are entered, such judgments are final and conclusive against attack in other courts of co-ordinate jurisdiction."
V. CERTIFICATE OF NATURALIZATION

Where the court in a naturalization proceeding has rendered judgment admitting the alien to citizenship, the fact that the clerk issued a naturalization certificate before the final judgment had been signed and entered did not render such proceeding void, the requirement being directory only and the proceeding subject to correction nunc pro tunc. U. S. v. Stoller, (E. D. Wash. 1910) 180 Fed. 910.

"Certificate of citizenship" defined.—A certified copy of the record of a court showing the admission of an alien to citizenship was held to constitute a "certificate of citizenship," within the meaning of former R. S. secs. 5425, 5427 (embodied in Penal Laws, §§ 77, 332, and repealed by section 341 thereof; see Penal Laws), making it a crime to use or to aid and abet another in using false certificates of citizenship for purposes therein specified. Dolan v. U. S., (C. C. A. 8th Cir. 1904) 133 Fed. 440, 69 C. C. A. 274.

VI. STATUS OF NATURALIZED CITIZEN

A naturalized citizen is made a citizen under an Act of Congress, but the Act does not proceed to give, to regulate, or to prescribe his capacities. In the view of the Constitution he stands on the footing of a native, and the Constitution does not authorize Congress to enlarge or abridge those rights. Osborn v. U. S. Bank, (1824) 9 Wheat. 738, 6 U. S. (L. ed.) 204.

VII. VACATION OF PROCEEDINGS

Proceedings for naturalization in a court of record should be governed by the same general principles as ordinary judicial proceedings, and vacated if the defects are vital and essential things, but sustained if the defects are merely technical and formal. The fact that defects of the latter class cause annoyance and trouble to the supervising administrative department, cannot make void any proceedings upon which substantial rights are based. U. S. v. Erickson, (W. D. Mich. 1910) 188 Fed. 747.

VIII. APPEAL

The right to appeal from an order admitting an alien to citizenship is affirmed by some authorities but denied by others. That a judgment or decree admitting an alien to citizenship may be reviewed upon appeal or writ of error from a District Court of the United States, at least, granting the same, is recognized by the Court of Appeals of this Circuit in the following cases: U. S. v. Ojala, (C. C. A. 8th Cir. 1910) 182 Fed. 51, 104 U. C. A. 491; U. S. v. Neas, (C. C. A. 2d Cir. 1916) 230 Fed. 950, 145 C. C. A. 144, affirming [N. D. Ia. 1914] 207 Fed. 108.


But referring to the question whether the government had the right to appeal from an order admitting an alien to citizenship, the court in C. S. r. Nupolous, (S. D. Ia. 1913) 225 Fed. 635, said: "There are cases holding that the right of appeal does exist; but, if it were necessary to decide this question, I should have to hold that the right of appeal does not exist."

"The courts have decided that there is no right to review by writ of error the action of a District Court in a naturalization proceeding, it not being a 'case' within the act of Congress conferring jurisdiction upon the Circuit Courts of Appeals 'in all cases,' etc. See U. S. v. Dolla, 177 Fed 101, 100 C. C. A. 521 (C. C. A. 5th Cir. 1910); [21 Ann. Cas. 665]; U. S. v. Neugebauer, [C. C. A. 3d Cir. 1911] 221 Fed. 938, 137 C. C. A. 508.

This court has in several cases had before it upon appeal the action of District Courts in naturalization proceedings. We have never had the question raised in any of them by counsel whether the court had jurisdiction to proceed upon appeal in such cases. The court's jurisdiction was not challenged in any of them, and without benefit of argument we were not disposed to decide the question. And the question is not now before us, and we express no opinion one way or the other concerning it. We have simply called attention to the matter for the purpose of showing that a serious doubt existed in the minds of the profession as to whether the right to review upon either writ of error or upon appeal existed. We may also point out that in the cases in which this court has reviewed upon appeal proceedings in naturalization the record did not show that the United States attorney had appeared on behalf of the government in opposition to the applicant's petition at the final hearing in the District Court, and no record had been made of the testimony and proceedings in the District Court.


As the act of 1906 is silent with regard to any appeal or writ of error, while sedulous in placing guards and restrictions around the proceedings and fully protecting the United States by authorizing a suit to annul any certificate fraudulently obtained or improperly granted, it
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is not to be supposed that it was the intention of the said act to make a reviewable case of every application for naturalization. The mischief to be remedied was not in that line, but was the hasty or improvident way in which many of the courts under the prior laws naturalized aliens without examination and proper proof. Naturalization of aliens is an act of grace, not right, and it is not necessarily a business of the courts. It is lodged in the courts for convenience and, at the pleasure of Congress, can be taken entirely away and lodged in the Bureau of Commerce and Labor, which is now charged with supervision of the operations under the act, or with any executive officer, as is now lodged the right and power to determine whether certain aliens shall be permitted to come into the country at all. State v. King County Superior Ct., (1913) 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C 425.

The admission of an alien to citizenship is a political, and not a judicial, act, and, having been vested by Congress in the courts to be exercised on proof "to the satisfaction of the court," its exercise is discretionary and not reviewable. U. S. v. Dolla, (C. C. A. 5th Cir. 1910) 177 Fed. 101, 100 C. C. A. 621, 21 Ann. Cas. 685.

IX. RENATURALIZATION ON LOSS OF CERTIFICATE

In the case of In re Buck, (E. D. Ark. 1913) 79 Fed. 117, the court said: The only question to be determined is whether the petitioner, having been once naturalized by a court of competent jurisdiction, and having therefore ceased to be an alien, is entitled to be again naturalized, for the purpose of enabling him to procure a certificate of naturalization, in order that he may have the evidence of his citizenship. His main object of requiring that certificate is that he has entered a homestead under the laws of the United States and is ready to make final proof, but is unable to do so, as he has no means of establishing his citizenship by a copy of the judgment naturalizing him. The naturalization laws of the United States clearly apply only to aliens and not citizens of the United States. . . . As the petitioner has by the judgment of the circuit court of McLean county, Ill., a court of competent jurisdiction, been naturalized, and is now a citizen of the United States, he has ceased to be an alien, and for that reason I am of the opinion that the court is without jurisdiction to entertain his petition. The loss of the certificate of naturalization or the record of the court does not deprive him of his citizenship. Citizenship having been once acquired, he continues to remain a citizen, unless the judgment be set aside by a court of competent jurisdiction, or his American citizenship renounced by his voluntary act. Whether his naturalization may under these circumstances be established by oral proof, or in some manner other than by a certified copy of the judgment of the circuit court of McLean county, Ill., is not before the court. The proper proceeding for him to pursue would be to apply to the court which naturalized him to restore the record of the judgment in the manner provided by the laws of the state of Illinois."

X. PROOF OF NATURALIZATION

The usual proof of naturalization is a copy of the record admitting the applicant, although in some instances there may be facts from which, in the absence of the record, the jury may be allowed to infer that a person having the requisite qualifications to become a citizen had been duly naturalized. Contzen v. U. S., (1900) 179 U. S. 191, 21 S. Ct. 98, 45 U. S. (L. ed.) 148.

Where no record of naturalization can be produced, evidence that a person having the requisite qualification to become a citizen did in fact and for a long time vote and hold office and exercise the rights belonging to citizens, is sufficient to warrant a jury in inferring that he had been duly naturalized as a citizen. Boyd v. Nebraska, (1892) 143 U. S. 135, 12 S. Ct. 375, 36 U. S. (L. ed.) 103. See Blight v. Rochester, (1822) 7 Wheat. 535, 5 U. S. (L. ed.) 616.


In the absence of proof of the loss or destruction of the record, the method of proving the record is by the production of the record itself or an extract from it. A certificate of the clerk is not such a record, nor is a book purporting to be a register of the names of aliens admitted to citizenship on which the applicant's name appears. Green v. Salas, (S. D. Ga. 1887) 31 Fed. 106. See also Miller v. Reinhart, (1865) 18 Ga. 239.

Supplying deficiencies in the record.— It is not competent to supply alleged deficiencies in the record by parol evidence; if the record is not correctly made up or is lost or destroyed, it should be perfected or replaced by appropriate proceedings in the court where the judgment was pronounced. Green v. Salas, (S. D. Ga. 1887)
exemplified copy thereof, or by proof of its loss or destruction. "There are, how- ever, certain limitations to this rule, for after proper proof of the naturalization of the parents of alien children, who were under twenty-one years of age, and resi- dents of the United States at the time their parents were naturalized, parol evi- dence may be received to prove the minor- ity and residence of the children in order to show that they are citizens (R. S. sec. 2172 [supra, p. 947]); and proof of natu- ralization may also be by the parol evi- dence of the party, in the form of an affi- davit, in proceedings concerning mining claims, by virtue of section 2321 of the Revised Statutes of the United States (see MINERAL LANDS, MINES AND MIN- ING, but parol evidence is not admissi- ble in any other cases. Prentice v. Miller, (1890) 82 Cal. 576, 23 Pac. 189. See also Slade v. Minor, (1817) 2 Cranch C. C. 139, 22 Fed. Cas. No. 12,937; Gagnon v. U. S., (1902) 38 Ct. Cl. 10; Dryden v. Swinburne, (1882) 20 W. Va. 89.

SEC. 10. [Evidence of residence.] That in case the petitioner has not resided in the State, Territory, or district for a period of five years con- tinuously and immediately preceding the filing of his petition he may estab- lish by two witnesses, both in his petition and at the hearing, the time of his residence within the State, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States, upon notice to the Bureau of Immigration and Naturalization and the United States attorney for the district in which said witnesses may reside. [34 Stat. L. 599.]

See section 4, paragraph "Fourth," of this Act, supra, p. 907, and the notes thereto.

"District" as used in this section refers to the District of Columbia, one of the three geographical names enumerated in section 3, to describe the habitat of the courts upon which exclusive naturaliza- tion jurisdiction is conferred. The order in which the words are used is the same, — state, territories, and district. U. S. v. Kolodner, (C. C. A. 3d Cir. 1913) 204 Fed. 240, 124 C. C. A. 1, reversing (M. D. Pa. 1912) 199 Fed. 809.

Establishing period of residence in state. — Where an applicant for naturalization has not resided within the state for five years, he may under this section, both in his petition and at the hearing, establish the time of his residence within the state by two witnesses, and the remaining por- tion of his residence within the United States by depositions. But in establishing the period of his residence in the state, the affidavit of the witnesses to his petition must cover the full period of his residence in such state. In re Manning, (N. D. Cal. 1913) 200 Fed. 499.

Honorably discharged soldiers.—The provision in this section that a naturaliza- tion petition shall be verified by the affida- vits of at least two credible witnesses, who shall state that they have personally known the applicant to be a resident of the United States for at least five years continuously, and of the state in which the application is made for at least a year immediately preceding the date of filing the petition, is inapplicable to the petition of an honorably discharged soldier, apply- ing for naturalization under R. S. sec. 2186 (see supra, p. 941), on proof of one year's residence only within the United
States, without being required to make a previous declaration of intention or prove residence in the state in which he applies for naturalization for any specified time. In re McNabb, (D. C. Ore. 1909) 175 Fed. 611.

Depositions as to residence and character were filed in U. S. v. Deans, (C. C. A. 8th Cir. 1916) 230 Fed. 957, 146 C. C. A. 151, affirming (W. D. Ark. 1913) 208 Fed. 1018.

**SEC. 11. [Examinations, etc., in opposition.]** That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings. [34 Stat. L. 599.]

Specification of objections by United States.—The court will ordinarily admit a petitioner to citizenship in the absence of declared opposition by the United States, and hence it is the duty of the United States attorney to specify his objections and to support the same by arguments. In re Mudarril, (C. C. Mass. 1910) 176 Fed. 465.

Appearance of representative of Naturalization Bureau as making proceeding an adversary one.—The mere appearance at the hearing of the agent of the Naturalization Bureau to interrogate the witnesses, without filing any pleading making specific objection to the granting of a certificate or putting in issue any of the averments of the petition, cannot have the effect of converting the proceeding from an ex parte to an adversary one, in a sense to make the doctrine of res judicata apply in proceedings to cancel the certificate under section 15. U. S. v. Leles, (N. D. Cal. 1918) 236 Fed. 784.

The fact that an application for citizenship was heard before a court of competent jurisdiction, in the presence of representatives of the government, who examined witnesses, and were heard by the court in opposition to the order made, does not estop the government from subsequently seeking to set aside an order admitting the applicant to citizenship. U. S. v. Nopulos, (S. D. La. 1915) 225 Fed. 856.

In U. S. v. Mulvey, (C. C. A. 2d Cir. 1916) 232 Fed. 613, 146 C. C. A. 471, the court said: "In the case at bar a representative of the Bureau of Naturalization had appeared before the District Court when the application for the certificate of citizenship was pending and placed before it the facts as to the applicant's absence in Ireland. The court thought that these facts did not deprive the respondent of his right to be naturalized, inasmuch as he had not lost his residence. After this decision the chief naturalization examiner in New York City requested the United States district attorney to institute this proceeding. It does not affirmatively appear in this record that any law officer of the government was heard in opposition in the proceeding originally had before the District Court, or that he was present or took any part in the proceedings. All that is disclosed is that some one connected with the Bureau of Naturalization was present and was heard in opposition. The representative of the Bureau was not the attorney for the government in the district in which the proceeding took place, and he was not even an attorney. His appearance at such hearings is as amicus curiae, to present to the court such facts relative to the personal history of the several applicants as the Bureau's investigations may have disclosed. The order admitting the respondent to citizenship recites no appearance by the government on the hearing, no minutes of the testimony were taken, and no record preserved. Under such circumstances we do not think that the appearance of a representative of the Bureau in the proceedings is to be regarded as an appearance by the United States in the technical sense in which that word is used in judicial proceedings. The United States, therefore, is not so bound by the decree that it is not entitled to proceed by petition to cancel the certificate so issued."

**SEC. 12. [Clerk of court — duty — duplicates of declarations and certificates — papers in rejected cases — penalty for failure of clerk — responsibility for blanks — return of defaced, etc., blanks — penalty.]** That it is hereby made the duty of the clerk of each and every court exercising jurisdiction in naturalization matters under the provisions of this Act to keep and file a duplicate of each declaration of intention made before...
him and to send to the Bureau of Immigration and Naturalization at Washington, within thirty days after the issuance of a certificate of citizenship, a duplicate of such certificate, and to make and keep on file in his office a stub for each certificate so issued by him, whereon shall be entered a memorandum of all the essential facts set forth in such certificate. It shall also be the duty of the clerk of each of said courts to report to the said Bureau, within thirty days after the final hearing and decision of the court, the name of each and every alien who shall be denied naturalization, and to furnish to said Bureau duplicates of all petitions within thirty days after the filing of the same, and certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said Bureau.

In case any such clerk or officer acting under his direction shall refuse or neglect to comply with any of the foregoing provisions he shall forfeit and pay to the United States the sum of twenty-five dollars in each and every case in which such violation or omission occurs, and the amount of such forfeiture may be recovered by the United States in an action of debt against such clerk.

Clerks of courts having and exercising jurisdiction in naturalization matters shall be responsible for all blank certificates of citizenship received by them from time to time from the Bureau of Immigration and Naturalization, and shall account for the same to the said Bureau whenever required so to do by such Bureau. No certificate of citizenship received by any such clerk which may be defaced or injured in such manner as to prevent its use as herein provided shall in any case be destroyed, but such certificate shall be returned to the said Bureau; and in case any such clerk shall fail to return or properly account for any certificate furnished by the said Bureau, as herein provided, he shall be liable to the United States in the sum of fifty dollars, to be recovered in an action of debt, for each and every certificate not properly accounted for or returned. [34 Stat. L. 599.]

As to the “Bureau of Immigration and Naturalization,” see the Acts given under subdivision 1 of this title, supra, p. 939.


Fees for copies of original declarations of intention.—A clerk of courts is not by virtue of this section entitled to fees for making, on the direction of the Bureau of Immigration and Naturalization, triplicate copies of original declarations of intention for naturalization and attaching the seal of the court to the same. Cross v. U. S., (1916) 242 U. S. 4, 37 S. Ct. 5, affirming (1915) 50 Ct. Cl. 413.

Sec. 13. [Fees — declaration — petition, certificate, etc.— disposal of fees — deposit by petitioner for expenses — retention by clerk — payment for additional clerks — additional allowance.] That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding:

For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar.

For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars;
and for entering the final order and the issuance of the certificate of citizen-
ship thereunder, if granted, two dollars.

The clerk of any court collecting such fees is hereby authorized to retain
one-half of the fees collected by him in such naturalization proceeding; the
remaining one-half of the naturalization fees in each case collected by such
clerks, respectively, shall be accounted for in their quarter[ly] accounts,
which they are hereby required to render the Bureau of Immigration and
Naturalization, and paid over to such Bureau within thirty days from the
close of each quarter in each and every fiscal year, and the moneys so
received shall be paid over to the disbursing clerk of the Department of
Commerce and Labor, who shall thereupon deposit them in the Treasury of
the United States, rendering an account therefor quarterly to the Auditor
for the State and other Departments, and the said disbursing clerk shall be
held responsible under his bond for said fees so received.

In addition to the fees herein required, the petitioner shall, upon the
filing of his petition to become a citizen of the United States, deposit with
and pay to the clerk of the court a sum of money sufficient to cover the
expenses of subpoenaing and paying the legal fees of any witnesses for whom
he may request a subpoena, and upon the final discharge of such witnesses
they shall receive, if they demand the same from the clerk, the customary
and usual witness fees from the moneys which the petitioner shall have
paid to such clerk for such purpose, and the residue, if any, shall be
returned by the clerk to the petitioner: Provided, That the clerks of courts
exercising jurisdiction in naturalization proceedings shall be permitted to
retain one-half of the fees in any fiscal year up to the sum of three thousand
dollars, and that all fees received by such clerks in naturalization proceed-
ings in excess of such amount shall be accounted for and paid over to said
Bureau as in case of other fees to which the United States may be entitled
under the provisions of this Act. The clerks of the various courts exercis-
ing jurisdiction in naturalization proceedings shall pay all additional
clerical force that may be required in performing the duties imposed by
this Act upon the clerks of courts from fees received by such clerks in
naturalization proceedings.

And in case the clerk of any court exercising naturalization jurisdiction
collects fees in excess of the sum of six thousand dollars in any fiscal year
the Secretary of Commerce and Labor may allow salaries, for naturaliza-
tion purposes only, to pay for clerical assistance, to be selected and employed
by that clerk, additional to the clerical force, for which clerks of courts are
required by this section to pay from fees received by such clerks in natural-
ization proceedings, if in the opinion of said Secretary the naturalization
business of such clerk warrants further additional assistance: Provided,
That in no event shall the whole amount allowed the clerk of a court and
his assistants exceed the one-half of the gross receipts of the office of said
clerk from naturalization fees during such fiscal year: Provided further,
That when, at the close of any fiscal year, the business of such clerk of court
indicates in the opinion of the Secretary of Commerce and Labor that the
naturalization fees for the succeeding fiscal year will exceed six thousand
dollars the Secretary of Commerce and Labor may authorize the continu-
ance of the allowance of salaries for the additional clerical assistance herein
provided for and employed on the last day of the fiscal year until such
time as the remittances indicate in the opinion of said Secretary that the fees for the then current fiscal year will not be sufficient to allow the additional clerical assistance authorized by this Act.

That payment for the additional clerical assistance herein authorized shall be in the manner and under such regulations as the Secretary of Commerce and Labor may prescribe. [34 Stat. L. 600 as amended by 36 Stat. L. 829.]

This section was amended to read as given in the text by an Act of June 25, 1910, ch. 401, § 1, entitled "An Act To amend section thirteen of an Act entitled "An Act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States," and for other naturalization purposes."

The amendment consisted in striking out the last sentence of the section as originally enacted, which was as follows: "And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance," and inserting in lieu thereof the provision of the text beginning "And in case the clerk of any court exercising naturalization jurisdiction" to the end of the section, as here given. See the notes to section 3 of this Act, supra, p. 932.

As to the "Bureau of Immigration and Naturalization," see the Acts under subdivision 1 of this title, supra, p. 939.

The provisions of this section superseded those of the Act of March 15, 1895, ch. 68, § 8, 30 Stat. L. 317, which were as follows:

"SEC. 8. . . . And provided further, That all clerks of courts of the United States shall pay over, at the times and in the manner provided by law for other fees and emoluments, all fees received by them for naturalization, after deducting the amount of compensation they are entitled to receive."

This section also superseded a provision of the Act of June 25, 1902, ch. 1301, 32 Stat. L. 419, given in Judicial Officers, vol. 4, p. 734, relating to returns of fees received in naturalization proceedings.

The purpose of Congress under section 13 was to provide annual compensation to the clerk of the court for his services in naturalization at a maximum of $5,000 for each fiscal year and this is not affected by R. S. sec. 2987 (see vol. 2, p. 968). Robb v. U. S., 26 C. C. A. 3d Cir. 1916 253 Fed. 353, 147 C. C. A. 411.

Fees exclusive.—The services performed by the clerk in naturalization cases do not require any precedent action of the court, and the fees provided by the act are exclusive. Jaynes v. U. S., 1915 47 Ct. Cl. 323.

Effect of state statutes regulating fees of state officers.—Although this section authorizes clerks to retain half of the fees in the case of naturalization proceedings begun in a state court it is left to the state to say whether they shall be returned to the state clerk's own use or shall be subject to the mandate of the state legislature. Maltby v. San Francisco, 254 U. S. 604, 41 S. Ct. 266, 65 U. S. L. ed. 625 affirming 18 Cal. App. 517, 128 P. 358. In this case it was held that a county clerk who was a state officer, and who received a salary from the state allowed by statute to be in full compensation for all services rendered, must account to the state for all naturalization fees received by him. The court said: "The act does not purport to deal with the relations of a state officer with the state. To so construe it might raise serious questions of power, and such questions are always to be avoided. We do not have to go to such lengths. The act is entirely satisfied without putting the officers of a state in antagonism to the laws of the state—the laws which give them their official status. It is easily construed and its purposes entirely accomplished by requiring an accounting of one-half of the fees to the United States, leaving the other half to whatever disposition may be provided by the state law." See to the same effect Pasante Friedl v. Shumer. 1914 25 N. J. L. 621, 98 Atl. 477, reversing 1913 24 N. J. L. 589, 88 Atl. 273; State v. Linsley, 47 Wash. 451, 42 Pac. 354; Franklin County v. Barnes, 1912 66 Wash. 485, 105 Pac. 779; Barnes County v. Bookworth, 1910 144 W. 472, 94 N. W. 1053; 155 A. E. R. 779, 29 2d. & L. N. S. 514. See also State v. Oren, 1913 53 Ind. App. 454, 107 N. E. 464; Fields v. Minkowski County, 1915 64 Neb. 17, 91 N. W. 125; 128 Pac. 344; 44 L. R. A. N. S. 223; Leffert v. Salt Lake County, 1914 7 Utah 356, 57 Pac. 356.
of the application may be made by motion on the general calendar without the payment of the fees attaching to the filing of an application. *In re Giulano,* (S. D. N. Y. 1907) 158 Fed. 420.

**Fees for copies of original declarations of intention.**—A clerk of courts is not by virtue of this section entitled to fees for making, on the direction of the Bureau of Immigration and Naturalization, triplicate copies of original declarations of intention for naturalization and attaching the seal of the court to the same. *Cross v. U. S.,* (1916) 242 U. S. 4, 37 S. Ct. 5, *affirming* (1915) 50 Ct. Cl. 413.

The claim is for per diem for entering and docketing petition in naturalization cases. *Jaynes v. U. S.,* (1912) 47 Ct. Cl. 592.

**Under an early statute it was held** that a clerk is not obliged to return to the United States as part of the emoluments of his office sums received for his services in naturalization proceedings. *U. S. v. Hill,* (1887) 120 U. S. 160, 7 S. Ct. 510, 30 U. S. (L. ed.) 627, (C. C. Mass. 1889) 40 Fed. 441; *U. S. v. McMillan,* (1897) 165 U. S. 504, 17 S. Ct. 396, 41 U. S. (L. ed.) 505.

**SEC. 14. [Binding of papers, etc.]** That the declarations of intention and the petitions for naturalization shall be bound in chronological order in separate volumes, indexed, consecutively numbered, and made part of the records of the court. Each certificate of naturalization issued shall bear upon its face, in a place prepared therefor, the volume number and page number of the petition wherein such certificate was issued, and the volume number and page number of the stub of such certificate. [34 Stat. L. 601.]

**Effect of failure to comply with section.**—The provisions of this section of the naturalization act providing that declarations of intention and petitions for naturalization shall be bound in chronological order merely define the duties of the officers having such matters in charge, and if they have so prepared and bound the applications that the provisions of the section cannot be observed it should not affect the right of the applicant, who has complied with all the formalities of law and has shown himself entitled to admission. *In re Freeze,* (D. C. Ore. 1911) 189 Fed. 1022.

**SEC. 15. [Proceedings to cancel certificates illegally procured — notice to holder, etc. — canceling certificates of persons permanently abroad — proceedings — records, etc. — application to all certificates.]** That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent
from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought. If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship. Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation. The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws. [34 Stat. L. 301.]

As to the "Bureau of Immigration and Naturalization," see subdivision I of this title, supra, p. 939.
As to the effect upon citizenship of continued residence abroad, see Citizenship. See the notes to section 3 of this Act, supra, p. 952.

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I. Constitutionality

In Johanneson v. U. S., (1912) 225 U. S. 227, 32 S. Ct. 613, 56 U. S. (L. ed.) 1066, the court upheld the constitutionality of this section. Mr. Justice Pitney, writing the opinion of the court, said: "It was long ago held in this court, in a case arising upon the early acts of Congress which submitted to courts of record
the right of aliens to admission as citizens, that the judgment of such a court upon the question was, like every other judgment, complete evidence of its own validity. Spratt v. Spratt, (1830) 4 Pet. 393, 406; [7 U. S. (L. ed.) 897]. This decision, however, goes no further than to establish the immunity of such a judgment from collateral attack. It does not follow that Congress may not authorize a direct attack upon certificates of citizenship in an independent proceeding such as is authorized by § 15 of the act of 1906. Appellant's contention involves the notice that because the naturalization proceedings result in a judgment, the United States is for all purposes concluded thereby, even in the case of fraud or illegality for which the applicant for naturalization is responsible. This question may be first disposed of. The Constitution, Art. I, § 8, gives to Congress power 'to establish a uniform Rule of Naturalization.' Pursuant to this authority it was enacted, as above quoted from the Revised Statutes, that an alien might be admitted to citizenship 'in the following manner and not otherwise;...' § 2165 requiring proof of residence within the United States for five years at least; and § 2170 declaring a continued term of five years' residence next preceding his admission to be essential. An examination of this legislation makes it plain that while a proceeding for the naturalization of an alien is in a certain sense a judicial proceeding, being conducted in a court of record and made a matter of record therein, yet it is not in any sense an adversary proceeding. It is the alien who applies to be admitted, who makes the necessary declaration and adduces the requisite proofs, and who renounces and abjures his foreign allegiance, all as conditions precedent to his admission to citizenship of the United States. He seeks political rights to which he is not entitled except on compliance with the requirements of the act. But he is not required to make the Government a party nor to give any notice to its representatives.

This section was also declared constitutional in Luria v. U. S., (1913) 231 U. S. 9, 34 S. Ct. 10, 58 U. S. (L. ed.) 101, affirming (S. D. N. Y. 1911) 184 Fed. 643, wherein the court through Mr. Justice Van Devanter said: 'Several contentions questioning the constitutional validity of § 15 are advanced, but all, save the one next to be mentioned, are sufficiently answered by observing that the section makes no discrimination between the rights of naturalized and native citizens, and does not in any wise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled. Objectively directed to the provision which declares that taking up a permanent residence in a foreign country within five years after the issuance of the certificate shall be considered prima facie evidence of a lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, and that in the absence of countervailing evidence the same shall be sufficient to warrant the cancellation of the certificate as fraudulent. It will be observed that this provision prescribes a rule of evidence not of substantive right. It goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome. If, in truth, it was his intention at the time of his application to reside permanently in the United States, and his subsequent residence in a foreign country was prompted by considerations which were consistent with that intention, he is at liberty to show it. Not only so, but these are matters of which he possesses full, if not special, knowledge. The controlling rule respecting the power of the legislature in establishing such presumptions is comprehensively stated in Mobile, etc., R. Co. v. Turnipseed, (1910) 219 U. S. 35, 42, 43 [31 S. Ct. 138, 55 U. S. (L. ed.) 78, Ann Cas. 1912A 463, 32 L. R. A. (N. S.) 220] as follows: 'Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government to make rational and secure, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. . . . That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presumption of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the
factors bearing upon the issue, there is no ground for holding that due process of law has been denied him. Nor is it a valid objection to such legislation that it is made applicable to existing causes of action." See further to the effect that this section is constitutional U. S. v. Spohrer, (C. C. N. J. 1910) 175 Fed. 440.

Since jurisdiction to naturalize aliens was originally bestowed by Congress on state courts, this section, providing for the vacation of a naturalization certificate obtained by fraud or illegal procurement in its inception is not unconstitutional because it gives one court power to pass on and annul the proceedings of another. U. S. v. Mansour, (S. D. N. Y. 1908) 170 Fed. 671.

This section is not void as depriving a naturalized citizen of a vested right, or imposing any penalty on him, since the Constitution contemplates that only those intending to become permanent residents shall be naturalized, or retain their citizenship, as indicated by the Fourteenth Amendment, declaring that all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens thereof. U. S. v. Ellis, (E. D. La. 1911) 185 Fed. 546.

II. CONSTRUCTION IN GENERAL

1. Retroactive

This section is retrospective but it is not therefore void as an ex post facto law. Johannessen v. U. S., (1912) 225 U. S. 227, 32 S. Ct. 613, 56 U. S. (L. ed.) 1066, wherein the court said: "The act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard. Retrospective acts of this character have often been held not to be an assumption by the legislative department of judicial powers."

The time for vacating an order admitting to citizenship, for an error of law of the court having expired before this Act was passed, it was held that a suit did not lie to vacate it, though the Act authorized suits to vacate certificates of citizenship. U. S. v. Askervik, (D. C. Ore. 1910) 180 Fed. 137.

2. Cumulative

This section, it will be observed, simply imposes the duty upon the United States district attorney of the proper district, when cause is shown by affidavit, to institute proceedings for canceling a certificate of citizenship. It does not, directly or inferentially, make the procedure exclusive or prohibit the enforcement of other remedies for striking down fraudulent naturalization certificates. The statute furnishes a new remedy for a wrong for which there was an existing appropriate remedy, and hence it is cumulative and not exclusive. In re Maculolo's Naturalization, (1912) 237 Pa. St. 132, 35 Atl. 146, Ann. Cas. 1914B 226.

3. "The Provisions of This Section"

The words "the provisions of this section" occurring in the last paragraph naturally mean every part of it, one paragraph as much as another, and that meaning cannot well be rejected without leaving it uncertain as to what those words embrace. Luria v. U. S., (1913) 231 U. S. 9, 34 S. Ct. 10, 58 U. S. (L. ed.) 101, affirming (S. D. N. Y. 1911) 184 Fed. 643.

III. GROUNDS FOR CANCELLATION

1. In General

This section makes fraud or illegal procurement a ground for the cancellation of certificates of citizenship.

The provision in this section for the cancellation of a certificate of naturalization does not forfeit the naturalized alien's right to citizenship, but merely confers jurisdiction on the courts of naturalization to cancel a previous certificate for fraud or illegal procurement in its inception. U. S. v. Luria, (S. D. N. Y. 1911) 184 Fed. 643.

Naturalization proceedings, like ordinary judicial proceedings, are properly sustained if defects asserted are merely technical and formal though the defects cause annoyance to the supervising administrative department. U. S. v. Erickson, (W. D. Mich. 1910) 188 Fed. 747.

Errors of procedure, such as will vitiate the judgments of all courts, are not within the purview of this section. Jurisdiction is herein conferred upon the federal courts to annul judgments of naturalization only when procured by fraud or other illegality as distinguished from errors of procedure. U. S. v. Ness, (N. D. Ia. 1914) 217 Fed. 169.

When a certificate of naturalization is obtained by fraud, or is illegally procured in the sense that it has been issued without authority of law, and is in effect false and spurious, a suit in equity may be maintained for its cancellation. Such a suit is not intended to correct an error of court, but to defeat the fraud of the litigant. But when a certificate is issued as the result of a judicial hearing in good faith attempt to exercise the jurisdiction conferred by the act of Congress, it is not open to attack in another court of coordinate jurisdiction simply by reason of alleged errors which may have occurred in the court pursuant to whose judgment the certificate was issued. Errors of that kind can properly be reached only by appeal or writ of error. U. S. v. Lenore, (D. C. N. D. 1917) 207 Fed. 865.
Findings of fact by the court granting a certificate of naturalization will not be reviewed on a petition to cancel a naturalization certificate because illegally procured in that continuous residence for the statutory period was not shown, unless there was fraud or abuse of power by the court making the findings. U. S. v. Shanahan, (E. D. Pa. 1918) 232 Fed. 196.

2. Fraud

False testimony generally.—A certificate of citizenship may be set aside for fraud or illegality in its procurement, comprehending false testimony under which the certificate was procured as well as error in rendering judgment on given state of facts. U. S. v. Aakervik, (D. C. Ore. 1910) 180 Fed. 137.

False statements as to residence.—Under this section the United States may maintain a suit in a federal court to cancel a certificate issued by a state court under either this or a former statute on the ground of fraud, in that the allegation and evidence of fraud that the applicant had resided in the United States for five years was untrue. U. S. v. Mansour, (S. D. N. Y. 1908) 170 Fed. 671; U. S. v. Spohrer, (C. C. N. J. 1910) 176 Fed. 440.

False evidence as to character.—A certificate is illegally and fraudulently procured, within the meaning of this section, when the court is deceived by false evidence as to the good moral character of the applicant. U. S. v. Ravera, (D. C. Mont. 1915) 222 Fed. 1018.

False statement as to marriage.—When an alien in his naturalization petition stated that he was not married, when in fact he had a wife and children in the country whom he came, but had abandoned them several years before, it was held that his certificate could be canceled for fraud. U. S. v. Albertini, (D. C. Mont. 1913) 206 Fed. 133.

No revocation of becoming permanent citizen.—Where one admitted to citizenship under R. S. sec. 2165, now repealed (as noted under R. S. sec. 2166, supra, p. 941), permitting the naturalization of persons possessing the necessary qualifications and intending bona fide to become citizens, did not in good faith intend to become a permanent citizen, and made his oath with a mental reservation to that effect, he was guilty of fraud in procuring the decree, and this section subsequently enacted authorizes the cancellation of his certificate of citizenship on the ground of fraud. Thus where an alien was naturalized in August, 1889, and he arrived in a foreign country November 23d following, and engaged in business there, where he continuously resided until after the institution of a suit in March, 1910, to cancel his certificate of citizenship, as authorized by this section, and it appeared that he had stated that he could not tell when he could leave the foreign country and return to the United States, and that he was not engaged solely as a representative of American trade and commerce, and that his residence in the foreign country was not for reasons of health or education, a decree setting aside the judgment of naturalization and canceling his certificate of citizenship was authorized. U. S. v. Ellis, (E. D. La. 1911) 185 Fed. 546. See also U. S. v. Mansour, (S. D. N. Y. 1908) 170 Fed. 671.

Person naturalized under age.—It is not ground for canceling a certificate of citizenship that the person naturalized lacked two months of being of age at the time of the proceedings for naturalization, there being no fraud involved. The age of the applicant is a question of fact and the statute does not prescribe an age qualification for citizenship. U. S. v. Butikofer, (D. C. Idaho 1916) 228 Fed. 918.

Certificate of socialist canceled.—A certificate of citizenship was canceled in U. S. v. Olson, (W. D. Wash. 1912) 196 Fed. 562, wherein the court said: "The grounds for the suit, as set forth in the government's petition, are that the respondent on the 10th day of January, 1910, obtained an order from the superior court of Pierce county, Wash., admitting him to become a citizen of the United States of America; that a certificate of citizenship was issued out of said court and delivered to him; that since said date he has claimed and now claims to be a citizen of the United States; that for the purpose of obtaining said certificate of citizenship the respondent intentionally represented to the court on the hearing of his application that he was attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Those averments and the jurisdictional facts set forth in the petition are admitted by the respondent. The question is an issue, however, by denying the charge contained in the petition that the representations which he made to the court respecting his attitude toward the Constitution and government of the United States were and are contrary to the truth.

"On the trial of the case the respondent appeared in person and by an attorney, and after the introduction of evidence on the part of the government tending to prove that he is now, and was at and previous to the time of being admitted to be a citizen of the United States, opposed to the form of government of this country and to the principles of the Constitution, he offered rebutting evidence and gave testimony in his own behalf, which in the opinion of the court materially aided the government's case. Answering to direct interrogatories propounded by his own attorney, he denied that he is an anarchist, denied that he is opposed to organized government, and denied that he
is in favor of overthrowing this government by force or violence, but omitted to make any declaration affirming his loyalty to the Constitution of the United States, and on the contrary, when tested by cross-examination, his answers to all questions respecting his attachment to the Constitution of the United States were evasive. He admitted that he is a socialist and frequenter of assemblages of socialists in which he participates as a speaker advocating a propaganda for radical changes in the institutions of the country. He claimed to have a clear understanding of the Constitution of the United States and knew that by one of its articles deprivation of life, liberty, or property without due process of law is forbidden, and yet the evidence introduced in his behalf proved that the party with which he is affiliated, and whose principles he advocates, has for its main object the complete elimination of property rights in this country. He expressed himself as being willing for people to retain their money, but insisting that all the land, buildings, and industrial institutions should become the common property of all the people, which object is to be attained, according to his belief, by use of the power of the ballot, and when that object shall have been attained the political government of the country will be entirely abrogated, because there will be no use for it. And he further admitted that his beliefs on these subjects were entertained by him at and previous to the date of the proceedings in the superior court admitting him to become a citizen of the United States.

The people of this country ordained the Constitution of the United States, to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, and thereby established a national government, to endure permanently. The notion that citizens of this country may absolve themselves from allegiance to the Constitution of the United States, otherwise than by expatriation, is a dangerous one. The nation generously and cordially admits to its citizenship aliens having the qualifications prescribed by law, but recognizing the premises of natural law and the law of self-preservation, it restricts the privilege of receiving citizenship in the United States to those who swear allegiance to the existing government as defined by the oath when they are required to take. Those who refuse to and propagate crude theories hostile to the Constitution are barred.

The evidence in this case including the respondent's admission above recited does not give rise to an answer or argument in favor of the respondent and does not warrant a question as to his attitude. He has no reverence for the Constitution of the United States, nor intention to support and defend it against its enemies, and he is not well disposed toward the peace and tranquility of the people. His propaganda is to create turmoil and to end in chaos. But in order to secure a certificate of naturalization he intentionally made representations to the court which necessarily deceived the court, or his application for naturalization would have been denied. Therefore, by the petition which he was required to file and his testimony at the final hearing of his application and by taking the oath which was administered to him in open court, he perpetrated a fraud upon the United States and committed an offense for which he may be punished as provided by law. The case therefore comes clearly within the provisions of the law requiring the court to peremptorily set aside and cancel his certificate of naturalization, and it will be so decreed.”

Changing witnesses' affidavit.—A naturalization certificate should not be vacated as having been obtained illegally or through fraud, because, on ineligibility of one of two witnesses appearing, his name was erased from the witnesses' affidavit, and another name substituted, and the date of the affidavit changed to that when the new witness verified, though no duplicate of the affidavit as so changed was forwarded to the Department of Commerce and Labor. U. S. r. Erickson, (W. D. Mich. 1910) 188 Fed. 747.

3. Illegal Procurement

In general.—The word 'illegal' means contrary to law, and therefore we think that the word as employed in this particular statute may be construed to mean that, whenever an alien has obtained a certificate of citizenship which is unauthorized by law, or procured it illegally, or contrary to law. U. S. r. Mulvey, (C. C. A. 2d Cir. 1916) 232 Fed. 513, 146 C. C. A. 471.

The term "illegally procured" is not limited to irregularity but also denotes the determination by the court contrary to law, as distinguished from legality. U. S. v. Napoulas, (S. D. La. 1915) 225 Fed. 604.

A certificate is "illegally procured" within the meaning of this section when it is issued by a court without jurisdiction or authority, under a statute, or without a petition of witnesses, or notice, or hearing. U. S. v. Albertini, D. C. Mo. 1913, 23rd Fed. 132.

A certificate is illegally procured even though the court granting it was formally authorized by law to grant a certificate under the circumstances shown if it is determined by the court that the certificate was not obtained by such authority.


Errors of law.—The words "illegally procured," as used in this section, mean procured by subornation or some other illegal means used to impose on the court, and not that the certificate was issued through error of law. U. S. v. Luria, (S. D. N. Y. 1911) 184 Fed. 643.

Testimony not taken in proper manner. A certificate of citizenship is illegally procured if it is obtained upon the testimony of witnesses who were not examined under oath in open court, before the court, and in the presence of the court as required by section 9 nor their testimony taken by deposition in the manner prescribed in section 10. U. S. v. Lebas, (W. D. Cal. 1915) 227 Fed. 189, following U. S. v. Niabet, (W. D. Wash. 1909) 168 Fed. 1005.

Mistake in renunciation of allegiance.—Where an alien through inadvertence or mistake, and with no unlawful intention, makes an erroneous statement in his declaration of intention that he is a native of a certain foreign country and intends to renounce allegiance to its sovereign, when as a matter of fact he is a subject of another foreign country, his certificate of naturalization issued pursuant to such declaration of intention is not one illegally procured within the meaning of this section. U. S. v. Orend, (W. D. Pa. 1915) 221 Fed. 777; U. S. v. Viaropoulos, (W. D. Pa. 1915) 221 Fed. 486.

Declaration of intention prematurely or untimely made.—In U. S. v. Hodgman, (D. C. Mont. 1916) 221 Fed. 1018, which was a suit to cancel a certificate of citizenship on the ground that after the declaration of intention and before admission to citizenship, the applicant became a naturalized British subject, the facts as stated by the court were as follows:

"The defendant was born a citizen of the United States, and about a month before making the declaration involved, he executed oath of allegiance to the British sovereign to qualify himself to secure title to Canadian lands. He was advised and believed he thereupon became a British subject. Shortly thereafter he determined to abandon British allegiance, return to the United States, and reapply for admission. He did return, and thereupon made the declaration involved. About two weeks after such declaration a Canadian court issued a certificate of naturalization upon the said oaths of allegiance made by defendant about four weeks before such declaration. The reason for the delay does not appear. The British law was not proved, but from a public document of the United States was read at argument what purports to be so much of said law as provides that the oaths of allegiance shall be presented to authorities to be prescribed by regulations, who shall proceed as by said regulations prescribed. Certified copies of said oaths were introduced in evidence, and said reading was by plaintiff. From said declaration defendant has resided within and maintained his intention to become a citizen of the United States, and was admitted to citizenship about six years subsequent to his declaration." Dismissing the suit the court said: "For many purposes naturalization has a limited retroactive effect. Osterman v. Baldwin, (1867) 6 Wall. [116], 122, 18 (L. ed.) 730; Samuel v. Wulff, (1894) 152 U. S. [505], 511, 14 S. Ct. 651, 38 U. S. (L. ed.) 532. And for all that appears, the defendant having done all required of him by British law when he executed the oaths of allegiance (one of which, doubtless of official form, makes the defendant refer to the United States 'of which country I was a subject'), the delay in issuance of the British certificate may have been mere routine, and the certificate took effect by relation as of the date of said oaths. The consequence would be that defendant was not an American citizen, but was a British subject, when he made the declaration involved, and the subsequent issuance of the British certificate in no wise affected the American declaration. Furthermore, while the methods of naturalization prescribed by Congress must be followed, all deviations are not fatal. The declaration is of contemplated future acts. It is a record notice and witness, when admission is sought, that the petitioner has entertained and thereto for at least the prescribed statutory period. In some instances, as the law was at the time of the declaration involved, no declaration was required by the statute. If untimely made, maintenance of the intent and petition for admission—performance of the contemplated future acts—cures the irregularity and ratifies the declaration. It has been so held in case of a minor (In re Symanski) [N. D. III. 1908] 188 Fed. 976, 980), and the instant case is the same in principle. The declaration is like unto declarations of intent to purchase public lands. If invalid when made, in that they are made by aliens, minors, or for lands not yet open to them, yet, if maintained until after the registration is removed, they become valid, and the purchase can be made. Still further after
admission to citizenship, the declaration has served its purpose, is merged, and no inquiry will be made into its regularity, if admission is otherwise valid. No beneficial purpose would be served by annul-
ing admission under such circumstances. 

Herein defendant's admission to citizen-
ship was neither illegal nor fraudulent, within section 15 of the Naturalization Act."

Failure to attach certificate to petition. — A certificate of citizenship is not "illegally procured" because the applicant failed to attach to his petition for natu-
ralization a certificate from the Depart-

IV. COURTS HAVING JURISDICTION TO CANCEL

In general.—The cancellation need not be by the court granting the certificate. A certificate granted by a state court may be canceled in a proceeding before a feder-

Where a certificate of naturalization is il-
legally granted by a state court, a Dis-

tinct Court of the United States for the
district in which the naturalized citizen resides has jurisdiction at the instance of the United States to cancel and vacate it. U. S. v. Plaisitow, (W. D. N. Y. 1910) 189 Fed. 1006.


It is not necessary that a proceeding to
cancel be commenced before the federal
district judge who entered the order ad-
mitting the respondent to citizenship. U. S. v. Mulvey, (C. C. A. 2d Cir 1916) 232 Fed. 515, 146 C. C. A. 471, wherein the court said: "The fact is quite im-
material that in the present case it was instituted before another district judge of the same district exercising co-ordinate jurisdiction."

"Reside." — The word "reside" as used in this section, whether it be taken to require a domicile, or merely an abode, contemplates choice upon the part of the naturalized citizen, a voluntary sojourn-
ing upon his part. U. S. v. Gronich, (W. D. Wash. 1914) 211 Fed. 548, wherein it was held that the federal court of a dis-

trict, in which a naturalized citizen was

imprisoned in a penitentiary, did not have jurisdiction to cancel his certificate of naturalization and that the word "re-

side" could in no sense be held to apply to an "imprison' convict who was incar-

cerated wholly without his consent or choice. The court said: "It being ap-

parent that the provision in section 15 — for bringing suit where a naturalized alien resides at the time of bringing suit — is for his convenience, it is clear that it would be more for the advantage of the prisoner that such a cause should be tried at his domicile, where, presumably, his friends and witnesses reside, than within the jurisdiction of his incarceration, where he would, in such a case as the present, imprisoned away from his domicile, be presumed to be among strangers. Defendant is held in this jurisdiction by process of the court, not by reason of, but against his will. No good reason would therefore appear — even in the absence of a statute — to except such a person from the gen-

eral rule applicable to litigants, coming within a court's jurisdiction, exempting them from civil suit, while within such jurisdiction in answer to the court's process."

V. SUITS TO CANCEL, BY WHOM INSTITUTED

United States district attorneys are charged by the plain provisions of the above section with the duty of prosecuting proceedings for the cancellation of certifi-
cates of citizenship; this is not one of the functions of the bureau of immigration and naturalization. U. S. v. Andersen, (D. C. Ore. 1909) 189 Fed. 291.

VI. AFFIDAVIT

Purpose.—"The sole purpose apparently of the affidavit is to furnish an authentic source or means through which the United States attorney of the district may receive information upon which he may rely, of a violation of the statute. If the disclosures of the affidavit are such as to show "good cause" — that is, facts which, if sustained by proof, would afford ground for revok-
ing the grant of citizenship involved, either for fraud or illegality — it is made his duty to proceed and institute proceed-
ings to have the validity of the grant judicially investigated and determined. When it has accomplished this purpose of putting the wheels of justice in motion, the affidavit would seem to have fulfilled its office, and so far as anything appear-
ing in the act to the contrary, becomes functionless. It is obviously not intended to serve as a pleading, since, in requiring a 'suit' to be brought, the statute contains the filing of a formal complaint. Not being a pleading, it need not state its contents with the exactitude of one, but.
like any affidavit, the form of which is not prescribed, is sufficient if the substantive matter required be presented, however informally or inartificially stated." U. S. v. Leles, (N. D. Ca. 1915) 227 Fed. 189.

Affidavit on information and belief.— An affidavit is sufficient though based upon information and belief rather than the personal knowledge of the affiant. U. S. v. Leles, (N. D. Cal. 1916) 227 Fed. 189.

VII. NOTICE

The notice provided for in this section must be given in the manner provided by the law of the state for service on absentees, and, where the law of a state provides for the appointment of an attorney at law as curator ad hoc to represent an absentee, service on him is sufficient. U. S. v. Ellis, (E. D. La. 1911) 185 Fed. 546.

VIII. PLEADINGS AND PROCEDURE

1. In General

A suit for the cancellation of a certificate of naturalization under this section is a special proceeding, and, while the proof must be of the kind and force required to set aside a judgment, the pleadings and procedure may be moulded in any way best calculated to meet the ends of justice. U. S. v. Mansour, (S. D. N. Y. 1909) 170 Fed. 676.

2. Petition or Complaint

A petition for the cancellation of a certificate of citizenship on the ground of fraud must point out specifically in what particular respect the representations were false. U. S. v. Rockteschell, (C. C. A. 9th Cir. 1913) 208 Fed. 530, 122 C. C. A. 532.

A complaint by the United States to cancel an alien's naturalization certificate for fraud was insufficient where it failed to tender the material issue of fraud, alleging merely a change of residence, which by statute is only prima facie evidence on that issue. U. S. v. Luria, (S. D. N. Y. 1911) 184 Fed. 643.

3. Pleading Laches


IX. JURY TRIAL

The defendant is not entitled to a trial by jury in an action to cancel his naturalization certificate, as the remedy sought under the section is essentially equitable, being in this respect no different from a suit to cancel a patent for public land or letters patent for an invention. Luria v. U. S. (1913) 231 U. S. 9, 34 S. Ct. 10, 58 U. S. (L. ed.) 101, affirming (S. D. N. Y. 1911) 184 Fed. 643. See to the same effect U. S. v. Mansour, (S. D. N. Y. 1908) 170 Fed. 671.

X. EVIDENCE

Fraud.—In proceedings to cancel a naturalization certificate for fraud, statements of consular agents abroad that the defendant has established a permanent residence abroad, etc., are admissible. U. S. v. Luria, (S. D. N. Y. 1911) 184 Fed. 643.

Presumption as to residence and character.—It is a familiar rule of law that residence and character once proved are presumed to continue in the absence of countervailing evidence, and the ordinary presumptions and rules of evidence are not reversed in writs to cancel certificates of citizenship. U. S. v. Deans, (C. C. A. 8th Cir. 1916) 230 Fed. 957, 145 C. C. A. 151, affirming (W. D. Ark. 1913) 208 Fed. 1018.

SEC. 18. [Punishment for illegally issuing, etc., certificates.] That it is hereby made a felony for any clerk or other person to issue or be a party to the issuance of a certificate of citizenship contrary to the provisions of this Act, except upon a final order under the hand of a court having jurisdiction to make such order, and upon conviction thereof such clerk or other person shall be punished by imprisonment for not more than five years and by a fine of not more than five thousand dollars, in the discretion of the court. [34 Stat. L. 602.]

See the notes to section 3 of this Act, supra, p. 952.

Construction.—In U. S. v. Stoller, (E. D. Wash. 1910) 180 Fed. 910, it was held that this section does not make it a felony to issue a naturalization certificate without final order under the hand of the court, but that the felony consists in issuing it contrary to the provisions of the Act, unless it be on a final order under the hand of the court.
SEC. 20. [Punishment for neglecting to render accounts, etc.] That any clerk or other officer of a court having power under this Act to naturalize aliens, who willfully neglects to render true accounts of moneys received by him for naturalization proceedings or who willfully neglects to pay over any balance of such moneys due to the United States within thirty days after said payment shall become due and demand therefor has been made and refused, shall be deemed guilty of embezzlement of the public moneys, and shall be punishable by imprisonment for not more than five years, or by a fine of not more than five thousand dollars, or both. [34 Stat. L. 602.]

SEC. 21. [Punishment for receiving, etc., illegal fees.] That it shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings, or [sic] to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys herein specified; and a violation of any of the provisions of this section or any part thereof is hereby declared to be a misdemeanor and shall be punished by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment. [34 Stat. L. 603.]

Fees for copies of original declarations of intention.—A clerk of courts is not entitled to fees for making on the direction of the Bureau of Immigration and Naturalization triplicate copies of original declarations of intention for naturalization and attaching the seal of the court to the same notwithstanding R. S. sec. 828 (see vol. 4, p. 857), which might otherwise give him a right to such fees. Cross v. U. S. (1916) 242 U. S. 4, 37 S. Ct. 5, affirming (1915) 50 Ct. Cl. 413.

SEC. 22. [Punishment for issuing false acknowledgments, etc.] That the clerk of any court exercising jurisdiction in naturalization proceedings, or any person acting under authority of this Act, who shall knowingly certify that a petitioner, affiant, or witness named in an affidavit, petition, or certificate of citizenship, or other paper or writing required to be executed under the provisions of this Act, personally appeared before him and was sworn thereto, or acknowledged the execution thereof or signed the same, when in fact such petitioner, affiant, or witness did not personally appear before him, or was not sworn thereto, or did not execute the same, or did not acknowledge the execution thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not to exceed five years. [34 Stat. L. 603.]

SEC. 23. [Punishment for fraudulently obtaining naturalization — accessories.] That any person who knowingly procures naturalization in violation of the provisions of this Act shall be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, and upon conviction the court in which such conviction is had thereupon adjudge and declare the final order admitting such person to citizenship void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication. Any person who knowingly aids, advises, or encourages any person not entitled thereto to apply for or to secure naturalization, or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceeding knowingly procures or gives false testimony as to any mate-
natural fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. [34 Stat. L. 603.]

Provisions very similar to those of the text were made by the Act of March 3, 1903, ch. 1012, § 39, 32 Stat. L. 1222, which was repealed by section 26 of this Act, infra, p. 998.

Amendment of former R. S. sec. 5395. — The section providing a punishment for knowingly making a false affidavit as to any material fact required to be proved in a naturalization proceeding is to be regarded as an amendment of R. S. sec. 5395. U. S. c. Dupont, (D. C. Ore. 1910) 176 Fed. 823.

Perjury. — In U. S. c. Dupont, (D. C. Ore. 1910) 176 Fed. 823, it was held that perjury committed by a false allegation of fact in a naturalization petition was punishable under R. S. sec. 5395 (now section 1251 of U. S. C., see Penal Laws), punishing perjury generally, and applicable to all cases in which a false oath or false testimony was given in a matter required by law before any competent tribunal, officer, or person, regardless of whether such evidence was punishable under this section or not. U. S. c. Dupont, (D. C. Ore. 1910) 176 Fed. 823.


"Knowingly" giving false testimony. — In U. S. v. Janke, (D. C. N. D. 1910) 183 Fed. 277, it appeared that a state court granted naturalization to a woman who had been dead over four years, and the certificate was issued by the clerk. No hearing was had nor evidence taken in open court, as required by section 9 of this Act, but affidavits in support of the petition were made out by the clerk, and subscribed and sworn to by defendants, the material statements in which were false. The defendants, however, did not understand the English language, and were not informed of the contents of the affidavit, but signed the same as directed by the clerk. It was held that they were not guilty of "knowingly" giving false testimony, made a crime by this section.

Decisions under former R. S. sec. 5395. — On a trial of a defendant charged with a violation of R. S. sec. 5395 (embodied in Penal Laws, § 80, and repealed by section 341 thereof; see Penal Laws), which denounced a penalty against one who "knowingly swears falsely" in making any oath under the law relating to naturalization, it was sufficient to warrant conviction if defendant knowingly and wilfully testified falsely, and it was not necessary that his act should also have been corrupt or malicious. Holmgren v. U. S., (C. C. A. 9th Cir. 1907) 156 Fed. 439, 84 C. C. A. 301.

An indictment charging that the defendant made a false affidavit before a notary public "in a proceeding for naturalization" then and there pending in a stated court "touching the matters in issue and material in said proceedings," could not be construed to charge the making of the affidavit "under or by virtue of any law relating to the naturalization of aliens," within the first clause of R. S. sec. 5395, but clearly charged the offense under the second clause, and was not sustained by evidence showing that the affidavit was made before the proceeding was instituted. Moore v. U. S., (C. C. A. 1st Cir. 1908) 144 Fed. 962, 75 C. C. A. 670.

Sec. 24. [Limit for prosecutions.] That no person shall be prosecuted, tried, or punished for any crime arising under the provisions of this Act unless the indictment is found or the information is filed within five years next after the commission of such crime. [34 Stat. L. 603.]

Sec. 25. [Prosecution of prior offenses.] That for the purpose of the prosecution of all crimes and offenses against the naturalization laws of the United States which may have been committed prior to the date when this Act shall go into effect, the existing naturalization laws shall remain in full force and effect. [34 Stat. L. 603.]
SEC. 26. [Laws repealed.] That sections twenty-one hundred and sixty-five, twenty-one hundred and sixty-seven, twenty-one hundred and sixty-eight, twenty-one hundred and seventy-three, of the Revised Statutes of the United States of America, and section thirty-nine of chapter one thousand and twelve of the Statutes at Large of the United States of America for the year nineteen hundred and three, and all Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed. [34 Stat. L. 603.]

See the notes to section 3 of this Act, supra, p. 952. The Act of March 3, 1903, ch. 1012, § 39, 30 Stat. L. 1222, repealed by the text, is noted infra, p. 1002, under the Act of June 29, 1906, ch. 3624.

Hawaii.—This provision repeals the special statute (Act April 30, 1900, ch. 339, 31 Stat. L. 161; see vol. 3, p. 528), dispensing in the territory of Hawaii with the necessity of a declaration of intention to become a citizen of the United States. Consequently a petition for naturalization of one who emigrated to Hawaii cannot be allowed where petitioner has made no declaration. U. S. v. Rodiek, (C. C. A. 9th Cir. 1908) 162 Fed. 469, 89 C. C. A. 389.

SEC. 27. [Forms.] That substantially the following forms shall be used in the proceedings to which they relate:

DECLARATION OF INTENTION.

(Invalid for all purposes seven years after the date hereof.)

.................., ss.:

I, .................., aged ...... years, occupation ......, do declare on oath (affirm) that my personal description is: Color ......, complexion ......, height ......, weight ......, color of hair ......, color of eyes ......, other visible distinctive marks ......; I was born in ............., on the ...... day of ............., anno Domini .............; I now reside at .............; I emigrated to the United States of America from ............. on the vessel .............; my last foreign residence was .............. It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ............., of which I am now a citizen (subject); I arrived at the (port) of ............., in the State (Territory or District) of ............. on or about the ...... day of ............., anno Domini .............; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein. So help me God.

(Original signature of declarant) .....................

Subscribed and sworn to (affirmed) before me this ...... day of ............., anno Domini .............

[L. S.]

(Official character of attester.)

PETITION FOR NATURALIZATION.

........... Court of ...........

In the matter of the petition of ............. to be admitted as a citizen of the United States of America.

To the ........... Court:

The petition of ............. respectfully shows:

First. My full name is .............

Second. My place of residence is number ............. street, city of ............., State (Territory or District) of .............
NATURALIZATION

Third. My occupation is ............

Fourth. I was born on the ...... day of ............ at ............

Fifth. I emigrated to the United States from ..........., on or about the ..... day of ............, anno Domini ............, and arrived at the port of ..........., in the United States, on the vessel ............

Sixth. I declared my intention to become a citizen of the United States on the ...... day of ............ at ............, in the ............ court of ............

Seventh. I am ...... married. My wife's name is ............ She was born in ............ and now resides at ............ I have ............ children, and the name, date, and place of birth and place of residence of each of said children is as follows: ............ ............ ............

Eighth. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ............, of which at this time I am a citizen (or subject), and it is my intention to reside permanently in the United States.

Ninth. I am able to speak the English language.

Tenth. I have resided continuously in the United States of America for a term of five years at least immediately preceding the date of this petition, to wit, since ............, anno Domini ............, and in the State (Territory or District) of ............ for one year at least next preceding the date of this petition, to wit, since ...... day of ............, anno Domini ............

Eleventh. I have not heretofore made petition for citizenship to any court. (I made petition for citizenship to the ............ court of ............ at ............, and the said petition was denied by the said court for the following reasons and causes, to wit, ............, and the cause of such denial has since been cured or removed.)

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of Commerce and Labor required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Dated ............

(Signature of petitioner) ............

............, ss.:

............, being duly sworn, deposes and says that he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this ...... day of ............, anno Domini ............

[L. s.]

............

Clerk of the ............ Court.
AFFIDAVIT OF WITNESSES.

In the matter of the petition of .......... to be admitted as a citizen of the United States of America.

.........., ss.:

.........., occupation .........., residing at .........., and .........., occupation .........., residing at .........., each being severally, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known .........., the petitioner above mentioned, to be a resident of the United States for a period of at least five years continuously immediately preceding the date of filing his petition, and of the State (Territory or District) in which the above-entitled application is made for a period of .......... years immediately preceding the date of filing his petition; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that he is in every way qualified, in his opinion, to be admitted as a citizen of the United States.

.........., nineteen hundred and ..........,

[L. s.]

(Official character of attessor.)

CERTIFICATE OF NATURALIZATION.

Number .......... Petition, volume .........., page .......... Stub, volume .........., page ..........

(Signature of holder) .......... Description of holder: Age, ..........; height, ..........; color, ..........; complexion, ..........; color of eyes, ..........; color of hair, ..........; visible distinguishing marks, .......... Name, age, and place of residence of wife, .........., .........., .......... Names, ages, and places of residence of minor children, .........., .........., .........., .........., ..........; .........., .........., .......... Be it remembered, that at a .......... term of the .......... court of .........., held at .......... on the .......... day of .........., in the year of our Lord nineteen hundred and .........., who previous to his (her) naturalization was a citizen or subject of .........., at present residing at number .......... .......... street, .......... city (town), .......... State (Territory or District), having applied to be admitted a citizen of the United States of America pursuant to law, and the court having found that the petitioner had resided continuously within the United States for at least five years and in this State for one year immediately preceding the date of the hearing of his (her) petition, and that said petitioner intends to reside permanently in the United States, had in all respects complied with the law in relation thereto, and that he was entitled to be so admitted, it was thereupon ordered by the said court that he be admitted as a citizen of the United States of America.
NATURALIZATION 1001

In testimony whereof the seal of said court is hereunto affixed on the day of __________, in the year of our Lord nineteen hundred and __________, and of our independence the ________.

[L. S.]

(Official character of attester.)

STUB OF CERTIFICATE OF NATURALIZATION.

No. of certificate, ________.
Name __________; age, ________.
Declaration of intention, volume ________, page ________.
Petition, volume ________, page ________.
Name, age, and place of residence of wife, ________, ________.
Names, ages, and places of residence of minor children, ________, ________.

Date of order, volume ________, page ________.
(Signature of holder) __________.

By the Act of March 4, 1913, ch. 141, § 3, supra, p. 939, the Bureau of Immigration and Naturalization was transferred to the Department of Labor.

"Substantially the following forms" are the words used at the beginning of the section. It follows that not every variation from the exact language of the former makes illegal a proceeding for naturalization. U. S. v. Viaropoulos, (W. D. Pa. 1915) 221 Fed. 486.

Early authorities passing on the sufficiency of certificates of naturalization are as follows: Miller v. Reinhart, (1865) 18 Ga. 239; Behrensley v. Kreitz, (1891) 135 Ill. 591, 26 N. E. 704; In re Nigris, (1890) 32 Misc. 392, 66 N. Y. S. 182; In re Election, etc., Acts, (1890) 2 Brewst. (Pa.) 138; Com. v. Towles, (1835) 5 Leigh (Va.) 743.

SEC. 28. [Rules, etc.—certified copies to be evidence.] That the Secretary of Commerce and Labor shall have power to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this Act. Certified copies of all papers, documents, certificates, any records required to be used, filed, recorded, or kept under any and all of the provisions of this Act shall be admitted in evidence equally with the originals in any and all proceedings under this Act and in all cases in which the originals thereof might be admissible as evidence. [34 Stat. L. 606.]

As to the Secretary of Commerce and Labor, see the Acts given under subdivision I of this title, supra, p. 939.

SEC. 30. [Naturalization of persons owing allegiance but not United States citizens.] That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence
within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law. [34 Stat. L. 606.]

"The history of section 30 is, broadly speaking, as follows: As a result of the Spanish-American War, the United States acquired certain territory, the inhabitants of which were held to be neither aliens nor citizens of the United States. There was then no way in which such persons, whatever their race, could be admitted to citizenship here, because they were not 'aliens;' and section 2169 extended the benefit of our naturalization laws only to aliens. This left a large class of persons, of various races, who owed allegiance to the United States, but who were incapable of obtaining citizenship here, and were more unfavorably treated by our laws than aliens from foreign countries. To meet this situation section 30, supra, was passed. It originated in an amendment offered by Senator Foraker when the bill (H. R. 15442) was under discussion in the Senate. (See Congressional Record, vol. 40, pt. 10, p. 9359, June 27, 1906.) It was then stated by Senator Foraker that this amendment had special reference to Porto Rico and the Philippine Islands. The discussion in the Senate clearly shows that that was the understanding which the Senate had of it." In re Mallari, (D. C. Mass. 1916) 239 Fed. 416.

"It has been the policy of Congress to facilitate the admission to American citizenship of such of the inhabitants of our insular possessions as under our general policy are racially qualified therefor." In re Giraldo, (D. C. Md. 1915) 226 Fed. 828.

The racial restrictions of section 2169 (see supra, p. 944) applies only to aliens and not to persons specified in this section. In re Mallari, (D. C. Mass. 1916) 239 Fed. 418, wherein the court said: "It follows that upon a showing of residence, as prescribed in section 30, the petitioner would be entitled to admission to citizenship here. This conclusion is in accord with the opinion of Attorney-General Bonaparte (1908) 27 Op. Atty.-Gen. 121, with In re Monica Loper (Supreme Court, District of Columbia, December 13, 1915), and with the position taken by the Department of Justice in advising the Bureau of Naturalization. (See letter of Mr. Davis, Solicitor-General, to Secretary of Labor, Jan. 4, 1916.) In re Alverto, [E. D. Pa. 1912] 198 Fed. 688, a different interpretation was placed upon the statute in question; but the actual result in that case may be supported on other grounds."

Sec. 31 [Effect.] That this Act shall take effect and be in force from and after ninety days from the date of its passage: Provided, That sections one, two, twenty-eight, and twenty-nine shall go into effect from and after the passage of this Act. [34 Stat. L. 607.]

An Act To validate certain certificates of naturalization


[Sec. 1.] [Validation of certain certificates.] That naturalization certificates issued after the Act approved March third, nineteen hundred and three, entitled "An Act to regulate the immigration of aliens into the United States," went into effect, which fail to show that the courts issuing said certificates complied with the requirements of section thirty-nine of said Act, but which were otherwise lawfully issued, are hereby declared to be as valid as though said certificates complied with said section: Provided, That in all such cases applications shall be made for new naturalization certificates, and when the same are granted, upon compliance with the provisions of said Act of nineteen hundred and three, they shall relate
back to the defective certificates, and citizenship shall be deemed to have been perfected at the date of the defective certificate. [34 Stat. L. 630.]

The Act of March 3, 1903, ch. 1012, § 39, 32 Stat. L. 1222, mentioned in the text, was repealed by the Act of June 29, 1906, ch. 3592, § 26, supra, p. 998, and read as follows:

"Sec. 39. That no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or who has violated any of the provisions of this Act, shall be naturalized or be made a citizen of the United States. All courts and tribunals and all judges and officers thereof having jurisdiction of naturalization proceedings or duties to perform in regard thereto shall, on the final application for naturalization, make careful inquiry into such matters, and before issuing the final order or certificate of naturalization cause to be entered of record the affidavit of the applicant and of his witnesses so far as applicable, reciting and affirming the truth of every material fact requisite for naturalization. All final orders and certificates of naturalization hereafter made shall show on their face specifically that said affidavits were duly made and recorded, and all orders and certificates that fail to show such facts shall be null and void.

"That any person who purposely procures naturalization in violation of the provisions of this section shall be fined not more than five thousand dollars, or shall be imprisoned not less than one nor more than ten years, or both, and the court in which such conviction is had shall thereupon adjudge and declare the order or decree and all certificates admitting such person to citizenship null and void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.

"That any person who knowingly aids, advises, or encourages any such person to apply for or to secure naturalization or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars, or imprisoned not less than one nor more than ten years, or both.

"The foregoing provisions concerning naturalization shall not be enforced until ninety days after the approval hereof."

Provisions similar to those of the foregoing repealed section were made by the Act of June 29, 1906, ch. 3592, §§ 7 and 23, supra, pp. 976, 998.

Section 2 of the Act given in the text was as follows:

"Sec. 2. That all the records relating to naturalization, all declarations of intention to become citizens of the United States, and all certificates of naturalization filed, recorded, or issued prior to the time when this Act takes effect in or from the criminal court of Cook County, Illinois, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this Act further validated or legalized." [34 Stat. L. 651.]

The Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355, § 9, 37 Stat. L. 487, contained the following temporary provision:

"Sec. 9. All of the records relating to naturalization or declarations of intention to become citizens of the United States and all certificates of naturalization filed, recorded, or issued prior to an Act to validate certain certificates of naturalization approved June twenty-ninth, nineteen hundred and six, in or from the Louisville city court, sometimes called the Louisville police court, Kentucky, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this Act further validated or legalized."

The Sundry Civil Appropriation Act of June 23, 1913, ch. 3, § 4, 38 Stat. L. 75, contained the following temporary provision:

"Sec. 4. That all of the records relating to naturalization or declarations of intention to become citizens of the United States and all certificates of naturalization filed, recorded, or issued prior to an Act to validate certain certificates of naturalization approved June twenty-ninth, nineteen hundred and six, in or from the county court of Davidson County, Tennessee, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this Act further validated or legalized."
An Act Providing for the naturalization of the wife and minor children of insane aliens, making homestead entries under the land laws of the United States.


[Insane alien — completion of naturalization by wife, etc., of, to make homestead entry.] That when any alien, who has declared his intention to become a citizen of the United States, becomes insane before he is actually naturalized, and his wife shall thereafter make a homestead entry under the land laws of the United States, she and their minor children may, by complying with the other provisions of the naturalization laws be naturalized without making any declaration of intention. [36 Stat. L. 929.]

[Sec. 1.] Aliens discharged from service in Navy or Marine Corps.

Any alien of the age of twenty-one years and upward who may, under existing law, become a citizen of the United States, who has served or may hereafter serve for one enlistment of not less than four years in the United States Navy or Marine Corps, and who has received therefrom an honorable discharge or an ordinary discharge, with recommendation for reenlistment, or who has completed four years in the Revenue-Cutter Service and received therefrom an honorable discharge or an ordinary discharge with recommendation for reenlistment, or who has completed four years of honorable service in the naval auxiliary service, shall be admitted to become a citizen of the United States upon his petition without any previous declaration of his intention to become such, and without proof of residence on shore, and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof from naval or revenue-cutter sources of such service: Provided, That an honorable discharge from the Navy, Marine Corps, Revenue-Cutter Service, or the naval auxiliary service, or an ordinary discharge with recommendation for reenlistment, shall be accepted as proof of good moral character: Provided further, That any court which now has or may hereafter be given jurisdiction to naturalize aliens as citizens of the United States may immediately naturalize any alien applying under and furnishing the proof prescribed by the foregoing provisions. [38 Stat. L. 395.]

This was a provision of the Naval Appropriation Act of June 30, 1914, ch. 130. This provision apparently superseded that of the Naval Appropriation Act of July 26, 1894, ch. 185, 28 Stat. L. 124, which was as follows:

"Any alien of the age of twenty-one years and upward who has enlisted or may enlist in the United States Navy or Marine Corps, and has served or may hereafter serve five consecutive years in the United States Navy or one enlistment in the United States Marine Corps, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention to become such; and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof of such person's service in and honorable discharge from the United States Navy or Marine Corps."

Earlier provisions relating to the naturalization of aliens honorably discharged from the military service of the United States were made by R. S. sec. 2109, supra, p. 941. The Revenue-Cutter Service is now a part of the Coast Guard Service. See COAST GUARD, vol. 2, p. 294.
Purpose.—“The purpose Congress had in mind by the enactment of the provision of the Naval Appropriation Act of 1914, now to be construed, clearly appears from the debate thereon in the House of Representatives. 51 Congressional Record, 7904-7908. One who re-enlists in the Navy, or in its allied service, is entitled to an increase of pay, provided he is a citizen. A noncitizen serving in the Navy, and who wishes to re-enlist, has a strong practical reason for desiring naturalization. An enlisted man, however, often found it hard to comply with the requirements of the general naturalization law. He seldom could prove residence for a year in any particular state. Under that law 90 days must elapse between the application for naturalization and the hearing. In that interval he would often be sent to sea. Congress wished to make easy the naturalization of men who had faithfully served the flag.” In re Giralde, (D. C. Md. 1915) 226 Fed. 826. See also In re Sterbuck, (D. C. Minn. 1914) 224 Fed. 1013.

Filipinos were held not included within the provisions of the Act of July 26, 1894. They fall within the provisions of Act of June 29, 1906, § 30 (see supra, p. 1001). In re Mallari, (D. C. Mass. 1906) 239 Fed. 416.

Porto Rican.—But in the case of In re Giralde, (D. C. Md. 1915) 226 Fed. 826, it was held that a native of Porto Rico was entitled to the provisions of the section.

Japanese sailors or marines.—In view of the provision of the Naturalization Act of June 29, 1906, ch. 3592, § 26, 34 Stat. L. 603 (see supra, p. 998), repealing related sections, but omitting from such repeal R. S. sec. 2169 (see supra, p. 944), which limits the privilege of naturalization to free white persons and persons of African nativity or descent, such section must be held to limit and control this Act, authorizing the naturalization of “any alien” twenty-one years or more of age who served in the United States navy or marine corps as therein provided, and therefore an alien of the Japanese race is not entitled to naturalization thereunder. Beashe v. U. S., (C. C. A. 4th Cir. 1910) 478 Fed. 245, 101 C. C. A. 805.

Posting of notice of petition.—Act Cong. June 29, 1906, ch. 3592, 34 Stat. L. 598, to provide for a uniform rule for the naturalization of aliens throughout the United States, declares, in section 4 (see supra, p. 968), that an alien may be admitted to become a citizen of the United States in the following manner, and “not otherwise.” It has been held that the provision of such Act (see supra, p. 975) requiring notice of the petition to be posted for ninety days prior to hearing was applicable to an alien applying for citizenship under Act Cong. July 26, 1894, ch. 165, 28 Stat. L. 124, providing that service in the navy or marine corps for a specified term, and honorable discharge, shall be counted as residence, and shall entitle an alien having other necessary requisites to citizenship. U. S. v. Peterson, (C. C. A. 8th Cir. 1910) 182 Fed. 289, 104 C. C. A. 571.

 Sufficiency of evidence.—Under the former Act of July 26, 1894, it was held that with respect to aliens who had served or were serving in the navy, proof of an honorable discharge after serving one enlistment of four years, with proof of re-enlistment and continued honorable service for the full five-year period, satisfies the statute. In re Brykczynski, (E. D. Wis. 1913) 207 Fed. 813.

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NAUTICAL ALMANAC

See Navy

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NAUTICAL SCHOOLS

See Education.
NAVAL ACADEMY

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Sec. 1511. [Where established.] The Naval Academy shall be established at Annapolis, in the State of Maryland. [R. S.]

Act of May 21, 1864, ch. 93, 13 Stat. L. 85.
Secs. 1511—1528 constitute chapter 6 of title 15 of the Revised Statutes, entitled "The Naval Academy."

Sec. 1512. [Title of students.] The students at the Naval Academy shall be styled cadet midshipmen. [R. S.]

By the Act of Aug. 5, 1882, ch. 391, § 1, infra, p. 1015, undergraduates at the Naval Academy were designated "Naval Cadets," and by the Act of July 1, 1902, ch. 1368, infra, p. 1017, the title "Naval Cadet" was changed to "Midshipman."
The qualification of cadet midshipman was used for the sake of distinction, to distinguish one kind of midshipman from another, a midshipman at school from a midshipman aboard ship. U. S. v. Cook (1888) 128 U. S. 254, 9 S. Ct. 108, 32 U. S. (L. ed.) 464.

Sec. 1513. [Number of midshipmen.] There shall be allowed in said academy one cadet-midshipman for every member or delegate of the House of Representatives, one for the District of Columbia, and ten appointed at large: Provided, however, That there shall not be at any time more in said academy appointed at large than ten; but the provisions of this section shall not be construed to apply to cadet-midshipmen appointed at large now in said academy. [R. S.]

This section was amended to read as above by Act of June 17, 1878, ch. 260, 20 Stat. L. 143.

The section read originally as follows:
"Sec. 1513. There shall be allowed at said Academy one cadet midshipman for every Member or Delegate of the House of Representatives, one for the District of

As to the change in the designation of students, see the note to the preceding R. S. sec. 1512.

The Act of July 1, 1902, ch. 1388, 32 Stat. L. 686, provided as follows:

"That until the year nineteen hundred and fourteen, in addition to the naval cadets now authorized by law (the title having been changed by this Act to midshipmen), the President shall appoint five midshipmen, and there shall be appointed from the States at large, upon the recommendation of Senators, two midshipmen for each State."

The Act of March 3, 1903, ch. 1010, 32 Stat. L. 1197, contained the following provision:

"There shall be allowed at the Naval Academy two midshipmen for each Senator, Representative, and Delegate in Congress, two for the District of Columbia, and five each year at large: Provided, That the additional Congressional appointments authorized by this Act shall be made at such times as may be determined by the Secretary of the Navy, who shall equitably distribute the increase among the several States, Districts, and Territories, so that ultimately, if practicable, each Senator, Representative, and Delegate may recommend for appointment during each Congress one midshipman. Provided further, That members of the Fifty-seventh Congress who will not be members of the Fifty-eighth Congress, and in whose Districts or States appointments have not been made or vacancies filled in the Fifty-seventh Congress, may immediately upon the expiration of the additional appointments make the additional appointments recommended for."

"That the provisions of this Act for the increase of appointments of midshipmen to the Naval Academy shall continue in force until the thirtieth day of June, nineteen hundred and thirteen; and thereafter one midshipman, as now provided by law, shall be appointed for each Senator, Representative, and Delegate in Congress."


The appointment of a midshipman from Porto Rico was authorized by the second paragraph of the Act of March 3, 1903, ch. 1010, given infra, p. 1017. See the notes to said paragraph.

Sec. 1515. [Examination of candidates.] All candidates for admission into the Academy shall be examined according to such regulations and at such stated times as the Secretary of the Navy may prescribe. Candidates rejected at such examination shall not have the privilege of another examination for admission to the same class, unless recommended by the board of examiners. [R. S.]


Recommendations on failure of candidates to pass.—On March 6, 1878, a representative in Congress was informed by the navy department of a vacant cadetship in the Naval Academy, which was to be filled by an appointment from his district. He recommended a candidate for admission, who failed to pass the examination held in June, 1878; he thereupon recommended another candidate, who failed to pass the examination held in September, 1878. The times fixed by the regulations of the academy for the examination of candidates for admission are June 11 and September 22 of each year. It was held that the next recommendation of a candidate for admission to fill the said vacancy should not be made until after March 5, 1878. This section is to be read as if the dates fixed by the regulations of the academy for the examination of candidates for admission were inserted therein; and hence, by the existing law, the season for recommendations and nominations of cadet midshipmen begins after the 5th of March and expires on the 23d of September in each year. (1879) 16 Op. Atty.-Gen. 621.
Sec. 1516. [Second recommendation.] When any candidate who has been nominated upon the recommendation of a Member or Delegate of the House of Representatives is found, upon examination, to be physically or mentally disqualified for admission, the Member or Delegate shall be notified to recommend another candidate, who shall be examined according to the provisions of the preceding section. [R. S.]


Further provisions relating to notification, etc., were made by the Act of June 29, 1906, ch. 3590, infra, p. 1020.

The only authority to call for a new recommendation is that given by this section. The Secretary of the Navy cannot revoke a nomination when the member making the nomination has been unseated in a contest of election. (1896) 21 Op. Atty.-Gen. 342.

Sec. 1517. [Qualifications.] Candidates allowed for congressional districts, for Territories, and for the District of Columbia must be actual residents of the districts or Territories, respectively, from which they are nominated. And all candidates must, at the time of their examination for admission, be between the ages of fourteen and eighteen years, and physically sound, well formed, and of robust constitution. [R. S.]


The minimum and maximum age of candidates was fixed at fifteen and twenty years, respectively, by the Act of March 2, 1899, ch. 296, § 2, infra, p. 1016, and at sixteen and twenty years, respectively, by the Act of March 3, 1903, ch. 1010, infra, p. 1017.

"Actual residents."—A nominee for the office of midshipman in the Navy, whose qualifications have been regularly certified to by a Representative in Congress, who has passed the necessary mental and physical examination and received and accepted the appointment, cannot, in the absence of fraud, be deprived of that office, although it should afterwards appear that he was not an actual resident of the congressional district whence he was appointed. The eligibility of the nominee having been determined by a former Secretary of the Navy, that action, in absence of fraud, must be regarded as final and not subject to re-examination under a subsequent administration. (1910) 28 Op. Atty.-Gen. 180.

"Between the ages of."—In (1862) 10 Op. Atty.-Gen. 315, the words "between the ages of fourteen and seventeen," in section 11 of the Act of July 16, 1862, were held to exclude all who had attained to seventeen years of age.

Sec. 1518. [Appropriations, how applied.] No money appropriated for the support of the Naval Academy shall be applied to the support of any midshipman appointed otherwise than in strict conformance with the provisions of this chapter. [R. S.]

Act of May 21, 1864, ch. 93, 13 Stat. L. 84.

Sec. 1519. [Midshipmen found deficient.] Cadet midshipmen found deficient at any examination shall not be continued at the Academy or in the service unless upon the recommendation of the academic board. [R. S.]


As to the change in the designation of cadet midshipmen, see the notes to R. S. sec. 1512, supra, p. 1007.

Recommendation as prerequisite to continuation at academy.—A cadet having no such recommendation as this section requires has no right to remain at the academy. Potter v. U. S., (1899) 34 Ct. Cl. 13.

Power of secretary to continue cadets.—Where certain naval cadets were found deficient at the semi-annual examination held at the Naval Academy in January, 1899, and, without the recommendation of the
academic board, were granted leaves of absence by the Secretary of the Navy with permission to report to the superintendent of the academy to join the next fourth class, it was held that the Secretary had no power to continue these cadets in the academy without the recommendation of the academic board. (1859) 19 Op. Atty.-Gen. 302. See also (1877) 15 Op. Atty.-Gen. 834.

Sec. 1520. [Academic course.] The academic course of cadet midshipmen shall be six years. [R. S.]


As to the change in designation of cadet midshipmen, see the note to R. S. sec. 1512, supra, p. 1007.

The course at the Naval Academy was reduced to four years by the Act of March 7, 1912, ch. 53, infra, p. 1023.

Sec. 1521. [Rank on graduation.] When cadet midshipmen shall have passed successfully the graduating examination at the Academy, they shall receive appointments as midshipmen and shall take rank according to their proficiency as shown by the order of their merit at date of graduation. [R. S.]


This section was in part superseded by the Act of Aug. 5, 1882, ch. 391, § 1, infra, p. 1015, which designated all undergraduates as "Naval Cadets," and which was in turn superseded by the Act of July 1, 1902, ch. 1368, infra, p. 1017, which changed the title "Naval Cadet" to "Midshipman."

The provisions of the text relating to "Appointments as Midshipmen" were superseded by a provision of the Act of Aug. 5, 1882, ch. 391, § 1, 22 Stat. L. 285, which was as follows:

"From those who successfully complete the six years' course appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line and Engineer Corps of the Navy and of the Marine Corps: ... And if there be a surplus of graduates, those who do not receive such appointment shall be given a certificate of graduation, an honorable discharge, and one year's sea-pay, as now provided by law for cadet-midshipmen; and so much of section fifteen hundred and twenty-one of the Revised Statutes as is inconsistent herewith is hereby repealed. That any cadet whose position in his class entitles him to be retained in the service may, upon his own application, be honorably discharged at the end of four years' course at the Naval Academy, with a proper certificate of graduation."

These provisions were largely superseded by the Act of March 2, 1889, ch. 396, § 1, 26 Stat. L. 878, quoted infra, this note, and by the Act of March 7, 1912, ch. 53, infra, p. 1023, and the Act of July 9, 1913, ch. 5, infra, p. 1024.

Said Act of Aug. 5, 1882, ch. 391, § 1, 22 Stat. L. 285, contained a further provision as follows:

"And provided further, That no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year; such appointments to be made from the graduates of the year, at the conclusion of their six years' course, in the order of merit, as determined by the academic board of the Naval Academy; the assignment to the various corps to be made by the Secretary of the Navy upon the recommendation of the academic board. But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years' course during the year eighteen hundred and eighty-two."

This was superseded by an Act of March 2, 1889, ch. 396, § 1, 25 Stat. L. 878 (section 2 of said Act is given infra, p. 1016), entitled "An Act to regulate the course at the Naval Academy," which provided as follows:

"That the Academic Board of the Naval Academy shall on or before the thirtieth day of September in each year separate the first class of naval cadets then commencing their fourth year into two divisions, as they may have shown special aptitude for the duties of the respective corps, in the proportion which the aggregate number of vacancies occurring in the preceding fiscal year ending on the thirtieth day of June in the lowest grades of commissioned officers of the line of the Navy and Marine Corps of the Navy shall bear to the number of vacancies to be supplied by the Academy during the same period in the lowest grade of commissioned officers of the engineer corps of the Navy; and the cadets so assigned to the line and Marine Corps division of the first class shall thereafter pursue a course of study
arranged to fit them for service in the line of the Navy, and the cadets so assigned to the Engineer Corps division of the first class shall thereafter pursue a separate course of study arranged to fit them for service in the Engineer Corps of the Navy, and the cadets shall thereafter, and until final graduation, at the end of their six years' course, take rank by merit with those in the same division, according to the merit marks; and that the final graduates of the line and Marine Corps division, at the end of their six years' course, appointments shall be made hereafter as it shall be necessary to fill vacancies in the lowest grades of commissioned officers of the line and Marine Corps; and the vacancies in the lowest grades of the commissioned officers of the Engineer Corps of the Navy shall be filled in like manner by appointments from the final graduates of the Engineer division at the end of their six years' course: Provided, That no greater number of appointments into the said lowest grades of commissioned officers shall be made each year than shall equal the number of vacancies which shall have occurred in the same grades during the fiscal year then current; such appointments to be made from the final graduates of the year, in the order of merit as determined by the Academic Board of the Naval Academy, the assignment to be made by the Secretary of the Navy upon the recommendation of the Academic Board at the conclusion of the fiscal year then current; but nothing contained herein or in the naval appropriation act of August fifth, eighteen hundred and eighty-two, shall reduce the number of appointments of final graduates at the end of their six years' course below twelve in each year to the line of the Navy, and not less than two shall be appointed annually to the Engineer Corps of the Navy, nor less than one annually to the Marine Corps; and if the number of vacancies in the lowest grades aforesaid, occurring in any year shall be greater than the number of final graduates of that year, the surplus vacancies shall be filled from the final graduates of following years, as they shall become available; and it is provided that in addition to the appointments to the Engineer Corps of the Navy hereby authorized there may also be appointed five Assistant Engineers from the graduates, in the order of merit, of the Naval Academy of the class which finished its six years' course in June, eighteen hundred and eighty-six, to take rank and receive pay only from the date of their appointment; and said Engineer Corps is hereby enlarged for the purpose of the additional appointments hereby authorized.

This was superseded by the transfer of the officers of the Engineer Corps to the line by the Act of March 3, 1899, ch. 413, §§ 1-7 (see Navy), and by the provisions that the course at the Academy should be four years, and that midshipmen on graduation should be commissioned ensigns and assigned to fill vacancies in the Marine Corps or Staff Corps of the Navy, made by the Act of March 7, 1912, ch. 53, infra, p. 1023, and the Act of July 9, 1913, ch. 5, infra, p. 1024. Said last cited Acts also superseded a provision of the Act of July 26, 1894, ch. 165, 28 Stat. L. 124, which was as follows:

"That in order to fill vacancies that may exist in the grade of ensign in the Navy and in the grade of assistant engineer in the Navy, the Secretary of the Navy shall, in case the number of vacancies in either of such grades exceeds the number of naval cadets in the line division or in the engineer division of the class of naval cadets finally graduated in the year eighteen hundred and ninety-four, or in any one year thereafter, select a number equal to such excess from the list of the graduates of said class in the engineer division or in the line division, as the case may require, who shall be reported as proficient and be recommended thereto by the Academic Board, and such final graduates shall be appointed to fill vacancies in the grade of ensign in the Navy or in the grade of assistant engineer in the Navy, respectively, and the naval cadets so appointed to fill vacancies in such grades shall take rank in those respective grades next after the naval cadets appointed from the line division or from the engineer division, as the case may be, to fill vacancies in those grades, but among themselves according to merit as determined by the Academic Board."

Cases construing section 1521.—The words "graduating examination" signify that examination which, under the regulations of the Naval Academy, takes place after the prescribed term of sea service has been performed. Assignments of relative rank, as between officers of the same class, based upon the results of such examination, are in conformity with law. (1877) 16 Op. Atty-Gen. 637. See also (1879) 16 Op. Atty-Gen. 296. That "the construction given to the statute of 1870 by the academy at Annapolis has been that midshipmen, although graduates, were nevertheless not entirely emancipated from probationary study, but that after graduation they were still (as theretofore) to be students at sea; that while so students at sea a provisional relative rank was assigned them by the statute, but that it was not intended by such legislation to abolish the old discipline by which a final graduating examination was to have effect upon the relative rank which they should bear after emancipation. I see no reason for disturbing this conclusion." See Harmon v. U. S. (1888) 23 Ct. Cl. 406; Harmon v. U. S. (1888) 23 Ct. Cl. 141; Grambe v. U. S. (1886) 23 Ct. Cl. 427; (1877) 15 Op. Atty-Gen. 635; (1899) 19 Op. Atty-Gen. 553.
Cases construing Act of Aug. 5, 1882, ch. 391, sec. 1.—Constitutionality of statute.—The provision of the statute providing for the honorable discharge of surplus graduates is not an unconstitutional exercise of congressional power. It was not aimed for a definite time or during good behavior has not a vested interest or contract right in his office of which Congress could not deprive him. He does not hold by contract, but enjoys a privilege revocable by the sovereignty at will. Crenshaw v. U. S., (1880) 134 U. S. 99, 10 S. Ct. 431, 33 U. S. (L. ed.) 825. See also Harmon v. U. S., (1888) 23 Ct. Cl. 406.

In Crenshaw v. U. S., (1890) 134 U. S. 99, 10 S. Ct. 431, 33 U. S. (L. ed.) 825, the court said that it did not regard the statute as an assumption on the part of Congress of the power of appointment belonging to the executive. Congress did not undertake to name the incumbent of any office, but simply changed the name and modified the scope of the duties, and this it had the power to do.

"The general purpose of this Act is quite apparent. One main object was to abolish the distinctions previously made by law between cadet engineers and cadet midshipmen, and for the future to merge both classes in the new designation of naval cadets. The previous differences between them grew out of separate provisions as to their number, their manner of appointment, their course and term of study, and their pay after their four years' course at the academy. Another principal purpose of the Act was to prevent the increase of the number of officers in the navy, by providing for the annual discharge from the service of all graduates of the year not needed to fill vacancies in the grade to which they were eligible for promotion, actually existing at the time of their graduation. But this was done in accordance with the declaration of the Act, 'that no officer now in the service shall be reduced in rank or deprived of his commission by reason of any provision of this Act reducing the number of officers in the several corps.' And to this end the whole scheme of reform embodied in the legislation was made prospective." U. S. v. Redgrave, (1886) 116 U. S. 474, 6 S. Ct. 444, 29 U. S. (L. ed.) 697.

Prospective.—The provision for the honorable discharge of surplus graduates was prospective only, and left the state and condition of cadet engineers, who at the date of the passage of the Act were already graduates according to the law as it then stood, unchanged. U. S. v. Redgrave, (1886) 116 U. S. 474, 6 S. Ct. 444, 29 U. S. (L. ed.) 697. See also Leopold v. U. S., (1883) 18 Ct. Cl. 546; Maxpine v. U. S., (1892) 27 Ct. Cl. 491.

In U. S. v. Perkins, (1886) 116 U. S. 485, 6 S. Ct. 449, 29 U. S. (L. ed.) 700, it was held that the Secretary of the Navy had no authority to discharge, under this statute, naval cadets who graduated in 1881 as cadet engineers. See also (1886) 18 Op. Atty.-Gen. 373, that those who accepted their pay without protest, or who protested against the legality of the discharge and subsequently accepted such pay, did not intend thereby to give to their acts the force and effect of resignation.

Cadet engineers who had finished their four years' course, passed their final academic examination, and received their diplomas before the passage of this Act, became "graduates," and were not made naval cadets by that Act. Leopold v. U. S., (1883) 18 Ct. Cl. 546.

A naval cadet who was an undergraduate of the class of 1883 was held subject to the provisions of this statute as to the honorable discharge of surplus graduates. Harmon v. U. S., (1888) 23 Ct. Cl. 132, 406.

"A naval cadet, discharged under an erroneous interpretation of this statute, cannot recover a salary of an office to which he might and should have been appointed. Grambs v. U. S., (1888) 23 Ct. Cl. 420.

"There are two kinds of graduation and two kinds of graduates. There is graduation and final graduation; there are graduates and final graduates. There are graduates of the four years' course at the academy proper, entitled to certificates of graduation; and graduates of the six years' course, four at the academy and two at sea, entitled to commissions." (1899) 22 Op. Atty.-Gen. 466.

Graduates physically disqualified for service.—Where certain members of the graduating class were reported as physically disqualified for the naval service, but as mentally and professionally qualified, and were placed among the "surplus graduates," they were each entitled under this statute to the commissions of March 2, 1889, ch. 396, as such surplus graduates, to a certificate of graduation, an honorable discharge, and one year's pay, and there is no authority in law for stating in such certificate the physical disqualification of the graduate. (1899) 19 Op. Atty.-Gen. 356.

Cases construing Act of March 2, 1889, ch. 396, ch. 1.—The phrases "final graduation" and "first graduate" are used throughout for the evident purpose of distinguishing the six years' course and those who have completed it and are entitled to commissions, from the four years' course and those who have completed it and have received certificates of proficiency in its studies. (1899) 22 Op. Atty.-Gen. 485.

Graduates physically disqualified for service.—Certain members of the graduating class were reported as physically disqualified for the naval service, but as mentally and professionally qualified, and were placed among the "surplus graduates," they were each entitled,
under this statute and the Act of Aug. 5, 1882, ch. 391, as such surplus graduates, to a certificate of graduation, an honorable discharge, and one year's pay, and there is no authority in law for stating in such certificate the physical disqualification of the graduate. (1889) 19 Op. Atty.-Gen. 358.

Filling vacancies.—Under this statute the vacancies in the lowest grade of commissioned officers in the line and marine corps must be filled from the final graduates of the line and marine corps at Annapolis; so also as to vacancies in the engineer corps. Vacancies in the line and marine corps cannot be filled from the engineer corps division, or vice versa. (1893) 20 Op. Atty.-Gen. 615.

An Act of July 16, 1863, 12 Stat. L. 583, provided “that the students at the Naval Academy shall be styled midshipmen until their final graduating examination, when, if successful, they shall be commissioned ensigns.” It was held that the “final examination” referred to was not the final academic examination of the Naval Academy, but the last examination referred to in the regulations subsisting at the time the Act was passed. Benjamin v. U. S., (1874) 10 Ct. Cl. 474.

R. S. secs. 1523-1525. These sections were superseded (see U. S. v. Redgrave, [1886] 116 U. S. 474, 478, 6 S. Ct. 444, 29 U. S. (L. ed.) 697) by the Act of Aug. 5, 1882, ch. 391, § 1, 22 Stat. L. 285, and the Act of March 2, 1889, ch. 396, § 1, 25 Stat. L. 578, noted as having been superseded in the preceding note to R. S. sec. 1521, and by the Act of March 3, 1899, ch. 413, §§ 1-7, given under NAVY, which transferred the officers of the Engineer Corps to the line. These sections were as follows:

“Sec. 1523. [Cadet engineers.] The Secretary of the Navy is authorized to make provision, by regulations issued by him, for educating at the Naval Academy, as naval constructors or steam-engineers, such midshipmen and others as may show a peculiar aptitude therefor. He may, for this purpose, form a separate class at the Academy, to be styled cadet engineers, or otherwise afford to such persons all proper facilities for such a scientific mechanical education as will fit them for said professions.” Act of July 4, 1864, ch. 252, 13 Stat. L. 393.

“Sec. 1523. [Number and appointment of.] Cadet engineers shall be appointed by the Secretary of the Navy. They shall not at any time exceed fifty in number, and no persons, other than midshipmen, shall be eligible for appointment unless they shall first produce satisfactory evidence of mechanical skill and proficiency, and shall have passed an examination as to their mental and physical qualifications.” Act of July 4, 1864, ch. 252, 13 Stat. L. 393; Act of March 2, 1867, ch. 174, 14 Stat. L. 516.

This section 1523 was repealed in part by Act of June 22, 1874, ch. 392, § 3, 19 Stat. L. 192, which was as follows:

“Sec. 3. That so much of the act entitled ‘An act to authorize the Secretary of the Navy to provide for the education of naval constructors and steam-engineers, and for other purposes,’ approved July 4, 1864, as provides that cadet-engineers, not to exceed fifty in number, shall be appointed by the Secretary of the Navy, is hereby repealed; and cadet-engineers shall hereafter be appointed annually by the Secretary of the Navy, and the number appointed each year shall not exceed twenty-five; and that all acts or parts of acts inconsistent with the provisions of this act be, and the same are hereby repealed.”

“Sec. 1524. [Academic course of.] The course for cadet engineers shall be four years, including two years of service on naval steamers.” Act of July 4, 1864, ch. 252, 13 Stat. L. 393; Act of March 3, 1873, ch. 230, 17 Stat. L. 555.

The Act of Feb. 24, 1874, ch. 35, § 2, 18 Stat. L. 17, also provided as follows:

“Sec. 2. That from and after the thirtieth day of June, eighteen hundred and seventy-four, the course of instruction at the Naval Academy for cadet-engineers shall be four years, instead of two as now provided by law; and this provision shall first apply to the class of cadet-engineers entering the academy in the year eighteen hundred and seventy-four, and to all subsequent classes; and that all acts or parts of acts inconsistent herewith be, and are hereby, repealed.”

“Sec. 1525. [Examinations of.] Cadet engineers shall be examined from time to time, according to regulations prescribed by the Secretary of the Navy, and if found deficient at any examination, or if dismissed for misconduct, they shall not be continued in the academy or in the service except upon the recommendation of the academic board.” Act of July 4, 1864, ch. 252, 13 Stat. L. 393.

Sec. 1526. [Studies not to be pursued on Sunday.] The Secretary of the Navy shall arrange the course of studies and the order of recitations at the Naval Academy so that the students in said institution shall not be required to pursue their studies on Sunday. [R. S.]

Sec. 1527. [Store-keeper at the Academy.] The store-keeper at the Naval Academy shall be detailed from the Paymaster's Corps, and shall have authority, with the approval of the Secretary of the Navy, to procure clothing and other necessaries for the midshipmen and cadet engineers in the same manner as supplies are furnished to the Navy, to be issued under such regulations as may be prescribed by the Secretary of the Navy. [R. S.]

See further the Act of May 13, 1908, ch. 106, infra, p. 1022.

Sec. 1528. [Professors of ethics, Spanish, and drawing.] Three professors of mathematics shall be assigned to duty at the Naval Academy, one as professor of ethics and English studies, one as professor of the Spanish language, and one as professor of drawing. [R. S.]

Act of May 21, 1864, ch. 93, 13 Stat. L. 85.
For provisions relating to the appointment of professors of mathematics, see Nat. The Naval Appropriation Act of March 3, 1915, ch. 83, 38 Stat. L. 946, contained the following provision:

"PAY OF PROFESSORS AND OTHERS, NAVAL ACADEMY: One professor of mathematics, one of mechanical drawing, one of English, one of French, and one of Spanish, at $3,000 each.
"Three professors, namely, one of English, one of French, and one of Spanish, at $2,640 each.
"Five instructors, at $2,400 each.
"Four instructors, at $2,160 each.
"Ten instructors, at $1,800 each.
"No part of any sum in this Act appropriated shall be expended in the pay or allowances of any commissioned officer of the Navy detailed for duty as an instructor at the United States Naval Academy to perform duties which were performed by civilian instructors on January first, nineteen hundred and thirteen."

Professors of mathematics.—Although the title conferred by law is a misnomer, the heads of the departments of ethics and English studies, of Spanish and other modern languages, and of drawing, should be commissioned as professors of mathematics. (1881) 17 Op. Atty.-Gen. 103.

An Act to prevent hazing at the Naval Academy.


[Hazing, how punished.] That in all cases when it shall come to the knowledge of the superintendent of the Naval Academy, at Annapolis, that any cadet-midshipman or cadet-engineer has been guilty of the offense commonly known as hazing, it shall be the duty of said superintendent to order a court-martial, composed of not less than three commissioned officers, who shall minutely examine into all the facts and circumstances of the case and make a finding thereon; and any cadet-midshipman or cadet-engineer found guilty of said offense by said court shall, upon recommendation of said court be dismissed; and such finding, when approved by said superintendent, shall be final; and the cadet so dismissed from said Naval Academy shall be forever ineligible to re-appointment to said Naval Academy. [18 Stat. L. 203.]

As to the change of the designation of cadet-midshipmen, see the notes to R. S. sec. 1512, supra, p. 1007.
This Act, in connection with the Act of March 3, 1903, infra, p. 1017, was in part repealed by the Act of April 9, 1906, ch. 1370, § 2, infra, p. 1019, the other sections of which Act made other provisions with respect of the offense of hazing.

Not repealed.—This Act, providing for the court-martialing of cadet midshipmen at the Naval Academy, is not repealed by the Act of March 2, 1895 (see infra, p. 1016) which provides that sentences of suspension and dismissal approved by the superintendent "shall not be carried into effect until confirmed by the President." Melvin v. U. S., (1910) 45 Ct. Ct. 213.

To constitute the offense of "hazing" at the Naval Academy, it is essential that the victim should be a new cadet of the fourth class. Hence, unless the charge against the accused alleges that the victim was a new cadet of the fourth class a court-martial organized under the statute would have no jurisdiction over it. An allegation that the victim was a candidate for appointment or admission to the academy is sufficient. (1885) 18 Op. Atty.-Gen. 292.

Where the record of the proceedings of a court-martial in the case of a naval cadet of the second class, who was tried under this statute, showed that the acts complained of were pulling the nose, striking, and otherwise maltreating a naval cadet of the fourth class, it was held that these facts, in conjunction with other circumstances, present a case containing all that is essential to constitute the offense of hazing within the meaning of the statute, and that the court had jurisdiction of the complaint. (1886) 18 Op. Atty.-Gen. 376.

"Older cadet."—In (1886) 18 Op. Atty.-Gen. 507, the attorney-general said that "where a cadet entered the naval academy and became a member of the fourth class in 1885, and also remained a member of the same class in 1886, he is at the latter period as much an 'older cadet' within the definition of the offense of 'hazing' as a cadet who, having entered the academy at the same time (1885), has since been advanced to a higher class, and (equally with the other) is capable of committing that offense."

Reinstatement.—This Act was designed to cut off from a cadet found guilty of the offense of hazing, should the finding of the court-martial be approved by the superintendent, all chance of reinstatement. (1876) 16 Op. Atty.-Gen. 80.

[Board of visitors.] • • • Naval Academy. • • • That from and after the passage of this act there shall be appointed every year, in the following manner, a Board of Visitors, to attend the annual examination of the academy. [20 Stat. L. 290.]

This is from the Naval Appropriation Act of Feb. 14, 1879, ch. 68.

The provisions referred to in the text as to the manner of appointing the Board of Visitors were superseded by the Act of March 4, 1913, ch. 148, infra, p. 1024, and were as follows:

"Seven persons shall be appointed by the President, and two Senators and three Members of the House of Representatives shall be designated as Visitors by the Vice-President or President pro tempore of the Senate and the Speaker of the House of Representatives, respectively, at the session of Congress next preceding such examination. Each member of said board shall receive not exceeding eight cents per mile traveled by the most direct route from his residence to Annapolis, and eight cents per mile for each mile from said place to his residence on returning."

[SEC. 1.] [Title of students.] • • • That hereafter there shall be no appointments of cadet-midshipmen or cadet-engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each Congressional district and at large, as now provided by law for cadet-midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called "naval cadets." [22 Stat. L. 285.]

This and the following paragraph of the text are from the Naval Appropriation Act of Aug. 5, 1882, ch. 391. For a reference to other provisions of this Act see the notes to R. S. sec. 1521, supra, p. 1010.
The text superseded so much of R. S. sec. 1512, supra, p. 1007, as provided that students should be called cadet-midshipmen and was in turn partly superseded by the Act of July 1, 1902, ch. 1388, infra, p. 1017, which provided that the term “Naval Cadet” should be changed to “Midshipman.”

[Special courses of study.] • • • That the Secretary of the Navy may prescribe a special course of study and training at home or abroad for any naval cadet. [22 Stat. L. 285.]

See the note to the preceding paragraph of the text.

[Sec. 1.] [Expenses of Board of Visitors.] • • • Naval Academy. • • • That no part of this sum, or of any other appropriation by Congress for expenses of the Board of Visitors, shall be used to pay for intoxicating liquors. [24 Stat. L. 268.]

This is from the Deficiencies Appropriation Act of Aug. 4, 1886, ch. 903.

Sec. 2. [Minimum and maximum ages.] That after the fourth day of March, eighteen hundred and eighty-nine, the minimum age of admission of cadets to the Academy shall be fifteen years and the maximum age twenty years. [25 Stat. L. 879.]

This is from an Act of March 2, 1889, ch. 396, entitled “An Act to regulate the course at the Naval Academy.”

Section 1 of this Act is noted as superseded under R. S. sec. 1521, supra, p. 1010.

The text superseded earlier provisions as to age made by R. S. sec. 1517, supra, p. 1009, and was in turn superseded by the Act of March 3, 1903, ch. 1010, infra, p. 1017, fixing the minimum and maximum age at sixteen and twenty years respectively.

[Court-martial.] • • • That the Secretary of the Navy shall have power to convene general courts-martial for the trial of naval cadets, subject to the same limitations and conditions now existing as to other general courts-martial, and to approve the proceedings and execute the sentences of such courts, except the sentences of suspension and dismissal, which, after having been approved by the Superintendent, shall not be carried into effect until confirmed by the President. [28 Stat. L. 838.]

This and the following paragraph of the text are from the Naval Appropriation Act of March 2, 1895, ch. 185.

Dismissal without court-martial.—This Act does not prevent the President from dismissing cadets or midshipmen without trial by court-martial. Weller v. U. S., (1906) 41 Ct. Cl. 324.

Approval and promulgation.—In Phillips’ Case, (1880) 16 Op. Atty.-Gen. 550, it was held that notification by the Secretary of the Navy of the approval by the President of the sentence was sufficient evidence both of approval and promulgation.

Under an early statute.—A midshipman was nominated and confirmed in March, 1888, to be ensign, the promotion being made “subject to examination.” In July, 1888, having never been examined, he was tried by a naval court-martial as a midshipman, and sentenced to dismissal from the service. It was held that, under the circumstances, he was properly tried as a midshipman. Phillips’ Case, (1880) 16 Op. Atty.-Gen. 550.
[Promotion of assistant professors.] * * * any assistant professor at the Naval Academy who has served as such for five years shall have the title and pay of a professor. [28 Stat. L. 837.]

See the note to the preceding paragraph of the text.
This provision appeared under the provision for pay of professors and others at the Naval Academy. It was not repeated in the Appropriation Act of the following year, although increased salaries for some of the professors were provided therein. The object of the provision in the text following apparently is to fix the provision in the above text as permanent.
See R. S. sec. 1828, supra, p. 1014, and the notes thereto.

[Pay of professors.] * * * That the proper pay officer of the Navy be, and is hereby, authorized to pay the professors at the Naval Academy, whose compensation was affected by the Act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and ninety-six, approved March second, eighteen hundred and ninety-five, at the rate of compensation fixed by that Act from July first, eighteen hundred and ninety-six. [29 Stat. L. 661.]

This is from the Naval Appropriation Act of March 3, 1897, ch. 386.
The Act of March 2, 1895, ch. 186, here mentioned, is given in the preceding paragraph of the text. See the notes thereto.

Pay of professors in military academy. — The Act 3d March, 1890, (see the title NAVY) provides that commissioned officers of the Navy shall receive the pay and allowance provided by law “for the officers of corresponding rank in the Army;” and R. S. sec. 1338 (see the title MILITARY ACADEMY) provides that the professors of the Military Academy “shall have the pay and allowance of colonel,” of “lieutenant-colonel,” and of “major.” But these provisions do not entitle a naval officer detailed to serve as professor in the Naval Academy to the pay specifically provided for professors in the Military Academy. The act of 1899 does not secure similarity of pay though both persons perform similar duties. Huse v. U. S., (1907) 43 Ct. Cl. 19.

[Title of students.] * * * The title “naval cadet” is hereby changed to “midshipman.” [32 Stat. L. 686.]

This is from the Naval Appropriation Act of July 1, 1902, ch. 1368.
This superseded in part R. S. sec. 1512, supra, p. 1007, and the Act Aug. 5, 1882, ch. 391, § 1, supra, p. 1015.


[Punishment for hazing.] * * * That the Superintendent of the Naval Academy shall make such rules, to be approved by the Secretary of the Navy, as will effectually prevent the practice of hazing; and any cadet found guilty of participating in or encouraging or countenancing such practice shall be summarily expelled from the Academy, and shall not thereafter be reappointed to the Corps of Cadets or be eligible for appointment as a commissioned officer in the Army or Navy or Marine Corps until two
years after the graduation of the class of which he was a member. [32 Stat. L. 1198.]

This and the two paragraphs of the text following are from the Naval Appropriation Act of March 3, 1905, ch. 1010. Other provisions of this section, relating to the number of midshipmen to be appointed, are noted under R. S. sec. 1513, supra, p. 1067.

The provisions of this paragraph, together with those of the Act of June 23, 1874, ch. 453, supra, p. 1014, were repealed in part by the Act of April 9, 1906, ch. 1370, § 2, infra, p. 1019, the other sections of which Act made different provisions with respect of the offense of hazing.

Hazing has such a well-known meaning that it need not be defined by rules under the statute. Melvin v. U. S., (1910) 45 Ct. Cl. 213.

Summary dismissal of cadet for hazing. — The statutes on the subject of hazing do not confer upon the superintendent of the Naval Academy, or the Secretary of the Navy, or upon both conjointly, the power summarily to dismiss from the academy, without trial by court-martial, a midshipman guilty of that offense. (1905) 25 Op. Atty.-Gen. 543.

[Appointment from Porto Rico.] • • • That hereafter there shall be at the Naval Academy one midshipman from Porto Rico, who shall be a native of said island, and whose appointment shall be made by the President on the recommendation of the governor of Porto Rico. [32 Stat. L. 1198.]

See the notes to the preceding paragraph of this section.

For provisions relating to the number of midshipmen, see R. S. sec. 1513, supra, p. 1007, and the notes thereto.


[Ages of candidates.] • • • That after January first, nineteen hundred and four, all candidates for admission to the Naval Academy at the time of their examination must be between the ages of sixteen and twenty years. [32 Stat. L. 1198.]

See the notes to the first paragraph of this section, supra, this page.

This superseded provisions with respect of age made by R. S. sec. 1517, supra, p. 1069, and the Act of March 2, 1883, ch. 396, § 2, supra, p. 1018.

Reappointment.—A midshipman at the Naval Academy who, being found deficient in studies, presented his resignation, which was accepted, cannot be reappointed to fill the vacancy thus created if he is more than twenty years of age. (1906) 25 Op. Atty.-Gen. 585.

An Act Granting authority to the Secretary of the Navy, in his discretion, to dismiss midshipmen from the United States Naval Academy and regulating the procedure and punishment in trials for hazing at the said Academy.

[Act of April 9, 1906, ch. 1370, 34 Stat. L. 104.]

[Sec. 1.] [Dismissal of midshipmen — procedure — board of inquiry.] That it shall be the duty of the Superintendent of the United States Naval Academy, whenever he shall believe the continued presence of any midshipman at the said academy to be contrary to the best interests of the service, to report in writing such fact, with a full statement of the facts upon which are based his reasons for such belief, to the Secretary of the Navy, who, if after due consideration of the said report he shall deem the super-
intendant's said belief reasonable and well founded, shall cause a copy of
the said report to be served upon the said midshipman and require the said
midshipman to show cause, in writing and within such time as the said
Secretary shall deem reasonable, why he should not be dismissed from the
said academy; and after due consideration of any cause so shown the said
Secretary may, in his discretion, but with the written approval of the
president, dismiss such midshipman from the said academy. And the truth
of any issue of fact so raised, except upon the record of demerit, shall be
determined by a board of inquiry convened by the Secretary of the Navy
under the rules and regulations for the government of the Navy. [34 Stat.
L. 104.]

SEC. 2. [Punishment for hazing.] That so much of the Acts approved
June twenty-third, eighteen hundred and seventy-four, and March third,
nineteen hundred and three, as requires the Superintendent of the United
States Naval Academy to convene a court-martial in all cases when it shall
come to the knowledge of the said superintendent that any midshipman
has been guilty of the offense commonly known as "hazing," and declares
the finding of a court-martial so convened, when approved by the said
superintendent, final, and directs that any midshipman found guilty by
such court-martial shall be summarily dismissed from the said academy, and
also all other Acts or parts of Acts inconsistent with the present Act are
hereby repealed, and that the offense known as "hazing" may hereafter be
proceeded against, dealt with, and punished as offenses against good order
and discipline and for violation and breaches of the rules of said academy.
But no midshipman shall be dismissed for a single act of hazing except
under the provisions of section three of this Act. [34 Stat. L. 104.]

The Act of June 23, 1874, ch. 483, in part repealed by the text, is given supra,
p. 1014, and the provisions of the Act of March 3, 1903, ch. 1010, also repealed in
part by the text, are given supra, p. 1017.

SEC. 3. [Trial by court-martial — punishment.] That the Superintendent
of the United States Naval Academy may, in his discretion and with
the approval of the Secretary of the Navy, cause any midshipman in the
said academy to be tried by court-martial for the offense of hazing, as pro-
vided by the Act approved June twenty-third, eighteen hundred and
seventy-four, and such court-martial, upon conviction, may sentence such
midshipman to any punishment authorized by the said Act or by the Act
approved March third, nineteen hundred and three, or authorized for any
violation or breach of the rules of the said academy by the said rules, or,
in cases of brutal or cruel hazing may, in addition to dismissal, sentence
such midshipman to imprisonment for a period not exceeding one year:
Provided, That such midshipman shall not be confined in a military or naval
prison or elsewhere with men who have been convicted of crimes or misde-
meanors; and such finding and sentence shall be subject to review by the
convening authority and by the Secretary of the Navy, as in the cases of
other courts-martial. [34 Stat. L. 104.]

For a reference to the Acts mentioned in the text see the note to the preceding
section 3 of this Act.

SEC. 4. [What constitutes offense of "hazing."] That the offense of
"hazing," as mentioned in this Act, shall consist of any unauthorized
assumption of authority by one midshipman over another midshipman whereby the last-mentioned midshipman shall or may suffer or be exposed to suffer any cruelty, indignity, humiliation, hardship, or oppression, or the deprivation or abridgment of any right, privilege, or advantage to which he shall be legally entitled. [34 Stat. L. 105.]

SEC. 5. [Violation of rules to be reported — punishment for failure to report.] That it shall be the duty of every professor, assistant professor, academic officer, or any cadet officer or cadet petty officer, or instructor, as well as every other officer stationed at the United States Naval Academy, to promptly report to the superintendent thereof any fact which comes to his attention tending to indicate any violation by a midshipman or midshipmen of any of the provisions of this Act or any violation of the regulations of the said academy. Any naval officer attached to the academy who shall fail to make such report as provided in this section shall be tried by court-martial for neglect of duty and if convicted he shall be dismissed from the service. Any civilian instructor attached to the academy who shall fail to make such report as provided in this section shall be dismissed by the superintendent of the academy upon the approval of the Secretary of the Navy. [34 Stat. L. 105.]

SEC. 6. [Effect — prior offenses.] That this Act shall take effect from the date of its approval, but no midshipman now connected with the United States Naval Academy shall by reason of its enactment, be punished for any offense heretofore committed otherwise than in pursuance of the sentence of a court-martial (if, by existing law, such sentence would be now necessary for such punishment) or punished more severely than is now by law allowed for any offense heretofore committed: Provided, That any midshipman now in said Naval Academy may waive his right to trial by court-martial under existing law for any offense of hazing heretofore committed and may accept punishment under the provisions of section two of this Act. [34 Stat. L. 105.]

[Sec. 1.] [Admission of foreign students restricted.] * * * No person shall be admitted for instruction at the Naval Academy at Annapolis from any foreign country except upon authority of law hereafter enacted. [34 Stat. L. 577.]

This and the following paragraph of the text are from the Naval Appropriation Act of June 29, 1906, ch. 3890.

[Nomination of candidates, etc. — filling vacancies.] * * * Hereafter the Secretary of the Navy shall, as soon as possible after the first day of June of each year preceding the graduation of midshipmen in the succeeding year, notify in writing each Senator, Representative, and Delegate in Congress of any vacancy that will exist at the Naval Academy because of such graduation, or that may occur for other reasons and which he shall be entitled to fill by nomination of a candidate and one or more alternates therefor. The nomination of a candidate and alternate or alternates to fill said vacancy shall be made upon the recommendation of the
Senator, Representative, or Delegate, if such recommendation is made by the fourth day of March of the year following that in which said notice in writing is given, but if it is not made by that time the Secretary of the Navy shall fill the vacancy by appointment of an actual resident of the State, Congressional district, or Territory, as the case may be, in which the vacancy will exist, who shall have been for at least two years immediately preceding the date of his appointment an actual and bona fide resident of the State, Congressional district, or Territory in which the vacancy will exist and of the legal qualification under the law as now provided. In cases where by reason of a vacancy in the membership of the Senate or House of Representatives, or by the death or declination of a candidate for admission to the academy there occurs or is about to occur at the academy a vacancy from any State, district, or Territory that can not be filled by nomination as herein provided, the same may be filled as soon thereafter and before the final entrance examination for the year as the Secretary of the Navy may determine. The candidates allowed for the District of Columbia and all the candidates appointed at large, together with alternates therefor, shall be selected by the President within the period herein prescribed for nomination of other candidates: Provided, That the President may select a candidate for the District of Columbia for the year nineteen hundred and eight. [34 Stat. L. 578.]

See the note to the preceding paragraph of the text.

This paragraph, together with the provisions of the Act of March 7, 1912, ch. 53, infra, p. 1023, superseded the Act of June 7, 1900, ch. 859, 31 Stat. L. 703; the Act of March 3, 1903, ch. 1010, § 1, 32 Stat. L. 1197, and R. S. sec. 1514, which, as amended, was as follows:

"Sec. 1514. The Secretary of the Navy shall, as soon after the fifth of March in each year as possible, notify in writing each Member and Delegate of the House of Representatives of any vacancy that may exist in his district. The nomination of a candidate to fill said vacancy shall be made upon the recommendation of the Member or Delegate, if such recommendation is made by the first day of July of that year; but if it is not made by that time, the Secretary of the Navy shall fill the vacancy by appointment of an actual resident of the district in which the vacancy exists, who shall be for at least two years immediately preceding the date of his appointment an actual and bona fide resident of the district in which the vacancy exists and of the legal qualification under the law as now provided. The candidate allowed for the District of Columbia, and all the candidates appointed at large, shall be selected by the President."


This section was amended to read as here quoted by the Naval Appropriation Act of July 26, 1894, ch. 165, 28 Stat. L. 136. The amendment consists in the insertion of the concluding part of the sentence after the words "the Secretary of the Navy shall fill the vacancy."

Actual bona fide residence.—The words "an actual bona fide resident of the state, congressional district, or territory in which the vacancy will exist" employed in this act require the appointee to be "actually domiciled" in the state where he is appointed. This, however, does not necessarily mean a physical presence. Thus a naval officer whose home is at Athens, N. Y., who has been physically present and attending school in New York City, is not an actual bona fide resident of the State of New York, but of Virginia, which is the legal residence of his parent, unless he has become entitled to or attempted to establish an actual residence separate and apart from his father. (1909) 28 Op. Atty.-Gen. 41.

A vacancy occurring by reason of the removal of a midshipman can be filled, under the statute, only by the selective appointment of the Secretary of the Navy. (1910) 28 Op. Atty.-Gen. 180.

Proviso construed.—In (1909) 27 Op. Atty.-Gen. 420, it was held that the candidate selected by the President from the
District of Columbia for the year 1908 for appointment to the Naval Academy having failed in his examination, the President was not authorized under the proviso to reappoint him or otherwise to exercise the power conferred on him by that proviso.

Cases construing former R. S. sec. 1514 — This section established a process by which the members of Congress might control the appointment of cadet midshipmen made during their respective terms of office. (1879) 16 Op. Atty-Gen. 621.

Congressman unseated by election contest.—The notice provided by this section was intended to be given by the member of Congress actually sitting, and the recommendation provided by said section was intended to be made by such member, and action duly taken thereon should not be affected by any subsequent event, except the failure of the nominee to pass his examination. (1896) 21 Op. Atty-Gen. 342.

Unrepresented congressional districts.—In (1862) 10 Op. Atty-Gen. 315, the Attorney-General advised the Secretary of the Navy that midshipmen could not lawfully be appointed for a district which was not represented in Congress. But in a subsequent opinion, (1863) 10 Op. Atty-Gen. 494, he said that under section 11 of the Act of July 16, 1862, the Secretary of the Navy had the power, and it is duty, to fill the vacancies in the Naval Academy that might exist from any district, when it was clearly impracticable to obtain the recommendation of the member or delegate in Congress from that district.

Resignation of naval cadets.—When a naval cadet had tendered his resignation and the same had been accepted by the Secretary of the Navy and the cadet notified of such acceptance, it was not within the power of the secretary to revoke his order of acceptance of the resignation as tendered, on request of the cadet for permission to withdraw his resignation. The consent of the parties to the act of resignation could not be recalled except by the reappointment of the same person as cadet in conformity to this section and R. S. sec. 1515, supra, p. 1008. (1889) 19 Op. Atty-Gen. 350.

Reinstatement of dismissed midshipman.—The Secretary of the Navy had no authority to reinstate to the Naval Academy a midshipman whose appointment had been revoked because of accumulated demerits and the revocation thereof duly promulgated. (1908) 25 Op. Atty-Gen. 579.

[Returns by storekeeper — inspection.] * * * That hereafter the storekeeper at the Naval Academy, authorized by section fifteen hundred and twenty-seven of the Revised Statutes, shall render quarterly returns of property to the Chief of the Bureau of Supplies and Accounts, under such regulations as the Secretary of the Navy may prescribe. A full report shall be made annually of receipts and expenditures by the Chief of the Bureau of Supplies and Accounts to the Secretary of the Navy: And provided further, That an inspection of the storekeeper’s accounts shall be made quarterly by the general inspector of the Pay Corps, with such recommendation as he may deem necessary, to the Chief of the Bureau of Supplies and Accounts. [35 Stat. L. 153.]

This is from the Naval Appropriation Act of May 13, 1908, ch. 166. It is repeated in the Naval Appropriation Act of March 3, 1909, ch. 255, 35 Stat. L. 764.

R. S. sec. 1527 mentioned in the text is given supra, p. 1014.

[Use of crypt and windows of academy chapel restricted — memorials.] * * * * The crypt and window spaces of the United States Naval Academy chapel are to be used only for memorials to United States naval officers who have successfully commanded a fleet or squadron in battle, or who have received or may receive the thanks of the Congress of the United States for conspicuously distinguished services in time of war, and no memorial shall be accepted for or installed in said crypt or window spaces until at least five years after the death of the officer in question: Provided,
That nothing in this provision shall be considered as invalidating any agreement made by the present or any former superintendent of the Naval Academy, authorizing a memorial window in the old Naval Academy chapel to be transferred to the new Naval Academy chapel. [35 Stat. L. 773.]

This is from the Naval Appropriation Act of March 3, 1909, ch. 255.

An Act To reorganize and enlist the members of the United States Naval Academy Band.


[Sec. 1.] [Naval Academy band reorganized — pay, etc.] That the Naval Academy Band shall consist of one leader, who shall have the pay and allowance of a second lieutenant in the Marine Corps; one second leader, with pay at the rate of fifty dollars per month; twenty-nine musicians, first class, and eleven musicians, second class; and shall be paid from "Pay of the navy." [36 Stat. L. 297.]

Sec. 2. [Enlistment, etc.— no back pay, etc.] That the members of the Naval Academy Band as now organized shall be enlisted in the navy and credited with all prior service of whatever nature as members of said band, as shown by the records of the Naval Academy and the pay rolls of the ships and academy; and the said leader and the enlisted musicians of the band shall be entitled to the same benefits in respect to pay, emoluments, and retirement arising from longevity, reenlistment, and length of service as are, or may hereafter become, applicable to other enlisted men of the navy: Provided, That no back pay shall be allowed to the leader or to any member of the said band by reason of the passage of this act. [36 Stat. L. 297.]

An Act Authorising that commission of ensign be given midshipmen upon graduation from the Naval Academy.


[Length of course — commission on graduation.] That the course at the Naval Academy shall be four years, and midshipmen on graduation shall be commissioned ensigns: * * * [37 Stat. L. 73.]

Further provisions of this Act, which may be regarded as temporary only, are as follows:

"Provided, That midshipmen now performing two years' service at sea in accordance with existing law shall be commissioned forthwith as ensigns from the date of the passage of this Act: And provided, That those midshipmen of the class which was graduated in nineteen hundred and nine, who have completed two years' service afloat, and who are due for promotion, shall be commissioned ensigns to take rank with the other members of their class, according to their standing as determined by their final multiples, respectively, for the six years' course, from the fifth day of June, nineteen hundred and eleven, the date of rank to which they were entitled prior to the passage of this Act: And provided further, That no back pay or allowances shall result by reason of the passage of this Act."
The text superseded so much of R. S. sec. 1520, supra, p. 1010, as provided that the course should be six years, and so much of R. S. sec. 1521, supra, p. 1010, as provided that graduates should be appointed midshipmen. A further provision that graduates should be commissioned ensigns was made by the Act of July 9, 1913, ch. 5, infra, p. 1024.

[Board of Visitors.] * * * Hereafter the Board of Visitors to the Naval Academy shall consist of seven members of the Committee on Naval Affairs of the United States Senate and seven members of the Committee on Naval Affairs of the House of Representatives, to be appointed by the respective chairmen thereof, and the members so appointed shall visit the Naval Academy annually at such time as the chairman of the Board of Visitors shall appoint, and the members of each House of Congress of said board may visit said academy together or separately as the said board may elect during the session of Congress. The expenses of the members of the board shall be their actual expenses while engaged upon their duties as members of said board, not to exceed $5 per day and their actual expenses of travel by the shortest mail routes: Provided, That so much of chapter sixty-eight, Statutes at Large, volume twenty, page two hundred and ninety, as is inconsistent with the provisions of this Act is hereby repealed. [37 Stat. L. 907.]

This and the following paragraph of the text are from the Navy Appropriation Act of March 4, 1913, ch. 148.

The Act of Feb. 14, 1879, ch. 68, in part repealed by the proviso of the text, is given supra, p. 1015. See the notes to said Act.

[Payment to servants.] * * * That hereafter such additional payments from the midshipmen's commissary fund as the superintendent of the Naval Academy may deem necessary may be made to the servants authorized in the commissary department. [37 Stat. L. 907.]

See the notes to the preceding paragraph of the text.

An Act Providing for an increase in the number of midshipmen in the United States Naval Academy after June thirtieth, nineteen hundred and thirteen.

[Act of July 9, 1913, ch. 5, 38 Stat. L. 103.]

[Number of midshipmen increased — commissions on graduation.] That after June thirtieth, nineteen hundred and thirteen, and until June thirtieth, nineteen hundred and nineteen, there shall be allowed at the Naval Academy two midshipmen for each Senator, Representative, and Delegate in Congress, one for Porto Rico, two for the District of Columbia, and ten appointed each year at large: Provided, That midshipmen on graduation shall be commissioned ensigns in the Navy, or may be assigned by the Secretary of the Navy to fill vacancies in the lowest commissioned grades of the Marine Corps or Staff Corps of the Navy. [38 Stat. L. 103.]

As to the number of midshipmen, see the notes to R. S. sec. 1513, supra, p. 1007. And see the following paragraph of the text.
"Commissioned ensigns."—Under the Act of July 16, 1862, § 11, students or midshipmen at the Naval Academy were not entitled to be commissioned ensigns until they had performed the term of duty on shipboard, prescribed by regulation of the department upon the completion of their academic studies and passed their final examination in practical navigation and seamanship. (1865) 11 Op. Atty.-Gen. 158.

[Appointment of enlisted men.] • • • Hereafter in addition to the appointments of midshipmen to the United States Naval Academy as now prescribed by law, the Secretary of the Navy is allowed fifteen appointments annually from the enlisted men of the Navy who are citizens of the United States and not more than twenty years of age on the date of entrance to the Naval Academy, and who shall have served not less than one year as enlisted men on the date of entrance: Provided, That such appointments shall be made in the order of merit from candidates who have in competition with each other passed the mental examination now or hereafter required by law for entrance to the Naval Academy, and who passed the physical examination required before entrance under existing law. [38 Stat. L. 410.]

This was from the Naval Appropriation Act of June 30, 1914, ch. 130. As to the number of midshipmen, see the notes to R. S. sec. 1513, supra, p. 1007. And see the preceding paragraph of the text.

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See HOSPITALS AND ASYLUMS

NAVAL MILITIA ACT
See MILITIA

NAVAL OBSERVATORY
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See also ARTICLES FOR THE GOVERNMENT OF THE NAVY; COAST GUARD; NAVAL ACADEMY; PENSIONS.

I. THE DEPARTMENT OF THE NAVY

Sec. 415. [Establishment of the Department of the Navy.] There shall be at the seat of Government an Executive Department, to be known as the Department of the Navy, and a Secretary of the Navy, who shall be the head thereof. [R. S.]

Sections 415–436 constitute title 10 of the Revised Statutes, "The Department of the Navy."
For R. S. sec. 428, see FLAGS.
For R. S. secs. 431–433, see SHIPPING AND NAVIGATION.
The current appropriation for the salary of the Secretary of the Navy was $12,000, made by the Act of March 4, 1915, ch. 141, 38 Stat. L. 1025.
For provisions relating to the Assistant Secretary of the Navy see the Act of July 11, 1890, ch. 667, § 1, infra, p. 1086, and the note thereto.

Authority of secretary.—The Secretary of the Navy has authority to transfer control of certain land at San Juan, P. R., reserved by executive order for naval purposes, to the department of commerce and
Sec. 416. [Clerks and employees.] There shall be in the Department of the Navy:

One chief clerk, at a salary of two thousand five hundred dollars a year, so long as there is no Assistant Secretary of the Navy, and at a salary of two thousand two hundred dollars a year when there is an Assistant Secretary of the Navy.

One disbursing clerk.

One superintendent of the Navy Department building, at a salary of two hundred and fifty dollars a year.

In the Bureau of Yards and Docks:

One civil engineer, at a salary of three thousand dollars a year.

One chief clerk, at a salary of one thousand eight hundred dollars a year.

One draughtsman, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Equipment and Recruiting:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Construction and Repair:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

One draughtsman, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Steam Engineering:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

One draughtsman, at a salary of one thousand eight hundred dollars a year.

One assistant draughtsman, at a salary of one thousand two hundred dollars a year.

In the Bureau of Navigation:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Ordnance:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

One draughtsman, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Provisions and Clothing:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

In the Bureau of Medicine and Surgery:

One chief clerk, at a salary of one thousand eight hundred dollars a year.

[R. S.]
The number of clerks and employees in the department and the amount of their salaries depend on the various appropriation acts. These acts also make provisions for the employment of draughtsmen and other technical employees in the various bureaus. The provisions for the fiscal year ending June 30, 1914, were made by the Act of March 4, 1914, ch. 141, 38 Stat. L. 1025.

The bureau of provisions and clothing was designated the bureau of supplies and accounts by the Act of July 18, 1892, ch. 206, infra, p. 1056.

Assistant to chiefs of bureaus.—This section makes no provision for the appointment of any assistants to chiefs of bureaus. In order to determine who should act in the place of the chief of the bureau during his absence, R. S. sec. 178 (title EXECUTIVE DEPARTMENTS, vol. 3, p. 58) is to be read in connection with this section. An officer of the navy, detailed and assigned to duty by the Secretary of the Navy as an assistant to the chief of a bureau, as such assistant, in the event of the death, resignation, absence or sickness of the chief of the bureau, and in case the President has not otherwise directed under the provisions of R. S. sec. 179 (title EXECUTIVE DEPARTMENTS, vol. 3, p. 258), is not authorized by said R. S. sec. 178 to perform the duties of such chief until his successor is appointed or until such absence or sickness shall cease. (1880) 19 Op. Atty.-Gen. 609.

Sec. 417. [Procurement of naval stores and equipment of vessels.] The Secretary of the Navy shall execute such orders as he shall receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment. [R. S.]


For provisions relating to contracts for naval supplies see Public Contracts.

Representative power of secretary.—The President acts and speaks through the heads of the departments, and the acts of the head of an executive department must be presumed to be by the direction of the President. Weller v. U. S., (1906) 41 Ct. Cl. 324.

The Secretary of the Navy represents the President and exercises his power on the subjects committed to his department. He is responsible to the people and the law for the proper exercise of that power committed to him. His acts and decisions on subjects submitted to his jurisdiction and control by the Constitution and laws, do not require the approval of any officers of another department to make them valid and conclusive. U. S. v. Jones, (1856) 18 How. 92, 15 U. S. (L. ed.) 274, affirmed (1854) 2 Hayw. & H. 160, 26 Fed. Cas. No. 15,493a.

Where the secretary dismissed a midshipman for violation of the regulations and the President appointed another to fill the vacancy, it must be held that the act of the secretary was the act of the President. Weller v. U. S., (1906) 41 Ct. Cl. 324.

An order of the Secretary of the Navy appointing a meteorologist at the navy yard to perform the work ordinarily performed by officers of the navy and making the employment a charge upon the national defense emergency fund must be regarded as the order of the President. Hayden v. U. S., (1903) 38 Ct. Cl. 30.

An official communication from the Secretary of the Navy to the fourth auditor in effect restricting the operation of a proclamation of the President increasing the pay of enlisted men in the navy must be deemed the act of the President himself. Button v. U. S., (1856) 20 Ct. Cl. 423.

An order dismissing an officer in the marine corps issued by the Secretary of the Navy as such, not purporting to be the act or by direction of the President, is nevertheless in legal effect the order of the President. McElrath v. U. S., (1876) 12 Ct. Cl. 201, affirmed (1880) 102 U. S. 426, 26 U. S. (L. ed.) 189.

Regulations of the navy.—"Regulations of the Navy" established by the Secretary of the Navy, with the approval of the President, have the force of law. Ex p. Reed, (1879) 100 U. S. 13, 25 U. S. (L. ed.) 538.

But the authority of the secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition, necessarily implied, that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes defining his powers or conferring rights upon others. U. S. v. Symonds, (1886)

Settlement upon cancellation of contract.—This statute requires the Secretary of the Navy to enter into numerous contracts for the public service; and the power to suspend work contracted for, whether in the construction, armament, or equipment of vessels of war, when from any cause the public interest requires such suspension, must necessarily rest with him. As in making the original contracts he must agree upon the compensation to be made for their entire performance, it would seem that when those contracts are suspended by him, he must be equally authorized to agree upon the compensation for their partial performance. When a settlement in such a case is made upon a full knowledge of all the facts, without concealment, misrepresentation, or fraud, it must be equally binding upon the government as upon the contractor.


Rating of vessels.—The Secretary of the Navy, under the direction of the President, has the power to rate all vessels which may have been authorized to be built. (1945) 4 Op. Atty.-Gen. 387.

Sec. 418. [Custody of the books and records.] The Secretary of the Navy shall have the custody and charge of all the books, records, and other property now remaining in and appertaining to the Department of the Navy, or hereafter acquired by it. [R. S.]

Act of April 30, 1798, ch. 35, 1 Stat. L. 554.

Sec. 419. [Establishment of Bureaus.] The business of the Department of the Navy shall be distributed in such manner as the Secretary of the Navy shall judge to be expedient and proper among the following Bureaus:

First. A Bureau of Yards and Docks.
Fifth. A Bureau of Construction and Repair.
Sixth. A Bureau of Steam Engineering.
Eighth. A Bureau of Medicine and Surgery. [R. S.]


The bureau of provisions and clothing is now termed the bureau of supplies and accounts. See Act of July 19, 1892, ch. 296, infra, p. 1056.

The bureau of equipment was abolished by the Act of June 30, 1914, ch. 130, infra, p. 1063.


Sec. 420. [Custody of books and records of Bureaus.] The several Bureaus shall retain the charge and custody of the books of records and accounts pertaining to their respective duties; and all of the duties of the Bureaus shall be performed under the authority of the Secretary of the Navy, and their orders shall be considered as emanating from him, and shall have full force and effect as such. [R. S.]


Orders of bureau chiefs.—The orders of the chief of bureaus are considered as emanating from the Secretary of the Navy, and have “full force and effect as such.” U. S. v. Barlow, (1902) 184 U. S. 123, 22 S. Ct. 468, 46 U. S. (L. ed.)
Cited generally in Wales v. Whitney, (1882) 114 U. S. 504, 5 S. Ct. 1050, 29

Sec. 421. [Appointment of chiefs of Bureaus.] The chiefs of the several Bureaus in the Department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections respectively, or from officers having the relative rank of captain in the staff corps of the Navy, on the active list, and shall hold their offices for the term of four years. [R.S.]

The Act of June 24, 1910, ch. 378, 36 Stat. L. 607, contained the following provision: "The pay and allowances of chiefs of bureaus of the Navy Department shall be the highest shore-duty pay and allowances of the rear-admiral of the lower grade; and all officers of the navy who are now serving or shall hereafter serve as chief of bureau in the Navy Department and are eligible for retirement after thirty years' service, shall have, while on the active list, the rank, title, and emoluments of a chief of bureau, in the same manner as is already provided by statute law for such officers upon retirement by reason of age or length of service, and such officers, after thirty years' service, shall be entitled to and shall receive new commission in accordance with the rank and title hereby conferred." This was repealed by the Act of August 24, 1912, ch. 355, 37 Stat. L. 329, which contained the following proviso: "That no officer who has received his commission under the provisions of said Act shall be deprived of said commission or the rank, title, and emoluments thereof by virtue of this repeal."


Temporary appointment.—The vacancy in the office of chief of the bureau of steam engineering occasioned by the retirement of the engineer in chief, could not be temporarily filled by the designation of another officer under R. S. sec. 202 (tit. 47, Executive Departments, vol. 3, p. 250), and an order designating the chief constructor as acting chief of the bureau was unauthorized. Such vacancy could only be filled by the President, by and with the advice and consent of the Senate, pursuant to R. S. secs. 421 and 424.

Officers of the navy holding commissions issued by the President, by and with the advice and consent of the Senate, but who do not hold any office in the Navy Department or in a bureau thereof by appointment of the President, cannot be legally designated by the President to act as chiefs of bureaus in the absence of the appointed chiefs of bureaus of equipment, construction and repair, and yards and docks. (1909) 25 Op. Atty.-Gen. 95.

Date of appointment.—On April 30, 1877, during a recess of the Senate, E. was appointed by the President to the office of chief of the bureau of construction and repair in the Navy Department to fill a vacancy, his commission to expire at the end of the next session of the Senate. At the next session (extra) of the Senate, in October, 1877, he was nominated by the President to that body for said office, under R. S. sec. 421, for the term of four years. The nomination was not acted upon during such session, which ended December 3, 1877, and the office became vacant. At the session of the Senate which immediately ensued, E. was again nominated by the President to date "from April 23, 1877," and the nomination was confirmed in the same terms as April 15, 1878. It was held that notwithstanding the special wording of the nomination to, and confirmation by, the Senate, the term of office of the appointee E., as prescribed by R. S. sec. 421, must be deemed to begin from the date of his appointment (namely, in April, 1878), and not "from April 23, 1877," the date specified in the nomination. (1880) 16 Op. Atty.-Gen. 656.

Right of incumbent to hold over the term.—The chief of a bureau cannot lawfully hold over after the expiration of the term for which he was appointed. The general rule seems to be that where Congress has not authorized the officer to hold over his incumbency must be deemed to cease at the end of his term, though no appointment of a successor may then be made. (1884) 17 Op. Atty.-Gen. 648.

Rank on retirement.—Where a captain of the navy was appointed to the office of chief of the bureau of navigation, with the relative rank of commodore, in case of his retirement by reason of a disability
incident to the service, or on his application, during his incumbency of that office, and whilst he is borne on the navy register as a captain, he should be placed on the retired list with the rank of captain, and, on being thus retired, he would be entitled to seventy-five per centum of the sea pay of officers of that rank. (1881) 17 Op. Atty.-Gen. 154.


Sec. 422. [Chiefs of Bureaus of Yards and Docks, Equipment and Recruiting, Navigation, and Ordnance.] The chiefs of the Bureau of Yards and Docks, of the Bureau of Equipment and Recruiting, of the Bureau of Navigation, and of the Bureau of Ordnance, shall be appointed from the list of officers of the Navy, not below the grade of commander. [R. S.]

Act of July 5, 1862, ch. 134, 12 Stat. L. 510. The chief of a bureau was given the rank of rear admiral by the Act of March 3, 1899, ch. 413, § 7, infra, p. 1064.

Eligibility.—An officer not below the rank of captain is eligible for appointment as chief of the bureau of yards and docks. This section restricts the President in his choice of the chiefs of the four bureaus mentioned to officers of the line not below the grade of commander, but the provision of the Act of March 3, 1871, incorporated in R. S. sec. 421, supra, p. 1047 enlarges the President’s power, giving him the alternative of making the appointment “from officers having the relative rank of captain on the staff corps of the navy on the active list.” “It may be said that the law, as thus construed, discriminates against the officers of the staff corps in the matter of the appointment of chiefs of the four bureaus mentioned in section 422 by requiring them to hold a higher rank than officer of the line in order to be eligible; but the answer is, these bureaus are essentially line bureaus, while those mentioned in sections 423 to 426, inclusive, are staff bureaus, and since line officers are not eligible at all to the chiefship of staff bureaus it is not unfair to require some extra evidence of fitness in a staff officer who is to be made head of a line bureau.” (1898) 22 Op. Atty.-Gen. 47.

Pay of rear admiral appointed chief of bureau.—In (1862) 10 Op. Atty.-Gen. 377, the attorney-general advised that a rear admiral, appointed to the office of chief of the bureau of yards and docks, may demand the pay allowed to a rear admiral performing shore duty.

Sec. 423. [Chief of Bureau of Construction and Repair.] The chief of the Bureau of Construction and Repair shall be appointed from the list of officers of the Navy, not below the grade of commander, and shall be a skillful naval constructor. [R. S.]

Act of July 5, 1862, ch. 134, 12 Stat. L. 510. The chief of the bureau was designated chief constructor by R. S. sec. 1471, infra, p. 1135.

Eligibility.—Naval constructors are of this section. (1898) 22 Op. Atty.-Gen. officers of the navy within the purport 47.

Sec. 424. [Chief of Bureau of Steam Engineering.] The Chief of the Bureau of Steam Engineering shall be appointed from the line of officers of the Navy not below the grade of lieutenant-commander, and shall be a skillful engineer. [R. S.]

The section was amended to read as above by the Naval Appropriation Act of June 7, 1900, ch. 859, 31 Stat. L. 702. The section as originally enacted read as follows:

“Sec. 424. The chief of the Bureau of Steam Engineering shall be appointed from the chief engineers of the Navy, and shall be a skillful engineer.” Act of July 5, 1862, ch. 134, 12 Stat. L. 510.

The officers constituting the engineer corps were transferred to the line of the navy by Act of March 3, 1899, ch. 413, § 1, 30 Stat. L. 1004, infra, p. 1091.
Sec. 425. [Chief of Bureau of Supplies and Accounts.] The chief of the Bureau of Provisions and Clothing shall be appointed from the list of paymasters of the Navy of not less than ten years' standing. [R. S.]


The bureau of provisions and clothing was designated the bureau of supplies and accounts by the Act of July 19, 1862, ch. 206, infra, p. 1056.

Qualification of paymaster.—At the time of his appointment, the paymaster-general of the navy must be an experienced officer in the navy. By the appointment he secures higher rank, title, and pay. Smith v. U. S., (1891) 26 Ct. Cl. 143.

Jurisdiction of court-martial.—A naval court-martial has jurisdiction to try the paymaster-general of the navy. No statute directly or indirectly classes these bureau chiefs as civilians and they have never been so regarded in the department. (1891) Smith v. U. S., (1891) 26 Ct. Cl. 143. See also (1885) 18 Op. Atty.-Gen. 176.

Sec. 426. [Chief of Bureau of Medicine and Surgery.] The chief of the Bureau of Medicine and Surgery shall be appointed from the list of the surgeons of the Navy. [R. S.]


An assistant to the bureau of medicine and surgery was authorized by R. S. sec. 1975, infra, p. 1050.

Liability to court-martial.—The chief of the bureau of medicine and surgery is amenable to the jurisdiction of a naval court-martial upon charges and specifications preferred against him for acts done as such chief. This and the preceding section have not the effect to make the chiefs of bureau civil officers for the term of their appointment. (1885) 18 Op. Atty.-Gen. 176. See also Smith v. Whitney, (1888) 116 U. S. 167, 6 S. Ct. 570, 29 U. S. (L. ed.) 601, in which it was held that a writ of prohibition could not issue to a general court-martial of naval officers convened to try a paymaster of the navy who was holding the office of chief of the bureau of provisions and clothing. Smith v. U. S., (1891) 26 Ct. Cl. 143; Wales v. Whitney, (1885) 114 U. S. 664, 5 S. Ct. 1050, 29 U. S. (L. ed.) 277.

Sec. 427. [Use of engraved plates of Wilkes's Expedition.] The Joint Committee on the Library shall grant to the Department of the Navy the use of such of the engraved plates of the United States Exploring Expedition under Captain Wilkes, in charge of the committee, as may be desired for the purpose of printing a supply of charts for the use of the Department. [R. S.]


Sec. 429. [Secretary of Navy to make annual reports.] The Secretary of the Navy shall make annual reports to Congress upon the following subjects:

First. A statement of the appropriations of the preceding fiscal year for the Department of the Navy, showing the amount appropriated under each specific head of appropriation, the amount expended under each head, and the balance which, on the thirtieth day of June preceding such report, remained unexpended. Such report shall be accompanied by estimates of the probable demands which may remain on each appropriation.

Second. • • •

Third. A statement showing the amounts expended during the preceding fiscal year for wages of mechanics and laborers employed in building, repairing, or equipping vessels of the Navy, or in receiving and securing stores and materials for those purposes, and for the purchase of material
and stores for the same purpose; and showing the cost or estimated value of the stores on hand, under this appropriation, in the navy-yards, at the commencement of the next preceding fiscal year; and the cost or estimated value of articles received and expended during the year; and the cost or estimated value of the articles belonging to this appropriation which may be on hand in the navy-yards at the close of the next preceding fiscal year.

Fourth. A statement of all acts done by him in making sale of any vessel or materials of the Navy; specifying all vessels and materials sold, the parties buying the same, and the amount realized therefrom, together with such other facts as may be necessary to a full understanding of his acts. [R. S.]


As originally enacted, this section contained after the word "second" in the text the following provision: "A statement of all offers for contracts for supplies and services made during the preceding year, by classes, indicating such as have been accepted."

This was repealed by the Act of June 22, 1910, ch. 331, 36 Stat. L. 591.

Other provisions relating to the reports required by the Secretary of the Navy are given elsewhere within this subdivision.

Sec. 430. [Estimates for expenses.] All estimates for specific, general, and contingent expenses of the Department, and of the several Bureaus, shall be furnished to the Secretary of the Navy by the chiefs of the respective Bureaus. [R. S.]


Sec. 1375. [Details of medical officers to Bureau of Medicine and Surgery.] A surgeon, assistant surgeon, or passed assistant surgeon, may be detailed as assistant to the Bureau of Medicine and Surgery, who shall receive the highest shore pay of his grade. [R. S.]


The last ten words were added to the section by Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 244.

Regulation of shore pay.—"In each of these grades the pay is increased after five years for assistant surgeons and passed assistant surgeons, and for surgeons after five, ten, fifteen, and twenty years respectively. For some twenty years, at least, both the Navy and Treasury Departments have practically and uniformly interpreted this law as entitling surgeons detailed as assistants to the bureau of medicine and surgery to the shore pay given to a surgeon after twenty years' service, although they may not have served as surgeons over five years; and these officers have always been so paid." Schueze v. U. S., (1889) 24 Ct. Cl. 299.

Operation of amendment.—The amendment was made retrospective by a provision that the section should have the same force and effect as though enacted as provided in the amendment. (1877) 15 Op. Atty. Gen. 259.

Sec. 3666. [Estimates for expenditures of the Navy Department.] The estimates for expenditures required by the Department of the Navy for the following purposes shall be given in detail, and the expenditures made under appropriations therefor shall be accounted for so as to show the disbursements of each Bureau under each respective [respective] appropriation:

First. Freight and transportation
Second. Printing and stationery.
Third. Advertising in newspapers.
Fifth. Purchase and repair of fire-engines and machinery.
Sixth. Repairs of and attending to steam-engines in navy-yards.
Seventh. Purchase and maintenance of horses and ozen, and driving teams.
Eighth. Carts, timber-wheels, and the purchase and repair of workmen’s tools.
Ninth. Postage of public letters.
Tenth. Fuel, oil, and candles for navy-yards and shore-stations.
Eleventh. Pay of watchmen and incidental labor not chargeable to any other appropriation.
Twelfth. Transportation to, and labor attending the delivery of provisions and stores on foreign stations.
Thirteenth. Wharfage, dockage, and rent.
Fourteenth. Traveling expenses of officers and others under orders.
Fifteenth. Funeral expenses.
Sixteenth. Store and office rent, fuel, commissions, and pay of clerks to navy-agents and store-keepers.
Seventeenth. Flags, awnings, and packing-boxes.
Eighteenth. Premiums and other expenses of recruiting.
Nineteenth. Apprehending deserters.
Twentieth. Per-diem pay to persons attending courts-martial, courts of inquiry, and other services authorized by law.
Twenty-first. Pilotage and towage of vessels, and assistance to vessels in distress.
Twenty-second. Bills of health and quarantine expenses of vessels of the United States Navy in foreign ports. [R. S.]


Sec. 3673. [Drafts for War and Navy Departments.] All moneys appropriated for the use of the War and Navy Departments shall be drawn from the Treasury, by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of those Departments, respectively, countersigned by the Second Comptroller of the Treasury, and registered by the proper Auditor. [R. S.]

The office of second comptroller was abolished and his powers, duties, and responsibilities annexed to the office of comptroller of the treasury by section 4 of the Act of July 31, 1894, ch. 174, 28 Stat. L. 205, and by section 3 of said Act the second auditor of the treasury was designated auditor for the War Department, and the fourth auditor was designated auditor for the Navy Department. See Treasury Department.

Former practice. — “Formerly, the moneys appropriated for the War and Navy Departments were placed in the treasury to the credit of the respective secretaries. That practice has been changed, and all the moneys in the treasury are in to the credit or in the custody of the treasurers.” Brashear v. Mason, (1848) 6 How. 92, 12 U. S. (L. ed.) 357.

“Warrant” and “requisition” synonymous. — The words “warrant” and “requisition” are sometimes used with the same meaning. For example, the “warrants drawn by the secretaries” of the War and Navy Departments, signify precisely the same thing as the “requisitions of the secretaries of those departments,” mentioned in this section. (1877) 15 Op. Atty.-Gen. 192.
Sec. 3676. [Appropriation for Navy controlled by Secretary; for each Bureau to be kept separately.] All appropriations for specific, general, and contingent expenses of the Navy Department shall be under the control and expended by the direction of the Secretary of the Navy, and the appropriation for each Bureau shall be kept separate in the Treasury. [E. S.]


Payment of special counsel in court-martial trial.—At the request of the Secretary of the Navy, the Attorney-General may employ special counsel to assist the judge-advocate in the court-martial trial, such counsel being paid, in the absence of other provisions, from the appropriation for naval contingent expenses. (1885) 18 Op. Atty.-Gen. 133.

An Act Authorizing a general account of advances for naval appropriations.


[Sec. 1.] [Requisitions of Secretary of Navy for advances; amount advanced, how used.] That the Secretary of the Navy be, and he is hereby, authorized to issue his requisitions for advances to disbursing officers and agents of the Navy under a "General account of advances", not to exceed the total appropriation for the Navy, the amount so advanced to be exclusively used to pay current obligations upon proper vouchers and that "Pay of the Navy" shall hereafter be used only for its legitimate purpose, as provided by law. [20 Stat. L. 167.]

Disbursements to foreign squadrons.—The Secretary of the Navy has authority to arrange with Baring Bros. & Co., of London, for the payment of the drafts of disbursing officers attached to foreign squadrons. (1849) 5 Op. Atty.-Gen. 218.

SEC. 2. [Advances, how charged.] That the amount so advanced be charged to the proper appropriations, and returned to "General account of advances" by pay and counter warrant; the said charge, however, to particular appropriations, shall be limited to the amount appropriated to each. [20 Stat. L. 167.]

SEC. 3. [Settlements, etc., by Fourth Auditor.] That the Fourth Auditor shall declare the sums due from the several special appropriations upon complete vouchers, as heretofore, according to law; and he shall adjust the said liabilities with the "General account of advances." [20 Stat. L. 168.]

The fourth auditor mentioned in the text was designated the auditor for the Navy Department by the Act of July 31, 1894, ch. 174, § 3, 28 Stat. L. 265. See Treasury Department.

[Small-stores fund created; resources, how used.] Bureau of Provisions and Clothing. * * * That from and after the first day of April, eighteen hundred and seventy-nine, the value of issues of small-stores shall be credited to a fund to be designated as the "small-stores fund", in the
same manner as the value of the issues of clothing is now credited to the "clothing fund"; the resources of the fund to be used hereafter in the purchase of supplies of small-stores for issue. [20 Stat. L. 288.]

This is from the Act of Feb. 14, 1879, ch. 68, making appropriations for the naval service for the next fiscal year.

The clothing fund and the small stores fund were consolidated and designated the clothing and small stores fund by the Act of June 30, 1890, ch. 640, infra, p. 1055.

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An act to authorize the President to appoint an officer of the Navy or the Marine Corps to perform the duties of solicitor and judge-advocate-general, and so forth, and to fix the rank and pay of such officer.


[Judge-Advocate-General of Navy.] That the President of the United States be, and he is hereby, authorized to appoint, for the term of four years, by and with the advice and consent of the Senate, from the officers of the Navy or the Marine Corps, a judge-advocate-general of the Navy, with the rank and highest pay of a captain of the Navy, or the rank, pay, and allowances of a colonel in the Marine Corps, as the case may be.

And the office of the said judge-advocate-general shall be in the Navy Department, where he shall, under the direction of the Secretary of the Navy, receive, revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service, and perform such other duties as have heretofore been performed by the solicitor and naval judge-advocate-general. * * *


This Act was amended to read as above by the Act of June 5, 1896, ch. 331, 29 Stat. L. 251. The amendment consisted in inserting in lieu of the words "with the rank, pay, and allowances of a captain in the Navy or a colonel in the Marine Corps, as the case may be," the words "with the rank and highest pay of a captain of the Navy, or the rank, pay, and allowances of a colonel in the Marine Corps, as the case may be;" and in adding the following proviso: "Provided, That this amendment shall take effect from July nineteenth, eighteen hundred and ninety-two, the date on which the present incumbent entered on duty, and that the amount herein appropriated shall be payable from the appropriation "Pay of the Navy."

So much of R. S. sec. 349 as provided for a "naval solicitor" was repealed, and the office abolished by the Act of June 19, 1878, ch. 329, § 1, 20 Stat. L. 263.

By the Act of April 28, 1902, ch. 594, infra, p. 1058, provision was made for the appointment of an assistant to the judge-advocate of the navy.

Rank of judge-advocate-general.—A person's rank as judge-advocate-general who was appointed to that office "with the rank, pay, and allowances of a colonel in the marine corps" is not an assimilated rank but an actual rank. Remy v. U. S., (1898) 33 Ct. Cl. 218.

Rank and pay on retirement.—A captain of the marine corps, appointed a judge-advocate-general of the navy under this statute, with the rank, pay, and allowances of a colonel, can be retired from that position as a colonel, and be entitled to the retired pay of an officer of that rank on the retired list. See R. S. sec. 1922, infra, p. 1222. Remy v. U. S., (1898) 33 Ct. Cl. 218.

Sea pay.—This statute does not allow the judge-advocate-general the sea pay and allowances of a captain in the navy. If Congress had intended by the statute to give sea pay or its equivalent for shore service, they would have so expressed it. Lemly v. U. S., (1893) 28 Ct. Cl. 469.

Sec. 3. [Secretary of Navy to report details of certain expenditures at each session of Congress.] That the Secretary of the Navy is hereby
directed to report to Congress, at its next and each regular session thereafter, the amount expended during the prior fiscal year, from the appropriations for the pay of the Navy, Bureaus of Navigation, Ordnance, Equipment and Recruiting, Yards and Docks, Medicine and Surgery, Provisions and Clothing, Construction and Repair, and Steam-Engineering, for civilians employed on clerical duty, or in any other capacity than as ordinary mechanics and workingmen, and to submit, under the estimates for pay of the Navy and for the respective Bureaus enumerated above, specific estimates for such civilian employees for the fiscal year eighteen hundred and eighty-seven, and each fiscal year thereafter. [23 Stat. L. 295.]

This section is from the Act of January 30, 1885, ch. 43, making additional appropriations for the naval service for the current fiscal year.
As to the change in the designation of the various bureaus see the notes to R. S. sec. 419, supra, p. 1046.

SEC. 2. [Balances of appropriations to pay Navy or the Marine Corps, when to be covered into Treasury.] All balances of moneys appropriated for the pay of the Navy or pay of the Marine Corps, for any year existing after the accounts for said year shall have been settled shall be covered into the Treasury. [24 Stat. L. 157.]

This section is from the Act of July 26, 1886, ch. 781, making appropriations for the naval service for the next fiscal year.

SEC. 3. [Loan of scientific instruments for Signal Service use, authorized.] * * * That the Secretary of the Navy be, and he is hereby authorized, in his discretion, to loan any scientific instruments in the possession of any of the bureaus under his charge, and not in use, to persons taking observations, or making investigations in connection with, or for the use of, the Signal Service under such regulations as he may prescribe, taking such security for the safekeeping and return of such instruments on demand as he may deem necessary. [25 Stat. L. 600.]

This is from the Deficiency Appropriation Act of Oct. 19, 1888, ch. 1210.

[Duty of Bureau of Supplies and Accounts.] * * * It shall be the duty of the Bureau of Provisions and Clothing to cause property accounts to be kept of all the supplies pertaining to the naval establishment, and to report annually to Congress the money value of the supplies on hand at the various stations at the beginning of the fiscal year, the dispositions thereof, and of the purchases, and the expenditures of supplies for the year, and the balances remaining on hand at the end thereof. [25 Stat. L. 817.]

This is from the Naval Appropriation Act of March 2, 1899, ch. 371.
This bureau was designated the bureau of supplies and accounts by the Act of July 19, 1892, ch. 206, infra, p. 1056.

Accumulated supplies.—The intentional acquisition of supplies for consumption or use in succeeding years, by purchases from appropriations for the current fiscal year, is inconsistent with the provisions of this Act. Supplies thus purchased should be
utilized in advance of stores regularly purchased under the annual appropriation for the current fiscal year, and Congress should be advised of the circumstances of these accumulations. (1910) 28 Op. Att'y-Gen. 634.

An act to provide certificates of honorable service to those who have served in the United States Navy or Marine Corps who have lost their certificates of discharge.

[Act of Feb. 7, 1890, ch. 8, 26 Stat. L. 6.]

[Certificates of honorable discharge in Navy or Marine Corps, when original is lost.] That from and after the passage of this act, whenever satisfactory proof is furnished at the Navy Department that any commissioned officer, regular or volunteer, appointed or enlisted man who served in the Navy or the Marine Corps of the United States in the war of eighteen hundred and twelve, the Mexican war, or the war of the rebellion, has lost his certificate of discharge, or the same has been destroyed without his privity or procurement, the Secretary of the Navy shall be authorized to furnish to such commissioned officer, regular or volunteer, appointed or enlisted man, a certificate of discharge in lieu thereof. Provided, That such certificate shall not be accepted as a voucher for the payment of any claim against the United States for pay, bounty, or any other allowance, or as evidence in any other case. [26 Stat. L. 6.]

[Clothing and small stores funds consolidated.] Bureau of provisions and clothing * * * And the clothing fund and small stores fund shall be hereafter consolidated and administered as a fund to be known as the clothing and small stores fund. [26 Stat. L. 197.]

This is from the Act of June 30, 1890, ch. 640, making appropriations for the naval service for the next fiscal year.

[Sec. 1.] [Assistant Secretary of the Navy.] * * * For an assistant Secretary of the Navy, to be appointed, from civil life, by the President, by and with the advice and consent of the Senate, who shall receive a compensation, at the rate of four thousand five hundred dollars per annum. [26 Stat. L. 254.]

This is from the Legislative, Executive, and Judicial Appropriation Act of July 11, 1890, ch. 667.


The current appropriation for the salary of the Assistant Secretary of the Navy was $5,000, made by the Act of March 4, 1915, ch. 141, 38 Stat. L. 1025.

See the following paragraph of the text.
[Sec. 1.] [Duties of Assistant Secretary of Navy.] * * * Assistant Secretary of the Navy, who shall hereafter perform such duties as may be prescribed by the Secretary of the Navy or required by law. [26 Stat. L. 934.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 3, 1891, ch. 541.
See the preceding paragraph of the text and the note thereto.

[Bureau of Supplies and Accounts designated.] * * * Bureau of Provisions and Clothing, hereafter to be called Bureau of Supplies and Accounts. [27 Stat. L. 243.]

This and the following paragraph are from the Naval Appropriation Act of July 19, 1892, ch. 208.
The provision of the text appeared as a heading—not a complete sentence—followed by the appropriations for the bureau for the year.

[Laws applicable.] * * * And all laws now in force relating to the Bureau of Provisions and Clothing shall now and hereafter apply to the Bureau of Supplies and Accounts. [27 Stat. L. 245.]

See the note to the preceding paragraph of the text.

[Naval Constructors eligible as Chief of Bureau of Construction and Repair.] * * * And any Naval Constructor having the rank of Captain, Commander or Lieutenant Commander shall be eligible as Chief of the Bureau of Construction and Repair. [27 Stat. L. 716.]

This and the following two paragraphs are from the Naval Appropriation Act of March 3, 1893, ch. 212.

[Credit of premiums arising from sale of bills of exchange, etc.] * * * Hereafter the accounting officers of the Treasury are hereby authorized to credit appropriation "Pay miscellaneous," with all receipts for interest on the account of the Navy Department with the London fiscal agents, premiums arising from sales of bills of exchange, and from any appreciation in the value of foreign coin. [27 Stat. L. 716.]

See the note to the preceding paragraph of the text.
This followed an appropriation for "Pay Miscellaneous."

[Assistant to Chief of Bureau of Navigation.] * * * That an officer of the Navy not below the rank of commander may be detailed as assistant to the Chief of the Bureau of Navigation in the Navy Department, and such officer shall receive the highest pay of his grade, and, in case of the death, resignation, absence, or sickness of the Chief of the Bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine of the Revised Statutes, perform the duties of such Chief
until his successor is appointed or such absence or sickness shall cease. [27 Stat. L. 717.]

See the note to the second preceding paragraph of the text.
From R. S. sec. 179 mentioned in the text see Executive Departments, vol. 3, p. 256.

[Assistant to Chief of Bureau of Supplies and Accounts.] * * * Bureau of Supplies and Accounts. That an officer of the pay corps of the Navy may be detailed as assistant to the Chief of the Bureau of Supplies and Accounts in the Navy Department, and that such officer shall, in case of the death, resignation, absence, or sickness of the Chief of the Bureau, unless otherwise directed by the President, as provided by section one hundred and seventy-nine of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease. [28 Stat. L. 132.]

This is from the Naval Appropriation Act of July 26, 1894, ch. 165.

[Assistant to Chief of Bureau of Ordnance.] * * * That a line officer of the Navy may be detailed temporarily as assistant to the Chief of the Bureau of Ordnance in the Navy Department, and that such officer during such detail shall receive the highest pay of his grade, and in the case of the death, resignation, absence, or sickness of the chief of the bureau shall, unless otherwise directed by the President, as provided by sections one and seventy-nine of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease, provided that, in case of the death, sickness, or absence on duty of the chief of the bureau and the assistant thereto, the chief clerk shall act as chief of the bureau. [30 Stat. L. 373.]

This is from the Naval Appropriation Act of May 4, 1898, ch. 234. The reference in the text to "sections one and seventy-nine of the Revised Statutes" was evidently intended to be to R. S. sec. 179, given under Executive Departments, vol. 3, p. 256.

[Pay of Assistant Chief of Bureau of Supplies and Accounts.] * * * The officer of the Pay Corps of the Navy detailed as assistant to the Chief of the Bureau of Supplies and Accounts pursuant to the Act of Congress approved July twenty-seventh, eighteen hundred and ninety-four, shall hereafter receive the highest pay of his grade. [30 Stat. L. 1038.]

This is from the Naval Appropriation Act of March 3, 1899, ch. 421. The reference in the text was evidently intended to be to the Act of July 26, 1894, ch. 165, given in the second preceding paragraph of the text.

[Secretary of Navy to report number, etc., of department employees.] It shall be the duty of the Secretary of the Navy to submit in the Book of
Estimates for the fiscal year nineteen hundred and two, and annually thereafter, under the respective bureaus and offices of the Navy Department, a statement in detail, showing the number of persons employed during the previous fiscal year and the rate of compensation of each under appropriations for "Increase of the Navy" or other general appropriations. [31 Stat. L. 117.]

This is from the Legislative, Executive, and Judicial Appropriation Act of April 17, 1900, ch. 192.

[SEC. 1.] [Solicitor in Judge-Advocate-General's Office.] • • •
For a solicitor, to be an assistant to the Judge-Advocate of the Navy, and to perform the duties of that officer in case of his death, resignation, absence, or sickness, two thousand five hundred dollars. [32 Stat. L. 153.]

This is from the Legislative, Executive, and Judicial Appropriation Act of April 28, 1902, ch. 594.
The Act of June 29, 1906, ch. 3590, 34 Stat. L. 555, provided as follows: "The Solicitor in the office of the Judge-Advocate-General of the Navy shall hereafter receive an annual salary of four thousand dollars during the service of the present incumbent."
The current appropriation for the salary of the solicitor is $4,000. See the Act of March 4, 1915, ch. 141, 38 Stat. L. 1025.

[SEC. 1.] [Employment of certain persons only as authorized.] • • •
On and after July first, nineteen hundred and four, it shall not be lawful for the Secretary of the Navy to employ in the Navy Department, at Washington, District of Columbia, and pay out of the appropriations for new ships, any civilian expert aids, additional draftsmen, writers, copyists, and model makers, except as herein or as may hereafter be specifically authorized: [33 Stat. L. 117.]

This and the following paragraph of the text are from the Legislative, Executive, and Judicial Appropriation Act of March 18, 1904, ch. 718.

[Bureau of Supplies and Accounts — civilian assistant to chief.] • • •
BUREAU OF SUPPLIES AND ACCOUNTS: For a civilian assistant, who shall perform the duties of chief clerk, and in case of the death, resignation, sickness, or absence of both the Paymaster-General of the Navy and his assistant, now provided for by law, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, Revised Statutes, such civilian assistant shall become the acting chief of the Bureau, two thousand five hundred dollars; [33 Stat. L. 121.]

See the note to the preceding paragraph of the text.
For R. S. sec. 179 mentioned in the text see EXECUTIVE DEPARTMENTS, vol. 3, p. 256.

[SEC. 1.] [Naval records — transfer to Navy Department.] • • •
All naval records, such as muster and pay rolls, orders, and reports relating to the personnel and operations of the Navy of the United States, from
the beginning of the Navy Department to the war of the rebellion, eighteen hundred and sixty-one, including operations against the French navy, Tripolitan war, war of eighteen hundred and twelve, operations against pirates in the West Indies, Florida war, and the war with Mexico, now in any of the Executive Departments, shall be transferred to the Secretary of the Navy, to be preserved. [33 Stat. L. 403.]

This is from the Deficiencies Appropriation Act of April 27, 1904, ch. 1620.
See further the second paragraph of the Act of June 29, 1906, ch. 3590, given infra, p. 1059.

[Sec. 1.] [Bureau of Steam Engineering—detail of line officer as assistant to chief.] • • • That a line officer of the Navy may be detailed as assistant to the Chief of the Bureau of Steam Engineering in the Navy Department, and that such officer during such detail shall receive the highest pay of his grade, and in case of death, resignation, absence, or sickness of the Chief of the Bureau shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine of the Revised Statutes, perform the duties of such chief until his successor is appointed or such absence or sickness shall cease. [33 Stat. L. 1111.]

This is from the Naval Appropriation Act of March 3, 1905, ch. 1481.

[Sec. 1.] [Restriction of expenditures from appropriations for naval establishment.] • • • For stationery, furniture, newspapers, plans, drawings, drawing materials, horses and wagons to be used only for official purposes, freight, expressage, postage, and other absolutely necessary expenses of the Navy Department and its various bureaus and offices, fourteen thousand dollars.

For additional amount for the objects mentioned in the foregoing paragraph and in lieu of expenditures heretofore made therefor from general appropriations for the naval establishment, twenty-six thousand dollars; and hereafter it shall not be lawful to expend, for any of the offices or bureaus of the Navy Department at Washington, any sum out of appropriations made for the naval establishment for any of the purposes mentioned or authorized in the said foregoing paragraph. [34 Stat. L. 427.]

This is from the Legislative, Executive, and Judicial Appropriation Act of June 22, 1906, ch. 3514.
Similar provisions, without the word "hereafter," have appeared in subsequent Acts. See the Act of March 4, 1915, ch. 141, 38 Stat. L. 1029. The use of the word "hereafter" in the text would seem to indicate that the restriction is permanent.

[Chief of Bureau of Yards and Docks.] • • • That the Chief of the Bureau of Yards and Docks shall be selected from the members of the Corps of Civil Engineers of the Navy having not less than seven years' active service. [34 Stat. L. 564.]

This and the following paragraph of the text are from the Naval Appropriation Act of June 29, 1906, ch. 3590.
[Custody of records relating to armed vessels in war of Revolution.]

That all records (such as muster and pay rolls and reports) relating to the personnel and operations of public and private armed vessels of the North American colonies in the war of the Revolution now in any of the Executive Departments shall be transferred to the Secretary of the Navy, to be preserved, indexed, and prepared for publication. [34 Stat. L. 579.]

See the note to the preceding paragraph of the text. See further the provisions of the Act of April 27, 1904, ch. 1630, given supra, p. 1056.

[Reports on proposed repairs, etc., on vessels.]

That the Secretary of the Navy shall hereafter report to Congress, at the commencement of each regular session, the number of vessels and their names upon which any repairs or changes are proposed which in any case shall amount to more than two hundred thousand dollars, the extent of such proposed repairs or changes, and the amounts estimated to be needed for the same in each vessel; and expenditures for such repairs or changes so limited shall be made only after appropriations in detail are provided for by Congress. [34 Stat. L. 1195.]

This is from the Naval Appropriation Act of March 2, 1907, ch. 2612. In addition to the report required by this paragraph an additional report was required by the second paragraph of the Act of March 3, 1909, ch. 255, infra, p. 1060.

An Act Authorizing the Secretary of the Navy to accept and care for gifts presented to vessels of the Navy of the United States.

[Act of May 20, 1908, ch. 182, 35 Stat. L. 171.]

That the Secretary of the Navy is hereby authorized to accept and care for such gifts in the form of silver, colors, books, or other articles of equipment or furniture as, in accordance with custom, may be presented to vessels of the Navy by States, municipalities, or otherwise. The necessary expense incident to the care and preservation of gifts of this character which have been or may hereafter be accepted shall be defrayed from the appropriation "equipment of vessels." [35 Stat. L. 171.]

[Estimates — contents.]

The estimates for the support of the navy shall hereafter show, under the head of Pay of the Navy, the sums allowed for pay of officers belonging to the line, to the several departments of the staff, and to the retired list; the estimates to show under each head the amount allowed for pay proper, for increases due to longevity and foreign service, and for pay at sea rates to officers employed on shore; together with the total number of warrant and petty officers and seamen
of the several grades and designations, including as to each class the amount allowed for pay proper and for longevity or service increases. The estimates shall include a list giving the rates of pay for all petty officers and other enlisted men of the navy. [35 Stat. L. 754.]

This and the following paragraph are from the Naval Appropriation Act of March 3, 1906, ch. 255.
Provisions similar to those of the text were made by the Act of May 18, 1908, ch. 165, 35 Stat. L. 129. These superseded the provisions relating to the form of estimates as made by the Act of Feb. 23, 1881, ch. 73, 21 Stat. L. 331.

[Report of secretary as to repairs on ships.] * * * That hereafter it shall be the duty of the Secretary of the Navy to report to Congress at the beginning of each regular session thereof, in addition to the report directed to be made in the Act of March second, nineteen hundred and seven, making appropriations for the naval service for the fiscal year ending June thirty first, nineteen hundred and eight, and for other purposes, a detailed statement showing the amount expended from each of the appropriations for the repair of every ship where such repairs exceed for any one ship the sum of two hundred thousand dollars in any one fiscal year. [35 Stat. L. 769.]

See the note to the preceding paragraph of the text.
The Act of March 2, 1907, ch. 2512, mentioned in the text, is given supra, p. 1060.

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[Collisions with naval vessels — adjustment of claims for damages.] * * * The Secretary of the Navy is hereby authorized to consider, ascertain, adjust and determine the amounts due on all claims for damages, where the amount of the claim does not exceed the sum of five hundred dollars, hereafter occasioned by collision, for which collisions vessels of the navy shall be found to be responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor. [36 Stat. L. 607.]

This is from the Naval Appropriation Act of June 24, 1910, ch. 378.

Former practice.—Formerly it was not one of the duties of the Secretary of the Navy to investigate a claim founded on the tortious or negligent acts of naval officers whereby a collision at sea was caused. Pope v. U. S., (1886) 21 Ct. Cl. 50.

For the adjustment of a claim, under a special Act of Congress, recommended by the Secretary of the Navy, prior to the passage of this Act, see Watts v. U. S., (S. D. N. Y. 1903) 123 Fed. 105.

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[Naval supply account created.] * * * Naval supply account for the Naval Establishment: All stores on hand July first, nineteen hundred and ten, shall be charged to a naval supply account on the records of the Bureau of Supplies and Accounts, and all purchases of stock or expenditures for manufactured or repaired articles for stock at navy-yards or stations, during the fiscal years nineteen hundred and eleven and nineteen hundred and
twelve, shall be charged to this account and be paid for from "General account of advances."

The amount so advanced during the fiscal years nineteen hundred and eleven and nineteen hundred and twelve shall be charged to the proper appropriations as these stores are consumed from stock, and when disbursements made for all other purposes are accomplished, the amount so charged shall be returned to "General account of advances" by pay or counter warrants: Provided, however, That such material as provisions, clothing and small stores, medical stores, and such other materials as the Secretary of the Navy may designate, may be purchased by specific appropriations or transferred to specific appropriations before such materials are issued for use or consumption. The said charge, however, to any particular appropriation shall be limited to the amount appropriated therefor.

Credit shall be made to appropriations during said fiscal years nineteen hundred and eleven and nineteen hundred and twelve for the value of surveyed material taken from repairs made to ships or plant at navy-yards and stations, or for stores turned in from ships, and this credit shall not be used by the bureaus to increase the amount of that appropriation, but shall be a deduction from the operating expenses of the annual appropriation concerned, subject to the same provision as stated in above paragraph. [36 Stat. L. 792.]

This is from the Deficiencies Appropriation Act of June 25, 1910, ch. 385. See the following paragraph of the text and the note thereto.

These provisions were modified by the second paragraph of the Act of June 30, 1914, ch. 130, infra, p. 1063.

[Naval supply fund abolished.] • • • The permanent Naval Supply Fund created by the Act of March third, eighteen hundred and ninety-three, as modified by the Acts of June tenth, eighteen hundred and ninety-six, and March third, eighteen hundred and ninety-seven, and further increased by the Acts of January fifth, eighteen hundred and ninety-nine, and February fourteenth, nineteen hundred and two, is hereby abolished, and of the sum remaining on the books of the Treasury to the credit of the said fund after the adjustment of all liabilities, the Secretary of the Treasury is hereby authorized and directed to cause the sum of one million five hundred thousand dollars transferred to the credit of said fund from the General Account of Advances to be returned to General Account of Advances, and the remainder to be covered into the Treasury; and hereafter the Naval Supply Account for the Naval Establishment, as created by the Act of June twenty-fifth, nineteen hundred and ten, under the Bureau of Supplies and Accounts, shall govern the charging, crediting, receipt, purchase, transfer, manufacture, repair, issue, and consumption of all stores for the Naval Establishment, excepting the materials named in that Act and such other materials as the Secretary of the Navy may designate: Provided, That the amount expended under General Account of Advances for the purchase and manufacture of stores and materials for the Naval Establishment shall not exceed the amount available for such purposes. [36 Stat. L. 1279.]

This and the following paragraph of the text are from the Naval Appropriation Act of March 4, 1911, ch. 239.

These provisions were modified by the second paragraph of the Act of June 30, 1914, ch. 130, infra, this page.


Increase of permanent naval supply fund.—The increase of the permanent naval supply fund, referred to in the text, and thereby abolished, beyond the statutory limit by adding to it all the stock technically known as "common general stock" was without warrant of law.


Appropriation for handling naval stores.

—The expenses of handling stores purchased under the naval supply fund, being specifically provided for in the annual appropriation acts, cannot be legally charged to the working appropriations.


[Direct and indirect charges included in cost of work under appropriations — money accounts to show charges.] That hereafter, in fixing the cost of work under the various naval appropriations, the direct and indirect charges incident thereto shall be included in such cost: And provided further, That the Bureau of Supplies and Accounts shall keep the money accounts of the Naval Establishment in such manner as to show such charges and shall report the same annually for the information of Congress.

[36 Stat. L. 1267.]

See the note to the preceding paragraph of the text.

[Shells and projectiles — purchase.] * * * That hereafter no part of any appropriation shall be expended for the purchase of shells or projectiles for the Navy except for shells or projectiles purchased in accordance with the terms and conditions of proposals submitted by the Secretary of the Navy to all the manufacturers of shells and projectiles and upon bids received in accordance with the terms and requirements of such proposals: Provided, That this restriction shall not apply to purchases of shells or projectiles of an experimental nature or to be used for experimental purposes and paid for from the appropriation "Experiments, Bureau of Ordnance": Provided, That hereafter the Secretary of the Navy is hereby authorized to make emergency purchases of war material abroad: And provided further, That when such purchases are made abroad, this material shall be admitted free of duty. [38 Stat. L. 398.]

This and the following three paragraphs of the text are from the Naval Appropriation Act of June 30, 1914, ch. 130.

[Naval supply account — credit to current appropriations.] * * * Those portions of the Acts of June twenty-fifth, nineteen hundred and ten, and March fourth, nineteen hundred and eleven, which create the "Naval supply account" under the Bureau of Supplies and Accounts, are hereby so modified and amended that hereafter the appraised value of all stores, equipage, and supplies turned in from ships, and ships’ equipage turned in from yards or stations (except salvage), shall be credited to the current appropriations concerned, and the amounts so credited shall be
available for expenditures for the same purposes as the appropriations credited; and all Acts or parts of Acts in so far as they conflict with this provision are hereby repealed. [38 Stat. L. 405.]

See the note to the preceding paragraph of the text.
The provisions of the Act of June 25, 1910, ch. 335, and the Act of March 4, 1911, ch. 296, modified by the text, are given supra, pp. 1061, 1062.

[Bureau of Equipment abolished.] * * * The Bureau of Equipment of the Navy Department is hereby abolished, and the duties assigned by law to that bureau shall be distributed among the other bureaus and offices of the Navy Department as herein provided, and all available funds heretofore appropriated for that bureau and such civil employees of that bureau as were heretofore authorized by law are hereby assigned and transferred to the other bureaus and offices as herein provided: Provided, That nothing herein shall be so construed as to authorize the expenditure of any appropriation for purposes other than those specifically provided by the terms of the appropriations heretofore and herein made. [38 Stat. L. 408.]

See the note to the second preceding paragraph of the text.
Provisions to the same end were made by the Act of Aug. 22, 1912, ch. 335, 37 Stat. L. 339.

[Naval appropriations—overhead charges.] * * * Hereafter there shall be charged against the several appropriations for the support of the Naval Establishment the overhead charges incident to upkeep and to industrial work at navy yards and stations. The total sum so charged shall be distributed in accordance with the work done in the various yards and stations in order that the cost of work may be determined. [38 Stat. L. 413.]

See the note to the third preceding paragraph of the text.

[Sec. 1.] [Chief of Naval Operations—appointment—duties.] * * * There shall be a Chief of Naval Operations, who shall be an officer on the active list of the Navy appointed by the President, by and with the advice and consent of the Senate, from among the officers of the line of the Navy not below the grade of captain for a period of four years, who shall, under the direction of the Secretary of the Navy, be charged with the operations of the fleet, and with the preparation and readiness of plans for its use in war: Provided, That if an officer of the grade of captain be appointed Chief of Naval Operations, he shall have the rank, title, and emoluments of a rear admiral while holding that position.

During the temporary absence of the Secretary and the Assistant Secretary of the Navy, the Chief of Naval Operations shall be next in succession to act as Secretary of the Navy. [38 Stat. L. 929.]

This and the following two paragraphs are from the Naval Appropriation Act of March 3, 1915, ch. 83.

[Transportation of fuel—expense charged to what appropriation.]
* * * That hereafter, when the lowest obtainable cost of transportation
of fuel between the Atlantic and Pacific coasts of the United States by merchant carriers is considered excessive, the appropriation "Fuel and transportation" may be charged with the expense of pay, transportation, shipping, and subsistence of civilian officers and crews, and such other incidental expenses as can not be paid from other appropriations, of naval auxiliaries engaged in the transportation of fuel: Provided, That the appropriation "Maintenance of naval auxiliaries" is insufficient therefor. [38 Stat. L. 944.]

See the note to the preceding paragraph of the text.

[Equipment outfits — to what appropriation charged.] • • •

INCREASE OF THE NAVY, EQUIPMENT: The unexpended balance on June thirtieth, nineteen hundred and fifteen, shall be transferred to appropriation "Increase of the Navy, construction and machinery," and beginning with July first, nineteen hundred and fifteen, equipment outfits shall be charged to appropriation "Increase of the Navy, construction and machinery." [38 Stat. L. 952.]

See the note to the second preceding paragraph of the text.

II. NAVAL OBSERVATORY AND NAUTICAL ALMANAC

Sec. 434. [Naval Observatory.] The officer of the Navy employed as superintendent of the Naval Observatory at Washington shall be entitled to receive the shore-duty pay of his grade, and no other. [R. S.]


R. S. sec. 435. This section was as follows:

"Sec. 435. [Meridiana.] The meridian of the Observatory at Washington shall be adopted and used as the American meridian for all astronomical purposes, and the meridian of Greenwich shall be adopted for all nautical purposes."


It was repealed by the Act of Aug. 22, 1912, ch. 335, 37 Stat. L. 342.

[Sec. 1.] [Board of Visitors to Naval Observatory — superintendent.] • • • There shall be appointed by the President, by and with the advice and consent of the Senate, from persons not officers of the United States a board of six visitors to the Naval Observatory, four to be astronomers of high professional standing and two to be eminent citizens of the United States. Appointments to this board shall be made for periods of three years, but provisions shall be made by initial appointments for shorter terms so that two members shall retire in each year. Members of this board shall serve without compensation, but the Secretary of the Navy shall pay the actual expenses necessarily incurred by members of the board in the discharge of such duties as are assigned to them by the Secretary of the Navy or are otherwise imposed upon them. The board of visitors shall make an annual visitation to the Observatory at a date to be determined by the Secretary of the Navy, and may make such other visitations not exceeding two in number annually by the full board or by a duly appointed committee
as may be deemed needful or expedient by a majority of the board. The board of visitors shall report to the Secretary of the Navy at least once in each year the result of its examinations of the Naval Observatory as respects the condition of buildings, instruments, and apparatus, and the efficiency with which its scientific work is prosecuted, and shall also report as respects the expenditures in the administration of the Observatory. The board of visitors shall prepare and submit to the Secretary of the Navy regulations prescribing the scope of the astronomical and other researches of the Observatory and the duties of its staff with reference thereto. When an appointment or detail is to be made to the office of astronomical director, director of the Nautical Almanac, astronomer, or assistant astronomer, the board of visitors may recommend to the Secretary of the Navy a suitable person to fill such office, but such recommendation shall be determined only by a majority vote of the members present at a regularly called meeting of the board held in the city of Washington. The Superintendent of the Naval Observatory shall be, until further legislation by Congress, a line officer of the Navy of a rank not below that of captain. [31 Stat. L. 1122.]

This is from the Naval Appropriation Act of March 3, 1901, ch. 862.

Sec. 436. [Nautical Almanac.] The Secretary of the Navy may place the supervision of the Nautical Almanac in charge of any officer or professor of mathematics in the Navy who is competent for that service. Such officer or professor, when so employed, shall be entitled to receive the shore-duty pay of his grade, and no other. [R. S.]

Printing and distribution of nautical almanac and other papers of Navy Department. See titles Public Documents; Public Printing.


[Nautical Almanac — exchange of data with foreign offices — termination — work of office force — use of employees on tables of the planets, etc.— meridian of Washington.] * * * The Secretary of the Navy is hereby authorized to arrange for the exchange of data with such foreign almanac offices as he may from time to time deem desirable with a view to reducing the amount of duplication of work in preparing the different national nautical and astronomical almanacs and increasing the total data which may be of use to navigators and astronomers available for publication in the American Ephemeris and Nautical Almanac: Provided, That any such arrangement shall be terminable on one year’s notice: Provided further, That the work of the Nautical Almanac Office during the continuance of any such arrangement shall be conducted so that in case of emergency the entire portion of the work intended for the use of navigators may be computed by the force employed by that office, and without any foreign cooperation whatsoever: Provided further, That any employee of
the Nautical Almanac Office who may be authorized in any annual appro-
priation bill and whose services in whole or in part can be spared from
the duty of preparing for publication the annual volumes of the American
Ephemeris and Nautical Almanac may be employed by said office in the
duty of improving the tables of the planets, moon, and stars, to be used in
preparing for publication the annual volumes of the office: Provided
further, That section four hundred and thirty-five, Revised Statutes, is
hereby repealed. [37 Stat. L. 342.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.
R. S. sec. 435, repealed by the text, is given supra, p. 1065.

III. ADVISORY COMMITTEE FOR AERONAUTICS

[Advisory committee for aeronautics — establishment — membership
— duties — rules — reports.] • • • An Advisory Committee for Aero-
nautics is hereby established, and the President is authorized to appoint
not to exceed twelve members, to consist of two members from the War
Department, from the office in charge of military aeronautics; two mem-
bers from the Navy Department, from the office in charge of naval aero-
nautics; a representative each of the Smithsonian Institution, of the United
States Weather Bureau, and of the United States Bureau of Standards;
together with not more than five additional persons who shall be acquainted
with the needs of aeronautical science, either civil or military, or skilled in
aeronautical engineering or its allied sciences: Provided, That the mem-
bers of the Advisory Committee for Aeronautics, as such, shall serve with-
out compensation: Provided further, That it shall be the duty of the
Advisory Committee for Aeronautics to supervise and direct the scientific
study of the problems of flight, with a view to their practical solution,
and to determine the problems which should be experimentally attacked,
and to discuss their solution and their application to practical questions.
In the event of a laboratory or laboratories either in whole or in part, being
placed under the direction of the committee, the committee may direct and
conduct research and experiment in aeronautics in such laboratory or
laboratories: And provided further, That rules and regulations for the
conduct of the work of the committee shall be formulated by the committee
and approved by the President.

That the sum of $5,000 a year, or so much thereof as may be necessary,
for five years is hereby appropriated, out of any money in the Treasury not
otherwise appropriated, to be immediately available, for experimental work
and investigations undertaken by the committee, clerical expenses and
supplies, and necessary expenses of members of the committee in going to,
returning from, and while attending meetings of the committee: Provided,
That an annual report to the Congress shall be submitted through the Presi-
dent including an itemized statement of expenditures. [38 Stat. L. 930.]

This is from the Naval Appropriation Act of March 3, 1915, ch. 83.
See War Department and Military Establishment.
IV. ORGANIZATION OF THE NAVY

Sec. 1362. [Grades of line officers.] The active list of the line officers of the Navy of the United States shall be divided into eleven grades, as follows, namely:

First. Admiral.
Second. Vice-Admiral.
Third. Rear-Admirals.
Fourth. Commodores.
Fifth. Captains.
Sixth. Commanders.
Seventh. Lieutenant-commanders.
Eighth. Lieutenants.
Ninth. Masters.
Tenth. Ensigns.
Eleventh. Midshipmen.

Provided, That vacancies occurring in the grades of Admiral and Vice-Admiral shall not be filled by promotion, or in any other manner, and that when the offices of said grades shall become vacant, the grade itself shall cease to exist. [R.S.]


The appointment of an admiral was authorized by the second paragraph of the Act of March 3, 1809, ch. 421, infra, p. 1057, and the grades of admiral and vice-admiral were re-established by the Act of March 3, 1915, ch. 83, infra, p. 1064.

The grade of commodore was omitted from the composition of the active list by the Navy Personnel Act of March 3, 1899, ch. 413, § 7, infra, p. 1064.

The titles and grades of master and midshipman were changed to lieutenant and ensign, respectively, by the Act of March 3, 1863, ch. 97, § 1, infra, p. 1087.

The officers of the engineer corps were transferred to the line by the Act of March 3, 1899, ch. 413, §§ 1–7, infra, pp. 1091–1094.

Boatswains, gunners and machinists.—Neither boatswains, gunners, nor warrant machinists are officers of the line of the navy within the meaning of this section, or of the Acts of Aug. 5, 1882, and March 3, 1899. (1899) 22 Op. Atty-Gen. 620.

Boatswains and gunners are officers in the line of command, and there is nothing in the classification in the Act of 1862 to indicate an intent to make unlawful the exercise of command by them. (1899) 22 Op. Atty-Gen. 620.

Promotion on retired list of navy.—The proviso to section 9 of the Amending Act of March 2, 1867, noted above, "that no promotion shall be made to the grade of rear admiral upon the retired list, while there shall be in that grade the full number allowed by law," did not forbid the advancement to that grade on the retired list, under section 1 of the Act of July 25, 1866, noted above, of any commodore who had commanded a squadron by order of the Secretary of the Navy, or performed other highly meritorious service. (1871) 13 Op. Atty-Gen. 544.

Grade of lieutenant.—A grade is a step in a series, a rank, and no lieutenant in the navy obtains rank simply by length of service. Schuetze v. U. S., (1899) 24 Ct. Cl. 299.

Pay of naval officer serving as aid to admiral.—A naval officer serving as an aid to the admiral was not entitled, by virtue of the clause of section 13 of the Navy Personnel Act of March 3, 1899, ch. 413, assimilating the pay of officers of the navy to that of officers of the army, to the higher rank and pay provided for in R. S. sec. 1066 (see title War Department and Military Establishment), under which section the General of the Army was entitled to aides, who received increased compensation as such aides by reason of the pay attached to the higher rank conferred upon them while serving as aides to the General. Wood v. U. S. (1912) 224 U. S. 132, 32 S. Ct. 461, 56 U. S. (L. ed.) 696, affirming (1909) 44 Ct. Cl. 611.
Sec. 1363. [Number on active list.] There shall be allowed on the active list of the line officers of the Navy one Admiral, one Vice-Admiral, ten rear-admirals, twenty-five commodores, fifty captains, ninety commanders, eighty lieutenant-commanders, two hundred and eighty lieutenants, one hundred masters, and one hundred ensigns; and no promotion to the grade of lieutenant-commander shall be made until the number of such grade is reduced below eighty. [R. S.]


The provisions of the text relating to an admiral, a vice-admiral, and commodores have been, in effect, superseded by subsequent legislation. See the note to the preceding R. S. sec. 1362.

The provisions relating to the number to be appointed were superseded by the Act of March 3, 1899, ch. 413, § 7, infra, p. 1064, and the Act of March 3, 1903, ch. 1010, infra, p. 1067.

These last cited Acts also superseded the last part of the text relating to promotions to the grade of lieutenant-commander.

Prior to the enactment of the Acts cited here and in the notes to the preceding R. S. sec. 1362, this section had been largely superseded by an Act of Aug. 6, 1882, ch. 391, 22 Stat. L. 226.

Sec. 1364. [When exceeded.] The provisions of the foregoing section shall not have the effect to vacate the commission of any lieutenant-commander, lieutenant, master, or ensign appointed according to law, in excess of the respective number therein fixed; nor to preclude the advancement of any officer to a higher grade, for distinguished conduct in battle, or for extraordinary heroism, under the provisions of sections fifteen hundred and six and fifteen hundred and eight. [R. S.]


This section has become practically obsolete and has been in effect superseded. See the notes to the two preceding sections.

Sec. 1365. [Selection of rear admirals during war.] During war rear-admirals shall be selected from those officers on the active list, not below the grade of commanders, who shall have eminently distinguished themselves by courage, skill, and genius in their profession; but no officer shall be so promoted, under this provision, unless, upon recommendation of the President by name, he has received the thanks of Congress for distinguished service. [R. S.]


Sec. 1366. [Promotion of rear admirals during peace.] During peace, vacancies in the grade of rear-admiral shall be filled by regular promotion from the list of commodores, subject to examination according to law. [R. S.]


The grade of commodore was not included in the active list as made by the Act of March 3, 1899, ch. 413, § 7, infra, p. 1094.
Sec. 1367. [Secretaries to Admiral and Vice-Admiral.] The Admiral and Vice-Admiral shall each be allowed a secretary, who shall be entitled to the rank and allowances of a lieutenant in the Navy. [R. S.]


The appointment of an admiral was authorized by the Act of March 3, 1899, ch. 421, infra, p. 1057, and both admirals and vice-admirals were authorized by the Act of March 3, 1915, ch. 83, infra, p. 1064.

Power of appointment.—The appointment of a secretary, allowed by this section, does not belong to the President, with the advice and consent of the Senate, but devolves upon the admiral as one personal to himself; and the contemporaneous construction of the statute and uniform practice thereunder by the executive branch of the government have accorded with this view. (1890) 19 Op. Atty.-Gen. 589.

R. S. sec. 1368. This section was as follows:

"Sec. 1368. The active list of the Medical Corps of the Navy shall consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and one hundred assistant surgeons." Act of March 3, 1871, ch. 117, 16 Stat. L. 535.

It was superseded by the Act of Aug. 5, 1892, ch. 391, infra, p. 1087, the Act of June 7, 1900, ch. 859, infra, p. 1096, and the Act of March 3, 1903, ch. 1010, infra, p. 1097.

Sec. 1369. [Appointments in medical corps.] All appointments in the Medical Corps shall be made by the President, by and with the advice and consent of the Senate. [R. S.]


Sec. 1370. [Appointment of assistant surgeons.] No person shall be appointed assistant surgeon until he has been examined and approved by a board of naval surgeons, designated by the Secretary of the Navy; nor who is under twenty-one or over thirty years of age, inclusive. [R. S.]


The section was amended to read as above by Act of May 4, 1898, ch. 234, 30 Stat. L. 380. The amendment consists in the substitution of the words "thirty years of age, inclusive," for the words "twenty-six years of age" in the section as originally enacted.

Appointment in regular service.—This section, as its language imports, was to guard against the appointment of incompetent surgeons in the navy, and evidently applies to appointments to be made in the regular or permanent service as con-tradistinguished from appointments in the temporary service. Taylor v. U. S., (1903) 38 Ct. Cl. 155.


Sec. 1371. [Appointment of surgeons.] No person shall be appointed surgeon until he has served as an assistant surgeon at least two years, on board a public vessel of the United States at sea, nor until he has been examined and approved for such appointment, by a board of naval surgeons, designated by the Secretary of the Navy. [R. S.]

Act of May 24, 1828, ch. 121, 4 Stat. L. 313.

This section would seem to be superseded by the Act of Feb. 13, 1897, ch. 221, infra, p. 1090.
Sec. 1372. [Rank of assistant surgeons in case of delayed examination.] When any assistant surgeon was absent from the United States, on duty, at the time when others of his date were examined, he shall, if not rejected at a subsequent examination, be entitled to the same rank with them; and if, from any cause, his relative rank cannot be assigned to him, he shall retain his original position on the register. [R. S.]


Competitive examination and promotion.
The system of competitive examinations to determine the relative merit of assistant surgeons preliminary to promotion, and thus define their rank by seniority, has, under this authority of law, been continued at the present time, and the uniform practice of the Navy Department has been to assign to the members of each class of assistant surgeons, examined and found qualified for promotion, positions in accordance with their relative standing, as determined and reported by the board of medical examiners. See R. S. sec. 1480 (given infra, div. V.) (1881) 17 Op. Atty.-Gen. 48.

Sec. 1373. [Surgeon of the fleet.] The President may designate among the surgeons in the service, and appoint to every fleet or squadron an experienced and intelligent surgeon, who shall be denominated "surgeon of the fleet," and shall be surgeon of the flag-ship. [R. S.]

Act of May 24, 1828, ch. 121, 4 Stat. L. 313.

Sec. 1374. [Duties of surgeon of the fleet.] The surgeon of the fleet shall, in addition to his duties as surgeon of the flag-ship, examine and approve all requisitions for medical and hospital stores for the squadron or fleet, and inspect their quality. He shall, in difficult cases, consult with the surgeons of the several ships, and he shall make, and transmit to the Navy Department, records of the character and treatment of diseases in the squadron or fleet. [R. S.]

Act of May 24, 1828, ch. 121, 4 Stat. L. 313.

R. S. sec. 1375. This section was as follows:

This section, and R. S. sec. 1377, hereafter noted, were superseded by the Act of Aug. 5, 1882, ch. 391, § 1, infra, p. 1087; the Act of March 3, 1899, ch. 421, infra, p. 1086; the Act of March 3, 1903, ch. 1010, infra, p. 1097; and the Act of Aug. 22, 1912, ch. 335, infra, p. 1100.

R. S. sec. 1377. This section was as follows:
"Sec. 1377. Until the number of passed assistant paymasters shall have been reduced below thirty, there shall be no promotion to that grade, nor any appointment to the grade of assistant paymaster." Act of July 15, 1870, ch. 295, 16 Stat. L. 334.

It was superseded, together with R. S. sec. 1376, theretofore noted, by the various provisions to which reference was thereunder made.

Sec. 1378. [Appointments, how made.] All appointments in the Pay Corps shall be made by the President, by and with the advice and consent of the Senate. [R. S.]


Effect of designation by admiral.—A by the admiral, "subject to the approval designation as "paymaster of the fleet" of the President," does not entitle the
nominee to the place and pay until his appointment by the President. (1853) 18

Paymaster's clerk.—It is obvious from
the language of this section that the pay
 corps is limited to officers commissioned
by the President, and that clerks and
others who are not so commissioned do
not belong to the pay corps. U. S. v.
Mound, (1866) 124 U. S. 505, 9 S. Ct.

Sec. 1379. [Qualifications of assistant paymasters.] No person shall
be appointed assistant paymaster who is, at the time of such appointment,
less than twenty-one or more than twenty-six years of age; nor until his
physical, mental, and moral qualifications have been examined and approved
by a board of paymasters appointed by the Secretary of the Navy, and
according to such regulations as he may prescribe. [R. S.]

Act of July 17, 1861, ch. 4, 12 Stat. L. 258.

thirteen hundred and seventy-nine, chapter one, Title Fifteen, Revised Statutes of the
United States, in relation to appointments of assistant paymasters in the Navy," and
which may be regarded as temporary only, was as follows:

"That the limitation as to age contained in section thirteen hundred and seventy-nine
of the Revised Statutes of the United States, relating to appointment of assistant
paymasters in the United States Navy to fill vacancies that may now or hereafter
exist in said grade, shall not apply to such of the graduates of the Naval Academy
as were at sea upon duty at the time of the passage and approval of the Act of Con-
gress approved August fifth, eighteen hundred and eighty-two, who were discharged
thereunder at the end of their two years' cruise, after passing successfully all the
examinations required of them: And provided further, That this amendment shall
not be construed as giving any preference in said appointment of assistant paymasters
to said graduates except as to waiving the limitation of age."

Sec. 1380. [Order of promotion.] Passed assistant paymasters shall
be regularly promoted and commissioned from assistant paymasters, and
paymasters from passed assistant paymasters; subject to such examinations
as may be prescribed by the Secretary of the Navy. [R. S.]

Act of July 17, 1861, ch. 4, 12 Stat. L. 258; Act of May 3, 1866, ch. 72, 14 Stat.
L. 43.

(1858) 124 U. S. 309, 3 S. Ct. 507, 31 U. S. (L. ed.) 463; Barton v. U. S.,
U. S. (L. ed.) 465;

Sec. 1381. [Acting appointments on ships at sea.] When the office
of paymaster or assistant paymaster becomes vacant, by death or otherwise, in
ships at sea, or on foreign stations, or on the Pacific coast of the United
States, the senior officer present may make an acting appointment of any
fit person, who shall perform the duties thereof until another paymaster or
assistant paymaster shall report for duty, and shall be entitled to receive
the pay of such grade while so acting. [R. S.]

Act of July 17, 1861, ch. 4, 12 Stat. L. 258.

Status of appointee.—An acting pay-
master, appointed under this section, is
not an officer. He is not appointed as re-
quired by the Constitution, takes no oath
of office, and gives no bond as paymaster.
Webster v. U. S., (1892) 22 Ct. Cl. 25.

Termination of appointment.—The con-
tinuance of the acting appointment does
not depend upon a discharge or revoca-
tion. It terminates when another pay-
master reports for duty, and the pay
continues at farthest only to the time
when the acting officer's accounts are
made up and filed. Such an appointment
is a temporary one to meet the particular
emergency and to be terminated when
the emergency is over. Ostrander v. U. S.,
(1887) 22 Ct. Cl. 218.
Compensation for two offices.—This section and R. S. sec. 1564, infra, p. 1178, must be construed with reference to other provisions of the statutes, and while they may operate literally if the appointee holds no office under the government, as may be the case, if he holds an office he cannot escape from the prohibitions of R. S. secs. 1763 and 1765 (title Public Officers). Webster v. U. S., (1892) 28 Ct. Cl. 25.

Acting purser.—The appointment of an acting purser was considered valid under the Acts of 1812 and 1817, in (1854) 6 Op. Atty.-Gen. 357.

Sec. 1382. [Paymasters of the fleet.] The President may designate among the paymasters in the service, and appoint to every fleet or squadron a paymaster, who shall be denominated "paymaster of the fleet." [R. S.]

Act of May 24, 1823, ch. 121, 4 Stat. L. 313; Act of April 21, 1864, ch. 63, 13 Stat. L. 54.

Presidential designation requisite.—No designation other than that made by the President entitles a naval paymaster to the place and perquisites of paymaster of the fleet. (1885) 18 Op. Atty.-Gen. 156.

Sec. 1383. [Bonds.] Every paymaster, passed assistant paymaster, and assistant paymaster shall, before entering on the duties of his office, give bond, with two or more sufficient sureties, to be approved by the Secretary of the Navy, for the faithful performance thereof. Paymasters shall give bonds in the sum of twenty-five thousand dollars, passed assistant paymasters in the sum of fifteen thousand dollars, and assistant paymasters in the sum of ten thousand dollars. [R. S.]


On reappointment.—On reappointment, a new bond should be given. "But, by this opinion, I would not be understood to say that the original sureties of Mr. Satterwhite are wholly discharged of responsibility since the reappointment. This point should be saved on behalf of the United States." (1814) 1 Op. Atty.-Gen. 175. See U. S. v. Wardwell, (1828) 5 Mason 82, 28 Fed. Cas. No. 10,640, as to liability of sureties on the old bond when a new bond is given under a new statute.

Corporations as sureties.—The Secretary of the Navy has power to approve a pay officer's bond in which the sureties are corporations, or a corporation joined with a natural person, if he deems such sureties sufficient. (1888) 19 Op. Atty.-Gen. 175. See also (1891) 20 Op. Atty.-Gen. 16.

No attestation was necessary to the validity of bonds of purser's given under the Act of March 1, 1817. (1828) 2 Op. Atty.-Gen. 93.

Suit on bond.—In an action of debt upon a bond given by the paymaster in the navy, laches cannot, even in favor of a surety, be alleged against the government. Raymond v. U. S., (1876) 14 Blatchf. 51, 20 Fed. Cas. No. 11,596.

Liability for all moneys received.—In U. S. v. Tingey, (1831) 5 Pet. 115, 8 U. S. (L. ed.) 66, it was held that a bond in terms making a pursuer of the navy liable for all moneys received by him, and for all public property committed to his care, whether officially as pursuer or otherwise, given under the Act of March 30, 1812, was valid, though the statute required such officer merely to give bond conditioned faithfully to perform all the duties of pursuer. "A voluntary bond taken by authority of the proper officers of the Treasury Department, to whom the disbursement of public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursement of public moneys, is a binding contract between him and his sureties and the United States; although such bond may not be prescribed or required by any positive law." See also U. S. v. Hodson, (1870) 10 Wall. 395, 19 U. S. (L. ed.) 937.
Sec. 1384. [New bonds.] Officers of the Pay Corps shall give new bonds with sufficient sureties, whenever required to do so by the Secretary of the Navy. [R. S.]


Sec. 1385. [Bond not affected by a new commission.] The issuing of a new appointment and commission to any officer of the Pay Corps shall not affect or annul any existing bond, but the same shall remain in force, and apply to such new appointment and commission. [R. S.]


Sec. 1386. [Clerks, when allowed.] Paymasters of the fleet, paymasters on vessels having complements of more than one hundred and seventy-five persons, on supply-steamers, store-vessels, and receiving-ships, paymasters at stations and at the Naval Academy, and paymasters detailed at stations as inspectors of provisions and clothing shall each be allowed a clerk. [R. S.]


By the Act of March 3, 1915, ch. 83, infra, p. 1106, the title of paymaster’s clerk was changed to pay clerk, and the foregoing R. S. sec. 1386, and the following R. S. secs. 1387, 1388, were expressly repealed in so far as they conflict with the repealing law.


Transfer of clerks.—The Civil Service Commission was not authorized to transfer a naval paymaster’s clerk assigned to sea duty to a similar position in the Navy Department, as the former were not classified by the President’s order of May 6, 1896, while such clerks performing similar services in offices on shore were classified by that order. (1897) 21 Op. Atty.-Gen. 503.

Sec. 1387. [Clerks, when not allowed.] No paymaster shall be allowed a clerk in a vessel having the complements of one hundred and seventy-five persons or less, excepting in supply-steamers and store-vessels. [R. S.]


See the note to the preceding R. S. sec. 1386.


Sec. 1388. [Clerks of passed assistant and assistant paymasters.] Passed assistant paymasters and assistant paymasters attached to vessels of war shall be allowed clerks, if clerks would be allowed by law to paymasters so attached. [R. S.]


See the note to R. S. sec. 1386, given in the second preceding paragraph of the text.

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SEC. 1389. [Loans to officers by paymasters.] It shall not be lawful for any paymaster, passed assistant paymaster, or assistant paymaster, to advance or loan, under any pretense whatever, to any officer in the naval service, any sum of money public or private, or any credit, or any article or commodity whatever. [R. S.]


R. S. sec. 1390. This section was as follows:

"SEC. 1390. The active list of the Engineer Corps of the Navy shall consist of seventy chief engineers, who shall be divided into three grades, by relative rank, as provided in Chapter Four of this Title;

Ten chief engineers;

Fifteen chief engineers; and

Forty-five chief engineers, who shall have the relative rank of lieutenant-commander or lieutenant.

And each and all of the above-named officers of the Engineer Corps shall have the pay of chief engineers of the Navy, as now provided.

One hundred first assistant engineers, who shall have the relative rank of lieutenant or master; and

One hundred second assistant engineers, who shall have the relative rank of master or ensign; and the said assistant engineers shall have the pay of first and second assistant engineers of the Navy, respectively, as now provided."


By L. S. 324, ch. 610, § 1, 18 Stat. L. 17, the title of first assistant engineer was changed to passed assistant engineer and the title of second assistant engineer was changed to assistant engineer. By the Act of Aug. 5, 1882, ch. 391, 22 Stat. L. 286, was prescribed the numbers of the various grades and their relative rank, and provisions were made as to vacancies. The Act of March 3, 1883, ch. 97, 22 Stat. L. 472, made further provisions with respect to filling vacancies. By an Act of Dec. 16, 1892, ch. 1, 27 Stat. L. 404, it was provided that the reduction in the numbers of the engineer corps of the navy provided for in the Act of Aug. 5, 1892, ch. 391, should be considered as having ceased on June 30, 1891.

The engineer corps was transferred to the line of the navy, and their rank and duties were fixed by the Act of March 3, 1899, ch. 413, §§ 1–7, infra, pp. 1091–1094.

"Grades."—The use of the word "grades," in referring to the three different relative ranks of chief engineers, lends weight to the contention that "grades," as used in R. S. secs. 1480, 1490, 1496, infra, pp. 1127, 1140, 1141, should be held to apply to the three classes of chief engineers. But the fact that the word "grades" appeared first in this section in the revision of the statutes, and did not appear in section 7 of the Act of 1871, which ch. is the parent section, weakens that argument very much. It is clear that the mere fact that different relative rank is assigned to officers whose office is designated by the same title does not necessarily put such officers in different grades. As the statute is doubtful, the practice of the department for twenty years should be followed: that the grade of chief engineer is one grade; that the promotion to that grade from first assistant engineer requires examination under said R. S. secs. 1493 and 1496, that the relative rank among the chief engineers changes with their seniority in that grade, but that such change may be indicated by a notification from the Secretary of the Navy; and that, as they hold the same office, no examination or new appointment or confirmation by the Senate is necessary.

The office of chief engineer remains the same. The relative rank, however, is changed by seniority and notification from the Secretary of the Navy. (1892) 20 Op. Atty.-Gen. 358. See (1880) 16 Op. Atty.-Gen. 414.

The class of chief engineers is divided into three grades and three ranks, technically so called, but they are grades and ranks of honor or duty, with no corresponding divisions on the pay-roll. On the contrary, the pay of chief engineers, as appears in R. S. sec. 1556, infra, p. 1171, is governed entirely by length of service. It is very clear, therefore, that the grade or rank described in this section and in R. S. sec. 1476, infra, p. 1136, is not the grade or rank called for in R. S. sec. 1558, infra, p. 1187. Rutherford v. U. S., (1855) 18 Ct. Cl. 339.

Effect of transfer to the line.—As the officers who constituted the engineer corps, under this section, had been transferred to the line of the navy, as above noted, it follows that the corps, as thus constituted, was abolished. But it will be observed that, while such officers are transferred to the line of the navy, the duties of engineers are not abolished. They will continue to be engineers of the navy, though under another name. See R. S. sec. 1385, infra, p. 1076. Denig v. U. S., (1902) 37 Ct. Cl. 383.
R. S. sec. 1391. This section was as follows:
“Sec. 1391. Engineers shall be appointed by the President, by and with the advice and consent of the Senate.”
R. S. secs. 1391, 1392, and 1394 were superseded by the Act of Aug. 5, 1882, ch. 391, § 1, 22 Stat. L. 285, and by the Act of March 2, 1889, ch. 396. § 1. 25 Stat. L. 873 (both of which Acts are quoted under R. S. sec. 1521, given under Naval Academy, ante, p. 1006), and by the transfer of the engineer corps to the line of the navy by the Act of March 3, 1899, ch. 413, §§ 1-7, infra, pp. 1091-1094.

R. S. sec. 1392. This section was as follows:
“Sec. 1392. No person under nineteen or over twenty-six years of age shall be appointed a second assistant engineer in the Navy; nor shall any person be appointed or promoted in the Engineer Corps until after he has been found qualified by a board of competent engineers and medical officers designated by the Secretary of the Navy, and has complied with existing regulations.”
This section has been superseded by the provisions cited in the foregoing note to R. S. sec. 1521.

Sec. 1393. [Engineer of the fleet.] The President may designate among the chief engineers in the service, and appoint to every fleet or squadron, an engineer, who shall be denominated “engineer of the fleet.” [R. S.]

Act of April 21, 1864, ch. 63, 13 Stat. L. 54.

Effect of Navy Personnel Act.—This section was not repealed by the Navy Personnel Act of March 3, 1899, ch. 413, infra, p. 1091. The office of “engineer of the fleet” continues, notwithstanding the provision in the later statute that “the officers constituting the engineer corps of the navy are transferred to the line of the navy and shall be commissioned accordingly.” Denig v. U. S., (1902) 17 Ct. Cl. 353.

R. S. sec. 1394. This section was as follows:
“Sec. 1394. Cadet engineers who are graduated with credit in the scientific and mechanical class of the Naval Academy may, upon the recommendation of the academic board, be appointed by the President and confirmed by the Senate as second assistant engineers.”
This section was superseded by the various provisions given in the note to R. S. sec. 1391, noted supra, this page.

Sec. 1395. [Chaplains, number and appointment of.] There shall be in the Navy, for the public armed vessels of the United States in actual service not exceeding twenty-four chaplains, who shall be appointed by the President with the advice and consent of the Senate. [R. S.]

This section was in part superseded by the Act of June 30, 1914, ch. 130, making various provisions with respect of chaplains.

Sec. 1396. [Qualifications of.] A chaplain shall not be less than twenty-one nor more than thirty-five years of age at the time of his appointment. [R. S.]

See the note to the preceding R. S. sec. 1503.

Appointment over age.—In (1802) 10 Op. Atty-Gen. 324, the Attorney-General advised that, under the Act of July 14, 1802, § 7, prescribing the age of chaplains in the navy, the President could not appoint a person to that office above the age of thirty-five, although, before the passage of that Act, the President instructed the Secretary of the Navy to prepare a nomination of that person to the Senate for the office.
Sec. 1397. [Form of worship.] Every chaplain shall be permitted to conduct public worship according to the manner and forms of the church of which he may be a member. [R. S.]


Sec. 1398. [Annual report.] Chaplains shall report annually to the Secretary of the Navy the official services performed by them. [R. S.]


Sec. 1399. [Professors of mathematics, number of.] The number of professors of mathematics in the Navy shall not exceed twelve. [R. S.]


Sec. 1400. [Appointment.] Professors of mathematics shall be appointed and commissioned by the President of the United States, by and with the advice and consent of the Senate. [R. S.]

See also the Act of Jan. 20, 1881, ch. 24, infra, p. 1086.

Sec. 1401. [Duties.] Professors of mathematics shall perform such duties as may be assigned them by order of the Secretary of the Navy, at the Naval Academy, the Naval Observatory, and on board ships of war, in instructing the midshipmen of the Navy, or otherwise. [R. S.]


Sec. 1402. [Naval constructors, number and appointment of.] The President, by and with the advice and consent of the Senate, may appoint naval constructors, who shall have rank and pay as officers of the Navy. [R. S.]

See the Act of March 3, 1899, ch. 413, § 10, infra, p. 1095.

Sec. 1403. [Assistant naval constructors.] Cadet engineers who are graduated with credit in the scientific and mechanical class of the Naval Academy may, upon the recommendation of the academic board, be immediately appointed as assistant naval constructors. [R. S.]

Cadet engineers are now designated “midshipmen” by virtue of the Act of July 1, 1902, ch. 1368, given under NAVAL ACADEMY, ante, p. 1006.

Sec. 1404. [Duty.] Naval constructors may be required to perform duty at any navy-yard or other station. [R. S.]


Constructor detailed to inspect vessel. Where a naval constructor is detailed by the Secretary of the Navy to inspect a vessel, the fact that she is chartered by the War Department as an army transport does not burden the officer with service not incident to his office. Stocker v. U. S., (1924) 39 Ct. Cl. 300.
Sec. 1405. [Warrant officers, number and appointment of.] The President may appoint for the vessels in actual service, as many boatswains, gunners, sailmakers, and carpenters as may, in his opinion, be necessary and proper. [R. S.]

The officers mentioned in this section were designated "warrant officers" by the following R. S. sec. 1406.
Provisions relating to the promotion of seamen to be warrant officers were made by R. S. sec. 1407, given in the second paragraph of the text following, and provisions relating to preferences in appointments were made by R. S. sec. 1417, infra, p. 1980.
Provisions for the appointment of pharmacists with the rank, etc., of warrant officers were made by the Act of June 17, 1806, ch. 483, § 1, infra, p. 1091.

Warrant officer — Mate.—A mate is a petty officer under R. S. sec. 1579, infra, p. 1184, and not a warrant officer, even though appointed by the Secretary of the Navy. U. S. v. Fuller, (1896) 160 U. S. 593, 16 S. Ct. 386, 40 U. S. (L. ed.) 549.
Acting master's mate.—An acting master's mate is not a warrant officer of the navy. (1865) 11 Op. Atty.-Gen. 251.

President's power to revoke.—The President has no power to revoke the warrant of a boatswain in the navy and discharge him from the service without the sentence of a court-martial. (1910) 28 Op. Atty.-Gen. 325.

Sec. 1406. [Title.] Boatswains, gunners, carpenters, and sailmakers shall be known and shall be entered upon the Naval Register as "warrant officers in the naval service of the United States." [R. S.]

Act of July 2, 1864, ch. 219, 13 Stat L. 373.

Sec. 1407. [Promotion of seamen to warrant officers.] Seamen distinguishing themselves in battle, or by extraordinary heroism in the line of their profession may be promoted to forward warrant officers, upon the recommendation of their commanding officer, approved by the flag-officer, and Secretary of the Navy. And upon such recommendation they shall receive a gratuity of one hundred dollars and a medal of honor, to be prepared under the direction of the Navy Department. [R. S.]

Act of May 17, 1864, ch. 89, 13 Stat L. 79, 80.
See the provisions given under subdivision XIV, Medals, infra, p. 1239.

Sec. 1408. [Seamen may be rated as mates.] Mates may be rated, under authority of the Secretary of the Navy, from seamen and ordinary seamen who have enlisted in the naval service for not less than two years. [R. S.]


Mates entitled to rations.—Mates are officers not holding commissions or warrants, and not entitled to them, but are petty officers promoted by the Secretary of the Navy from seamen of inferior grades, who have enlisted for not less than two years, and are distinguished from other petty officers only in the fact that their pay is fixed by statute instead of by the President. From this it would seem to follow that, although their pay is fixed by law instead of by the President, they are in other respects entitled to the emoluments of petty officers, among which are rations. U. S. v. Fuller, (1896) 160 U. S. 593, 16 S. Ct. 386, 40 U. S. (L. ed.) 549.
Sec. 1409. [Rating shall not discharge from enlistment.] The rating of an enlisted man as a mate, or his appointment as a warrant officer, shall not discharge him from his enlistment. [R. S.]


Officer and enlisted man at same time.—A person can, under the provisions of R. S. secs. 1409 and 1410, be at the same time an officer of the navy and an enlisted man, the distinction being between commissioned officers and the enlisted force. (1907) 26 Op. Atty.-Gen. 433.

Sec. 1410. [Petty officers.] All officers not holding commissions or warrants, or who are not entitled to them, except such as are temporarily appointed to the duties of a commissioned or warrant officer, and except secretaries and clerks, shall be deemed petty officers, and shall be entitled to obedience, in the execution of their offices, from persons of inferior ratings. [R. S.]

Act of July 17, 1862, ch. 204, 12 Stat. L. 610.

Construction and scope.—That there are three sorts of officers known to the navy, viz., commissioned, warrant, and petty, is evident from this section. (1877) 16 Op. Atty.-Gen. 634.

"All officers."—The navy regulations connect paymasters' stewards with the term "petty officers," and this section includes petty officers in the more general designation of "all officers." This section recognizes the usage of referring to petty officers and warrant officers as officers, but all petty officers are not officers within the intent of the Constitution. Muse v. U. S., (1884) 19 Ct. Cl. 441.

Officers holding temporary appointments in the navy are not either commissioned or warrant officers, and legislation as to the manner in which such officers are to be cashiered, etc., does not apply to the case of a temporary appointment. (1878) 16 Op. Atty.-Gen. 560.

The power to appoint acting gunners is strongly implied by this section. (1876) 15 Op. Atty.-Gen. 565.


Secretaries.—"The necessary implication of this section is that secretaries are officers not holding commissions or warrants, and are not entitled to them. The only secretaries named in the statutes are the secretaries to the admiral and vice-admiral and commanders of squadrons (see R. S. sec. 1556, infra, p. 1171). If secretaries do not hold commissions, and are not entitled to them, it follows that they are not appointed by the President, because appointments by the President are always evidenced by a commission." (1869) 19 Op. Atty.-Gen. 589.

Sec. 1411. [Acting assistant surgeons.] The Secretary of the Navy may appoint, for temporary service, such acting assistant surgeons as the exigencies of the service may require, who shall receive the compensation of assistant surgeons.


By section 2 of an Act of Feb. 15, 1879, ch. 53, 20 Stat. L. 295, entitled "An Act to abolish the Volunteer Navy of the United States," it was provided as follows:

"Sec. 2. That from and after the passage of this act the Secretary of the Navy shall not appoint acting assistant surgeons for temporary service, as authorized by section fourteen hundred and eleven, Revised Statutes, except in case of war."

Both this provision and that of the text would seem to be superseded by the Act of May 4, 1898, ch. 234, infra, p. 1057.

R. S. sec. 1412 is given infra, p. 1112.

Sec. 1413. [Civil engineers and store-keepers at navy-yards.] The President by and with the advice and consent of the Senate, may appoint a
civil engineer and a naval store-keeper at each of the navy-yards where such officers may be necessary. [R. S.]

Act of March 2, 1867, ch. 175, 14 Stat. L. 490; Act of June 17, 1868, ch. 61, 15 Stat. L. 69.

The number of civil engineers was limited to twenty-one by the Act of March 3, 1899, ch. 413, § 7, infra, p. 1094, but the number was increased by the Act of July 1, 1902, ch. 1865, infra, p. 1097; and the Act of March 3, 1905, ch. 1010, infra, p. 1097.

Official status of civil engineers.—Civil engineers in the naval service are officers in the navy, possessing defined relative rank with other naval officers. (1881) 17 Op. Atty.-Gen. 126.

But in Granger's Case, (1878) 16 Op. Atty.-Gen. 203, the Attorney-General said: "This statute necessarily implies that such appointments are only to be made where such officers are found necessary, and, inferentially, that their services may be dispensed with when unnecessary; and indicates that the appointment is to some extent a local one, and that the appointee cannot be a naval officer in the full sense of the term."

Civil engineers appointed under this section are officers of the navy within the meaning of articles 36 and 37 of R. S. sec. 1624 (Articles for Government of Navy). (1876) 15 Op. Atty.-Gen. 165. See also (1876) 15 Op. Atty.-Gen. 597.

Longevity pay.—Civil engineers in the navy prior to the Act of March 2, 1867, from which this section was taken, were officers, and were in the naval service within the intent of the Act of March 3, 1883, relating to longevity pay. See Act of May 13, 1908, ch. 166, infra, p. 1206, relating to longevity pay. Brown v. U. S., (1897) 32 Ct. Cl. 379.

Sec. 1414. [Store-keepers on foreign stations.] The Secretary of the Navy may appoint citizens who are not officers of the Navy to be store-keepers on foreign stations, when suitable officers of the Navy cannot be ordered on such service, or when, in his opinion, the public interest will be thereby promoted. [R. S.]


The appointment by the commander of a squadron of a civilian naval storekeeper is not authorized by law, and is therefore void and furnishes no ground upon which the salary for that office can be claimed. Larkin v. U. S., (1889) 5 Ct. Cl. 535.

Sec. 1415. [Store-keepers' bond.] Every person who is appointed store-keeper under the provisions of the preceding section shall be required to give a bond, in such amount as may be fixed by the Secretary of the Navy, for the faithful performance of his duty. [R. S.]


Sec. 1416. [Civil offices at yards may be discontinued by Secretary of the Navy.] The Secretary of the Navy is authorized, when in his opinion the public interest will permit it, to discontinue the office or employment of any measurer and inspector of timber, clerk of the yard, clerk of the commandant, clerk of the store-keeper, clerk of the naval constructor, and the keeper of the magazine employed at any navy-yard, and to require the duties of the keeper of the magazine to be performed by gunners. [R. S.]


Sec. 1417. [Number of enlisted men — preference in appointment of warrant officers.] The number of persons who may at one time be enlisted into the Navy of the United States, including seamen, ordinary seamen,
landsmen, mechanics, firemen, and coal-heavers, and including seven hundred and fifty apprentices and boys, hereby authorized to be enlisted annually, shall not exceed eight thousand two hundred and fifty: Provided, That in the appointment of warrant officers in the naval service of the United States, preference shall be given to men who have been honorably discharged upon the expiration of an enlistment as an apprentice or boy, to serve during minority, and re-enlisted within three months after such discharge, to serve during a term of three or more years: Provided further, That nothing in this act shall be held to abrogate the provisions of section fourteen hundred and seven of the Revised Statutes of the United States. [R. S.]

This section was amended to read as above by Act of May 12, 1879, ch. 5, § 1, 21 Stat. L. 3.

The section was originally as follows:

"Sec. 1417. The number of persons who may at one time be enlisted into the Navy of the United States, including seamen, ordinary seamen, landsmen, mechanics, firemen, coal-heavers, apprentices, and boys, shall not exceed eight thousand five hundred." Act of June 7, 1864, ch. 111, 13 Stat. L. 120; Act of June 17, 1868, ch. 61, 16 Stat. L. 72.

It was first amended by Act of June 30, 1876, ch. 159, 19 Stat. L. 66, by changing the number to seven thousand and five hundred.

The first part of the text, down to the proviso, was superseded by the re-enactment thereof in the same words, except as to the total number limited in the Act of March 3, 1893, ch. 212, infra, p. 1066. See the notes to said Act.

Enlisted men — Paymasters' clerks.—Paymasters' clerks are not among the enlisted men enumerated in this section. Apprentice boys.—Service of boys as apprentices in the navy yard is not provided for as an enlistment. Davis v. U. S., 1892, 25 Ct. Cl. 21.

Sec. 1418. [Term of enlistment.] Boys between the ages of fourteen and eighteen years may be enlisted to serve in the Navy until they shall arrive at the age of twenty-one years; other persons may be enlisted to serve for a period not exceeding five years, unless sooner discharged by direction of the President. [R. S.]


This section was amended to read as above by the Act of Feb. 23, 1881, ch. 73, § 2, 21 Stat. L. 338. The first amendment, by Act of May 12, 1879, ch. 5, 21 Stat. L. 3, changed the age from sixteen to fifteen, and the one noted above from fifteen to fourteen. See amendment in following section.

The term of enlistment was changed to four years by the Act of March 3, 1899, ch. 413, § 16, infra, p. 1096, and the Act of Aug. 22, 1912, ch. 335, infra, p. 1100.

Provisions relating to the enlistment of minors were made by the Act of March 3, 1915, ch. 83, infra, p. 1106.

For provisions relating to the punishment of officers for wrongfully enlisting minors, see Articles for the Government of the Navy, vol. 1, p. 427.

Construction — Other persons.—The phrase "other persons" includes minors above eighteen as well as men of full age. (1896) 21 Op. Atty.-Gen. 327.

"The words 'other persons,' in the first section of the Act [of 1837] means adult males. Congress, by the Act, would seem to have adopted a new policy in regard to the enlistment of minors for the navy, namely, that of not allowing them to be enlisted of every age under majority, but of permitting them to be enlisted only at such age, above that of thirteen years, as will insure a service by them of at least three years before they shall become adults, and of requiring them to enlist to serve until they shall become adults, and of making the consent of their parents or guardians necessary, in view of the fact that the service is to continue during the entire remainder of their minority." In re McLave, (1870) 8 Blatchf. 67, 16 Fed. Cas. No. 8,576.

The words "other persons" mean persons capable of making a contract of enlistment, and a minor twenty years of age.

Medina.—The statute providing for enlisting boys for the naval service does not include the enlistment of marines. (1842) 4 Op. Atty.-Gen. 89. See further the note Enlistment in marine corps, under R. S. sec. 1419, next following.

Sec. 1419. [Consent of parents and guardians.] Minors between the age of fourteen and eighteen years shall not be enlisted for the naval service without the consent of their parents or guardians. [R. S.]


The section was amended to read as above by Act of Feb. 23, 1881, ch. 73, § 2, 21 Stat. L. 338. As first enacted the earliest age given was sixteen years. This was changed to fifteen years by Act of May 12, 1879, ch. 5, 21 Stat. L. 3, and then to fourteen years by the Act above noted. See the note to the preceding R. S. sec. 1418.

Enlistment of persons over the age of eighteen years.—"When the Congress enacted that 'no minor under the age of fourteen years shall be enlisted in the naval service,' that 'minors between the ages of fourteen and eighteen years of age shall not be enlisted for the naval service without the consent of their parents or guardians,' and that 'other persons may be enlisted,' they affirmatively authorized the enlistment of male minors over the age of eighteen years without the consent of parent or guardian. In section 1420 the expression of the legislative intent to the effect that minors under the age of fourteen years shall not be enlisted excludes the idea that male persons over that age are under a like prohibition. In section 1419 the expression of the legislative intent that minors between the ages of fourteen and eighteen years shall have the consent of parents or guardians, as a condition precedent to valid enlistment, excludes the idea that other persons competent to enlist shall be required to conform to that precedent condition; and, reading all the statutes together, we think the conclusion is apparent that the Congress intended to leave male minors over the age of eighteen years free to enlist in the naval service, without condition as to parental or guardianship consent." Thomas v. Winne, (C. C. A. 4th Cir. 1903) 122 Fed. 395, 38 C. C. A. 613; McCalla v. Facer, (C. C. A. 9th Cir. 1906) 144 Fed. 61, 75 C. C. A. 219. See also U. S. v. Bainbridge, (1816) 1 Mason 71, 24 Fed. Cas. No. 14,497, and U. S. v. Stewart, (1839) Crabbé 265, 27 Fed. Cas. No. 18,490, that it is within the constitutional power of Congress to provide for the enlistment of minors without the consent of parents.

The obvious construction of this section, the preceding R. S. sec. 1418, and R. S. sec. 1624 (see ARTICLES FOR THE GOVERNMENT OF THE NAVY, vol. 1, p. 416) is that minors over the age of eighteen years may be lawfully enlisted in the United States navy without the consent of their parents or guardians. The express provision that minors between the ages of sixteen and eighteen years shall not be enlisted in the naval service without the consent of their parents or guardians, and that "other persons" may be enlisted, and the further provision making it an offense in any officer of the navy to knowingly enlist a minor between the ages of sixteen and eighteen years without such consent, is sufficient to show that the consent of his parent or guardian is not essential to the valid enlistment of a minor over the age of eighteen years. In re Norton, (N. D. Cal. 1899) 98 Fed. 606.

The enlistment of minors over the age of eighteen is valid without the consent of the parents or guardians. (1867) 12 Op. Atty.-Gen. 258.

A minor over eighteen years of age can bind himself by a contract of enlistment in the navy, without the consent of his parents or guardians. In re Oliver, (1897) 1 Alaska 1; U. S. v. Watson, (1858) 2 Hayw. & H. 226, 28 Fed. Cas. No. 16,650a.

In In re McNulty, (1873) 2 Lowell 270, 16 Fed. Cas. No. 8,917, it was held that minors could not be enlisted in any branch of the service without the consent of their parents.

In In re Mclave, (1870) 8 Blatchf. 67, 16 Fed. Cas. No. 8,876, it was held that the statute makes unlawful the enlistment of boys for the navy, unless they are boys not under thirteen nor over eighteen years of age, and unless, when they are of that description, they enlist with the consent of their parents or guardians.

Minors under eighteen.—In Ee p. Liak, (E. D. Va. 1906) 145 Fed. 860, it was held that a boy between fourteen and eighteen could not be enlisted under any
circumstances without the consent of his parents or guardian. See also In re Hayes, (1886) 15 Iowa 23; 11 Fed. Cas. No. 63; In re McNulty, (1873) 2 Lowell 270, 16 Fed. Cas. No. 8,917.

So in the case of In re Falconer, (S. D. N. Y. 1898) 91 Fed. 649, it was held that the enlistment of a minor under the age of eighteen years is void and that the continued service of the son after eighteen is tantamount to a re-enlistment.

But in U. S. v. Pendleton, (E. D. Pa. 1908) 167 Fed. 690, it was held that this section is for the protection of the parent or guardian; and that an enlistment in violation thereof is valid as to the minor, and voidable only by the parent or guardian before the minor attains the age of eighteen years. To the same effect was U. S. v. Reaves, (C. C. A. 5th Cir. 1903) 126 Fed. 127, 60 C. C. A. 975, citing In re Morrison, (1890) 87 U. S. 157, 11 S. Ct. 57, 34 U. S. (L. ed.) 644, and In re Grimeley, (1890) 137 U. S. 147, 11 S. Ct. 54, 34 U. S. (L. ed.) 636.

Habeas corpus.—In U. S. v. Pendleton, (E. D. Pa. 1909) 167 Fed. 690, it was held that a minor enlisted in the navy, although without the consent of his parent and in violation of the statute, is punishable for breach of discipline, and cannot be discharged on habeas corpus at suit of his parent while undergoing such punishment.

So in Dillingham v. Booker, (C. C. A. 4th Cir. 1908) 163 Fed. 606, 90 C. C. A. 280, 16 Ann. Cas. 127, 18 L. R. A. (N. S.) 956, it was held that the civil courts should not interfere by habeas corpus to discharge a minor under eighteen years of age who has been enlisted in either the military or naval service without the consent of his parents or guardian, if at the time of the representation of the petition for the writ the minor is under arrest and held for trial by court-martial on a charge of desertion or fraudulent enlistment or other charge cognizable by a military or naval court.

But in Ex p. Bakley, (E. D. Va. 1906) 145 Fed. 56, affirmed (C. C. A. 4th Cir. 1907) 162 Fed. 1062, 82 C. C. A. 659, the court held that the parents of a minor son under the age of eighteen years, who has enlisted in the navy without their knowledge or consent, in violation of this section, are entitled to his discharge on habeas corpus, and their rights cannot be denied because of contemplated or possible court-martial proceedings against the minor for fraudulent enlistment, especially where, between the time demand for his discharge was made by the parents and the procuring of the writ, several months elapsed, during which no proceedings were taken against him.

Enlistment in marine corps.—Enlistments into the marine corps are not governed by this section, and minors cannot be enlisted into the marine corps without the consent of parents or guardians. McCalla v. Facer, (C. C. A. 9th Cir. 1906) 144 Fed. 61, 75 C. C. A. 219; In re Shugrue, (1883) 3 Mackey (D. C.) 324. See also (1842) 4 Op. Atty.-Gen. 89.

In the case of In re Doyle, (S. D. N. Y. 1883) 18 Fed. 369, it was held that the marine corps is part of the United States naval service, in which minors over eighteen years of age may be enlisted without the consent of their parents or guardians. This decision was considered in McCalla v. Facer, supra, wherein the decision in the case of In re Shugrue, supra, was held to present the true construction of the law.

Minor having neither parent nor guardian.—Where a minor, having neither a parent nor a guardian, enlisted, his contract of enlistment was held to be voidable but not void. In re Wall, (C. C. Mass. 1881) 8 Fed. 85.


**Sec. 1420. [Persons not to be enlisted.]** No minor under the age of fourteen years, no insane or intoxicated person, and no person who has deserted in time of war from the naval or military service of the United States, shall be enlisted in the naval service. [R. S.]

As first enacted (Act of March 3, 1865, ch. 79, 13 Stat. L. 490), the age was given in this section as sixteen years. This was changed to fifteen years by an Act of May 19, 1879, ch. 5, 21 Stat. L. 3, and by the Act of Feb. 23, 1881, ch. 73, § 2, 21 Stat. L. 358, it was amended to read as follows:

"Sec. 1420. No minor under the age of fourteen years, no insane or intoxicated person, and no deserter from the naval or military service of the United States shall be enlisted in the naval service."

By an act of Aug. 22, 1912, ch. 336, § 2, 37 Stat. L. 356, it was again amended to read as given in the text.

Construction.—The expression that minors under the age of fourteen years shall not be enlisted excludes the idea that male persons over that age are under a like prohibition, and minors over the age of eighteen years are free to enlist in the
Sec. 1421. [Transfer from military to naval service.] Any person enlisted in the military service of the United States may, on application to the Navy Department, approved by the President, be transferred to the Navy or Marine Corps, to serve therein the residue of his term of enlistment, subject to the laws and regulations for the government of the Navy. But such transfer shall not release him from any indebtedness to the Government, nor, without the consent of the President, from any penalty incurred for a breach of military law. [R. S.]


Transfer.—Lieutenants in the artillery and marine corps may be exchanged, with their own consent, where the rank of other officers will not be prejudiced, by and with the advice and consent of the Senate. (1830) 2 Op. Atty.-Gen. 355.

Sec. 1422. [Men to be sent to place of enlistment at expiration of term.] That it shall be the duty of the commanding officer of any fleet, squadron, or vessel acting singly, when on service, to send to an Atlantic or to a Pacific port of the United States, as their enlistment may have occurred on either the Atlantic or Pacific coast of the United States, in some public or other vessel, all petty-officers and persons of inferior ratings desiring to go there at the expiration of their terms of enlistment, or as soon thereafter as may be, unless, in his opinion, the detention of such persons for a longer period should be essential to the public interests, in which case he may detain them, or any of them, until the vessel to which they belong shall return to such Atlantic or Pacific port. All persons enlisted without the limits of the United States may be discharged, on the expiration of their enlistment, either in a foreign port or in a port of the United States, or they may be detained as above provided beyond the term of their enlistment; and that all persons sent home, or detained by a commanding officer, according to the provisions of this act, shall be subject in all respects to the laws and regulations for the government of the Navy until their return to an Atlantic or Pacific port and their regular discharge; and all persons so detained by such officer, or re-entering to serve until the return to an Atlantic or Pacific port of the vessel to which they belong, shall in no case be held in service more than thirty days after their arrival in said port; and that all persons who shall be so detained beyond their terms of enlistment or who shall, after the termination of their enlistment, voluntarily re-enter to serve until the return to an Atlantic or Pacific port of the vessel to which they belong, and their regular discharge therefrom, shall receive for the time during which they are so detained, or shall so serve beyond their original terms of enlistment, an addition of one-fourth of their former pay: Provided, That the shipping-articles shall hereafter contain the substance of this section. [R. S.]

Act of July 17, 1862, ch. 204, 12 Stat. L. 610.
The section was amended so as to read as above by the Act of March 3, 1875, ch. 155, 18 Stat. L. 484. The section read originally as follows:

"Sec. 1422. It shall be the duty of the commanding officer of any fleet, squadron, or vessel acting singly, when on service, to send to an Atlantic port of the United States, in some public or other vessel, all petty officers and persons of inferior ratings desiring to go there, at the expiration of their terms of service, or as soon thereafter as may be, unless, in his opinion, the detention of such persons for a longer period should be very essential to the public interests, in which case he may detain them, or any of them, until the vessel to which they belong shall return to such Atlantic port."

Expenses of travel and subsistence.—This section contains no provision authorizing the payment of expenses for travel or subsistence to petty officers or enlisted men on their discharge. Only transportation in kind is authorized, and this only to those who desire to return to the United States. Hunt v. U. S., (1903) 38 Ct. Cl. 135.

Right may be waived.—An enlisted man on board a vessel under orders to proceed to the Atlantic waters, whose enlistment would have expired within a year, did not wish to be transferred to another vessel. He made a request to be allowed to remain on board, giving a waiver of all claims to transportation home should he be discharged before the return of the vessel to American waters. He was discharged at Tsings, China, at the expiration of his enlistment, refusing to re-enlist. While this statute accorded to him the right of transportation in kind from the place of his discharge to the place of his enlistment, it was a personal right which he could and did waive on his failure to comply with the terms of his voluntary waiver. Hunt v. U. S., (1903) 38 Ct. Cl. 135.

Sec. 1423. [Subject to regulations while sent home or detained.] All persons sent home, or detained by a commanding officer, according to the provisions of the preceding section, shall be subject in all respects to the laws and regulations for the government of the Navy, until their return to an Atlantic port and their regular discharge. [R. S.]

Act of July 17, 1862, ch. 204, 12 Stat. L. 610.

Sec. 1424. [Limit of detention.] Persons so detained by a commanding officer, or re-entering to serve until the return to an Atlantic port of the vessel to which they belong, shall in no case be held in service more than thirty days after their arrival in said port. [R. S.]

Act of July 17, 1862, ch. 204, 12 Stat. L. 610.

Sec. 1425. [What to be contained in shipping articles.] The shipping articles shall contain the substance of the three sections next preceding and of section fifteen hundred and seventy-two. [R. S.]

Act of July 17, 1862, ch. 204, 12 Stat. L. 610.
R. S. sec. 1572, mentioned in the text, is given infra, p. 1181.

Sec. 1426. [Honorable discharge, to whom granted.] Honorable discharges may be granted to seamen, ordinary seamen, landsmen, firemen, coal-heavers, and boys who have enlisted for three years. [R. S.]


The benefits of this section were extended to all enlisted persons in the navy by a Res. of June 11, 1896, No. 62, infra, p. 1195.

Provisions relating to a temporary home on receiving ships for discharged seamen, were made by the Act of Feb. 8, 1899, ch. 115, infra, p. 1088.

A report of men entitled to honorable discharge was required by R. S. sec. 1429, infra, p. 1100.

Presumption of honorable discharge.—Where a discharge paper simply stated that one "has this day been discharged from the U. S. ship Lancaster, and from
the naval service," his discharge was held to have been an honorable one, it not appearing to be otherwise. Brockton v. Uxbridge. (1885) 138 Mass. 292.

Discharge after acceptance of resignation.—An officer who resigns and whose resignation is accepted is thereby out of the service and cannot subsequently be discharged. Douw v. U. S., (1901) 26 Ct. Cl. 112.

Sec. 1427. [Form of honorable discharge.] Honorable discharges shall be granted according to a form prescribed by the Secretary of the Navy. [R. S.]


Sec. 5. [Passed assistant surgeons — pay — rank.] * * * That assistant surgeons of three years' service who have been found qualified for promotion by a medical board of examiners, shall have the pay of past assistant surgeons, as now provided; and passed assistant surgeons shall have the relative rank of lieutenant or master. [16 Stat. L. 535.]

This is from the Naval Appropriation Act of March 3, 1871, ch. 117. As to the change in the designation of the grade of master, see the Act of March 3, 1883, ch. 97, infra, p. 1087.

[Officers detailed as secretaries and clerks.] * * * That on and after the first day of July, eighteen hundred and seventy-eight, there shall be no appointments made from civil life of secretaries or clerks to the Admiral, or Vice-Admiral, when on sea service, commanders of squadrons, or of clerks to commanders of vessels; and an officer not above the grade of lieutenant shall be detailed to perform the duties of secretary to the Admiral or Vice-Admiral, when on sea service, and one not above the grade of master to perform the duties of clerk to a rear-admiral or commander and one not above the grade of ensign to perform the duties of clerk to a captain, commander, or lieutenant-commander when afloat: [20 Stat. L. 50.]

This is from the Naval Appropriation Act of May 4, 1878, ch. 91.

An act relating to the appointment of professors of mathematics in the Navy.


[Examinations before appointment.] That hereafter no person shall be appointed a professor of mathematics in the Navy until he shall have passed a physical examination before a board of naval surgeons, and a professional examination before a board of professors of mathematics in the Navy, to be convened for that purpose by the Secretary of the Navy, and received a favorable report from said boards. [21 Stat. L. 317.]

For other provisions relating to professors of mathematics, see R. S. secs. 1399, 1400, 1401, supra, p. 1077.
NAVY

[Sec. 1.] [Medical Corps — number on active list.] • • • That the active-list of the medical corps of the Navy shall hereafter consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and ninety assistant and passed assistant surgeons. [22 Stat. L. 285.]

This and the following two paragraphs of the text are from the Naval Appropriation Act of Aug. 5, 1882, ch. 391.
The number on the active list was increased by the Act of June 7, 1900, ch. 859, infra, p. 1096, and the Act of March 3, 1903, ch. 1010, infra, p. 1097.

[Pay corps — number on active list.] That the active-list of the pay corps of the Navy shall hereafter consist of thirteen pay-directors, thirteen pay-inspectors, forty paymasters, twenty passed assistant paymasters, and ten assistant paymasters. [22 Stat. L. 285.]

See the note to the preceding paragraph of this section.
The numbers included in the grades mentioned in the text were increased by the Act of March 3, 1899, ch. 421, infra, p. 1096; the Act of March 3, 1903, ch. 1010, infra, p. 1097; and the Act of Aug. 22, 1912, ch. 335, infra, p. 1100.

Paymaster of the fleet.—No designation other than that made by the President entitles a naval paymaster to the place and perquisites of paymaster of the fleet. (1885) 18 Op. Atty.-Gen. 166.

[Effect of act on officer previously in service.] That no officer now in the service shall be reduced in rank or deprived of his commission by reason of any provision of this act reducing the number of officers in the several staff corps. [22 Stat. L. 286.]

See the note to the second preceding paragraph of this section.

[Sec. 1.] [Masters to be styled lieutenants.] • • • For the pay of one hundred masters, the title of which grade is hereby changed to that of lieutenants, and the masters now on the list shall constitute a junior grade of, and be commissioned as, lieutenants, having the same rank and pay as now provided by law for masters, but promotion to and from said grade shall be by examination as provided by law for promotion to and from the grade of master, and nothing herein contained shall be so construed as to increase the pay now allowed by law to any officer in the line or staff; [22 Stat. L. 472.]

This and the provision following are from the Naval Appropriation Act of March 3, 1883, ch. 97.

[Midshipmen to be styled ensigns.] • • • ninety-one midshipmen, the title of which grade is hereby changed to that of ensign, and the midshipman [sic] now on the list shall constitute a junior grade of, and be commissioned as, ensigns, having the same rank and pay as now provided by law for midshipmen, but promotions to and from said grade shall be under the same regulations and requirements as now provided by law for promotion to and from the grade of midshipmen, and nothing herein contained shall be so construed as to increase the pay now allowed by law to any officer of said grade or of any officer of relative rank; [22 Stat. L. 472.]

See note to the prior paragraph of the text.
The grade of junior ensign was abolished by Act of June 26, 1884, ch. 122, given in the following paragraph of the text.
Sec. 2. [Grade of junior ensigns abolished.] That the grade of junior ensign in the Navy is hereby abolished and the junior ensigns now on the list shall be commissioned ensigns in the Navy: Provided, That nothing in this act shall be so construed as to increase the number of officers in the Navy now allowed by law. [23 Stat. L. 60.]

This is from an Act of June 26, 1889, ch. 122, entitled "An act to equalize the rank of graduates of the Naval Academy upon their assignment to the various corps."
Sec. 1 of this Act was as follows:
"[Sec. 1.] That from and after the passage of this act all graduates of the Naval Academy who are assigned to the line of the Navy, on the successful completion of the six years course, shall be commissioned ensigns in the Navy."

It was superseded by the Act of March 7, 1912, ch. 83, and the Act of July 9, 1913, ch. 5, given under NAVAL ACADEMY, ante, p. 1006.
Sec. 3 of this Act was as follows:
"Sec. 3. That all Acts and parts of Acts inconsistent with the provisions of this Act be and the same are hereby repealed."

An act to provide a temporary home for certain persons discharged from the United States Navy.


[Temporary home for seamen receiving honorable discharge.] That the Secretary of the Navy be, and he is hereby, authorized to permit any person receiving the honorable discharge authorized by section fourteen hundred and twenty-nine of the Revised Statutes to elect a home on board of any of the United States receiving-ships, during any portion of the three months granted by law as the limit of time within which to receive the pecuniary benefit of such discharge, the men so choosing a home to be entitled to one ration per day for their keeping while furnished with such home, but not to pay, other than that authorized by section fifteen hundred and seventy-three of the Revised Statutes of the United States upon re-enlistment: Provided, That the persons so furnished with a home shall be amenable to such regulations as may be prescribed by the Secretary of the Navy or other competent authority. [25 Stat. L. 657.]

R. S. sec. 1429 is given infra, p. 1108.
R. S. sec. 1873 is given infra, p. 1182.

An act to encourage the enlistment of boys as apprentices in the United States Navy.

[Act of March 1, 1889, ch. 331, 25 Stat. L. 781.]

[Bounty on enlistment of apprentices.] That in order to encourage the enlistment of boys as apprentices in the United States Navy the Secretary of the Navy is hereby authorized to furnish as a bounty to each of said apprentices after his enlistment, and when first received on board of a
training-ship, an outfit of clothing not to exceed in value the sum of forty-five dollars. [25 Stat. L. 781.]

The Naval Appropriation Act of March 3, 1915, ch. 83, 38 Stat. L. 932 provided, as did similar Acts for preceding years, "outfits for all enlisted men and apprentice seamen of the Navy on first enlistment, at not to exceed $60 each."

Refund of bounty after discharge.—The regulations of the Secretary of the Navy issued July 1, 1901, pursuant to this Act, are inconsistent with law and void in so far as they require a refund of the bounty, or any portion of it, in case an apprentice is discharged within a year after his enlistment for disability not incurred in the line of duty. (1904) 25 Op. Atty.-Gen. 270.

[Purchase of discharge.] * * * and in time of peace the President may in his discretion [sic], and under such rules and upon such conditions as he may prescribe, permit any enlisted man to purchase his discharge from the Navy or the Marine Corps, the amounts received therefrom to be covered into the Treasury. [27 Stat. L. 717.]

This and the following paragraph of the text are from the Naval Appropriation Act of March 3, 1893, ch. 212.

[Increased number of enlisted men.] * * * and the number of persons who may at one time be enlisted into the Navy of the United States, including seamen, ordinary seamen, landsmen, mechanics, firemen, and coal heavers, and including one thousand five hundred apprentices and boys, hereby authorized to be enlisted annually, shall not exceed nine thousand. [27 Stat. L. 730.]

See the note to the preceding paragraph of the text.
See the note to R. S. sec. 1417, supra, p. 1080, which was in part superseded by the provisions of the text, and see the following paragraph of the text.

[Additional seamen.] * * * and the Secretary of the Navy is hereby authorized to enlist as many additional seamen as in his discretion he may deem necessary, not to exceed one thousand; [28 Stat. L. 826.]

This is from the Naval Appropriation Act of March 2, 1895, ch. 186.
See the preceding paragraph of the text and the note thereto.

Sec. 2. [Apprentices not included in limit of number.] That all apprentices of the Navy, whether at a training station or on board an apprentice training ship, shall be additional to the number of enlisted persons allowed by law for the Navy. [29 Stat. L. 96.]

This is from the Act of April 24, 1896, ch. 120. Sec. 1 of this Act is given infra, p. 1156.
By R. S. sec. 1417, supra, p. 1080, and the Act of March 3, 1893, ch. 212, supra, p. 1056, apprentices were included in the number to which the enlisted force was limited.

[Additional seamen.] * * * and the Secretary of the Navy is hereby authorized to enlist at any time after the passage of this Act as many
additional men as in his discretion he may deem necessary, not to exceed one thousand. [29 Stat. L. 361.]


Aliens.—An alien can be enlisted in the navy or marine corps and is bound by the term of his enlistment the same as citizens. (1844) 4 Op. Atty.-Gen. 350.

An Act To commission passed assistant surgeons in the United States Navy, and to provide for their examination preliminary to their promotion to the grade of surgeon.


[Passed assistant surgeons — promotion.] That passed assistant surgeons now borne upon the Navy Register shall be commissioned as such by the President, such commissions to bear the dates upon which said passed assistant surgeons, respectively, received their appointments as such; and hereafter assistant surgeons shall be regularly promoted and commissioned as passed assistant surgeons, and passed assistant surgeons as surgeons, subject to such examinations as may be prescribed by the Secretary of the Navy: Provided, however, That no examination of passed assistant surgeons shall be ordered until the expiration of six months from the passage of this Act, during which time promotions shall be made as now provided by law. [29 Stat. L. 526.]

This Act superseded in part R. S. sec. 1371, supra, p. 1070, and the Act of March 3, 1871, ch. 117, § 5, supra, p. 1086. The proviso of this Act may be regarded as temporary only.

[Acting assistant surgeons.] • • • The President is hereby authorized to appoint for temporary service twenty-five acting assistant surgeons, who shall have the relative rank and compensation of assistant surgeons. [30 Stat. L. 380.]

This is from the Naval Appropriation Act of May 4, 1898, ch. 234.

Constructive service.—An assistant surgeon appointed “for temporary service” in the navy under this Act is not entitled to the five years constructive service given to those officers in the navy appointed from civil life by the Navy Personnel Act. (Act of March 3, 1899, ch. 413, § 18, infra, p. 1199). Nelson v. U. S., (1906) 41 Ct. Cl. 157.

Compensation.—When this Act was passed the pay of officers in the naval service was generally regulated by R. S. sec. 1556, infra, p. 1171. By section 13 of the Navy Personnel Act of March 3, 1899, infra, p. 1195, the pay of naval officers generally was increased and therefore the pay of assistant surgeons enhanced. The effect was to assimilate the pay of acting assistant surgeons to that of assistant surgeons in the army. Plummer v. U. S., (1912) 224 U. S. 137, 32 S. Ct. 467, 56 U. S. (L. ed.) 697, reversing (1909) 45 Ct. Cl. 614.

Under former Acts.—Under the Acts of May 24, 1828, and March 3, 1835, the assistant surgeon was entitled to the pay of a surgeon whenever he was called to discharge the peculiar duties of a surgeon; but those duties had to be such as could only be performed by him when present. (1838) 3 Op. Atty.-Gen. 308; see also (1861) 10 Op. Atty.-Gen. 97; (1861) 10 Op. Atty.-Gen. 101.
An Act To organize a hospital corps of the Navy of the United States; to define its duties and regulate its pay.

[Act of June 17, 1898, ch. 463, 30 Stat. L. 474.]

[Sec. 1.] [Establishment of hospital corps — appointments — transfers.] That a hospital corps of the United States Navy is hereby established, and shall consist of pharmacists hospital stewards, hospital apprentices (first class), and hospital apprentices; and for this purpose the Secretary of the Navy is empowered to appoint twenty-five pharmacists with the rank, pay, and privileges of warrant officers, removable in the discretion of the Secretary, and to enlist, or cause to be enlisted, as many hospital stewards, hospital apprentices (first class), and hospital apprentices as in his judgment may be necessary, and to limit or fix the number; and to make such regulations as may be required for their enlistment and government. Enlisted men in the Navy or the Marine Corps shall be eligible for transfer to the hospital corps, and vacancies occurring in the grade of pharmacist shall be filled by the Secretary of the Navy by selection from those holding the rate of hospital steward. [30 Stat. L. 474.]

Sec. 3 of this Act was as follows:

"Sec. 3. That the pay of hospital stewards shall be sixty dollars a month, the pay of hospital apprentices (first class) thirty dollars a month, and the pay of hospital apprentices twenty dollars a month, with the increase on account of length of service as is now or may hereafter be allowed by law to other enlisted men in the Navy."


SEC. 2. [Duties — attached to Medical Department.] That all necessary hospital and ambulance service at naval hospitals, naval stations, navy-yards, and marine barracks, and on vessels of the Navy, Coast Survey, and Fish Commission, shall be performed by the members of said corps, and the corps shall be permanently attached to the Medical Department of the Navy, and shall be included in the effective strength of the Navy and be counted as a part of the enlisted force provided by law, and shall be subject to the laws and regulations for the government of the Navy. [30 Stat. L. 475.]

See the notes to the preceding sec. 1 of this Act.

SEC. 4. [Benefit of existing laws, etc.] That all benefits derived from existing laws, or that may hereafter be allowed by law, to other warrant officers or enlisted men in the Navy shall be allowed in the same manner to the warrant officers or enlisted men in the hospital corps of the Navy. [30 Stat. L. 475.]

SEC. 5. [Repeal.] That all acts and parts of acts, so far as they conflict with the provisions of this Act, are hereby repealed. [30 Stat. L. 475.]

An Act To reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States.


[Sec. 1.] [Engineer Corps transferred to the line.] That the officers constituting the Engineer Corps of the Navy be, and are hereby, transferred
to the line of the Navy, and shall be commissioned accordingly. [30 Stat. L. 1004.]

This Act is known as the “Navy Personnel Act.”
Secs. 8, 11 and 17 of this Act, relating to retirement of officers and men are given under subdivision VI of this title, infra, p. 1126. Section 9 was repealed by the Act of March 3, 1915, ch. 83, 38 Stat. L. 936, and is noted under said sec. 8.
Sec. 12, relating to the rank, etc., of warrant officers is given under subdivision VII of this title, infra, p. 1145.
Sec. 13, relating to pay of officers, etc., is given under subdivision X of this title, infra, p. 1195.
Secs. 18-24, relating to the Marine Corps, are given infra, p. 1224, with the exception of sec. 21, which is noted under said sec. 18.
Sec. 25, relating to the oath of men in the Navy, is given under subdivision IX, infra, p. 1166.

Construction — Fleet engineers.—This statute does not repeal R. S. sec. 1393, supra, p. 1076, authorizing the President to designate from among the chief engineers, and appoint an engineer who shall be denominated as engineer of the fleet. The purpose of the Act was to reorganize and increase the efficiency of the personnel of the navy, and not to limit the power of the President, as it then existed, to designate fleet officers. Denig v. U. S., (1902) 37 Ct. Cl. 383.

Marine corps.—This section does not apply to officers of the marine corps. (1903) 24 Op. Atty.-Gen. 709.
Effect of transfer.—The transfer of the engineer corps (steam) of the navy to the line by the Navy Personnel Act, does not preclude the appointment of a naval officer on the active list, formerly an officer of that corps and now restricted to the performance of engineer duty, to the superintendency of the state war and navy building. (1905) 25 Op. Atty.-Gen. 508.

Rank of civil engineers.—Civil engineers in the naval service are officers in the navy, possessing defined relative rank with other naval officers. (1891) 17 Op. Atty.-Gen. 126.

Relative to rank of chief engineers.—The relative rank among the chief engineers changes with their seniority in that grade. Such change may be indicated by a notification from the Secretary of the Navy and does not require examination, new appointment or confirmation by the Senate. (1892) 20 Op. Atty.-Gen. 358.
There is but one grade of chief engineers in the navy. (1892) 20 Op. Atty.-Gen. 358.

Sec. 2. [Rank in the line.] That engineer officers holding the relative rank of captain, commander, and lieutenant-commander shall take rank in the line of the Navy according to the dates at which they attained such relative rank. Engineer officers graduated from the Naval Academy from eighteen hundred and sixty-eight to eighteen hundred and seventy-six, both years inclusive, shall take rank in the line next after officers in the line who graduated from the Naval Academy in the same year with them: Provided, That when the date of a line officer’s commission as captain, commander, or lieutenant-commander and the date when the engineer officer attained the same relative rank of captain, commander, or lieutenant-commander are the same, the engineer officer shall take rank after such line officer. [30 Stat. L. 1004.]

See the notes to the preceding sec. 1 of this Act.

Rank attained prior to statute.—Engineer officers who attained the rank of commander prior to the passage of the Personnel Act, became entitled, under the first sentence of this section, to take that actual rank in the line of the navy. (1889) 22 Op. Atty.-Gen. 449.

Sec. 3. [Rank, how determined.] That engineer officers who completed their Naval Academy course of four years from eighteen hundred and seventy-eight to eighteen hundred and eighty, both inclusive, shall take rank in the line as determined by the Academic Board under the Department’s instructions of December first, eighteen hundred and ninety-seven;
and engineer officers who completed their Naval Academy course of four years in eighteen hundred and eighty-one and eighteen hundred and eighty-two shall take rank in the line as determined by the merit roll of graduating classes at the conclusion of the six years' course, June, eighteen hundred and eighty-three and eighteen hundred and eighty-four: Provided, That those engineer officers who were appointed from civil life, and whose status is not fixed by section two of this Act, shall take rank with other line officers according to the dates of their first commissions, respectively: And provided further, That the engineer officers who completed their Naval Academy course of four years in eighteen hundred and eighty-one and eighteen and eighty-two shall retain among themselves the same relative standing as shown on the Navy Register at the date of the passage of this Act. [30 Stat. L. 1005.]

See the notes to sec. 1 of this Act given in the second preceding paragraph of the text.

SEC. 4. [Duties of engineer officers below rank of commander.] That engineer officers transferred to the line who are below the rank of commander, and extending down to, but not including, the first engineer who entered the Naval Academy as cadet midshipman, shall perform sea or shore duty, and such duty shall be such as is performed by engineers in the Navy: Provided, That any officer described in this section may, upon his own application, made within six months after the passage of this Act, be assigned to the general duties of the line, if he pass the examination now provided by law as preliminary to promotion to the grade he then holds, failure to pass not to displace such officer from the list of officers for sea or shore duty such as is performed by engineers in the Navy. [30 Stat. L. 1005.]

See the notes to sec. 1 of this Act, supra, p. 1002.

Failure to pass examinations.—The examination is for promotion only, so that cadet engineers who after graduation in the four years' academic course fail to pass the examinations are nevertheless officers in the naval service. (1888) 18 Op. Atty.-Gen. 395.

SEC. 5. [Duties of engineer officers ranking as, or above, commander.] That engineer officers transferred to the line to perform engineer duty only who rank as, or above, commander, or who subsequently attain such rank, shall perform shore duty only. [30 Stat. L. 1005.]

See the notes to sec. 1 of this Act, supra, p. 1002.

SEC. 6. [Other officers to perform line duties—examination.] That all engineer officers not provided for in sections four and five transferred to the line shall perform the duties now performed by line officers of the same grade: Provided, That after a period of two years subsequent to the passage of this Act they shall be required to pass the examinations now provided by law as preliminary to promotion to the grade they then hold, and subject to existing law governing examinations for promotion. [30 Stat. L. 1005.]

See the notes to sec. 1 of this Act, supra, p. 1002.
SEC. 7. [Composition of active list of the line—rank—pay, etc.] That the active list of the line of the Navy, as constituted by section one of this Act, shall be composed of eighteen rear-admirals, seventy captains, one hundred and twelve commanders, one hundred and seventy lieutenant-commanders, three hundred lieutenants, and not more than a total of three hundred and fifty lieutenants (junior grade) and ensigns: Provided, That each rear-admiral embraced in the nine lower numbers of that grade shall receive the same pay and allowance as are now allowed a brigadier-general in the Army. Officers, after performing three years' service in the grade of ensign, shall, after passing the examinations now required by law, be eligible to promotion to the grade of lieutenant (junior grade): Provided, That when the office of chief of bureau is filled by an officer below the rank of rear-admiral, said officer shall, while holding said office, have the rank of rear-admiral and receive the same pay and allowance as are now allowed a brigadier-general in the Army: And provided further, That nothing contained in this section shall be construed to prevent the retirement of officers who now have the rank or relative rank of commodore with the rank and pay of that grade: And provided further, That all sections of the Revised Statutes which, in defining the rank of officers or positions in the Navy, contain the words "the relative rank of" are hereby amended so as to read "the rank of," but officers whose rank is so defined shall not be entitled, in virtue of their rank to command in the line or in other staff corps. Neither shall this Act be construed as changing the titles of officers in the staff corps of the Navy. No appointments shall be made of civil engineers in the Navy on the active list under section fourteen hundred and thirteen of the Revised Statutes in excess of the present number, twenty-one. [30 Stat. L. 1005.]

The provisions of the text relating to the active list superseded to a large extent those contained in R. S. sec. 1363, supra, p. 1069.

The grades of the active list were increased by the Act of March 3, 1903, ch. 1010, infra, p. 1097.

That part of the second proviso of the text relating to chiefs of bureaus reading as follows, "And receive the same pay and allowances as are now allowed a brigadier-general in the Army," was superseded by the provision that pay and allowances of chiefs of bureaus should be the highest pay at the grade to which they belong, and not below that of rear-admiral of the lower nine, made by the Act of May 13, 1888, ch. 166, given under subdivision X, infra, p. 1203.

R. S. sec. 1413 mentioned in the last clause of the text is given supra, p. 1079.
See the notes to said section for reference to Acts increasing the number of civil engineers.

Effect of Act.—The Navy Personnel Act abolished the grade of commodore and practically constituted, within the grade of rear-admiral, a new grade for pay purposes known as "the nine lower numbers," into which commodores were advanced without increase of pay; but under the Act of June 7, 1900, noted infra, p. 1104, the old pay of rear-admirals extends to a rear admirals in the nine lower numbers. Terry v. U. S., (1904) 39 Ct. Cl. 353.

The provision abolishing the rank of commodore and lifting those in that rank to that of rear-admiral, and providing that they should receive a special and permanent profession, and not affected by section 13 (Act of March 3, 1899, c. 413, given infra, p. 1105), but must be taken as an exception to and limitation of the general rule declared by section 13. Rodgers v. U. S., (1902) 185 U. S. 83, 22 S. Ct. 582, 46 U. S. (L ed.) 816.

Rear-admirals' shore pay and sea pay. —The provision of this section that the rear-admirals embraced in the nine lower numbers of that grade should receive such pay and allowances as were given to brigadier-generals, was not intended to be absolute and exclusive, and did not ignore the general rule in respect to naval service of a difference between the pay of officers doing shore duty and that of

Boatswains, gunners, and warrant ma-

SEC. 10. [Rank of naval and assistant naval constructors — promotions — number.] That of the naval constructors five shall have the rank of captain, five of commander, and all others that of lieutenant-commander or lieutenant. Assistant naval constructors shall have the rank of lieutenant or lieutenant (junior grade). Assistant naval constructors shall be promoted to the grade of naval constructor after not less than eight or more than fourteen years' service as assistant naval constructor: Provided, That the whole number of naval constructors and assistant naval constructors on the active list shall not exceed forty in all. [30 Stat. L. 1006.]

See the notes to sec. 1 of this Act, supra, p. 1092.

For provisions relating to naval constructors see R. S. secs. 1402, 1403, 1404, supra, p. 1077, and as to the increase in the number thereof see the Act of July 1, 1902, ch. 1868, infra, p. 1097, and the Act of March 3, 1903, ch. 1010, infra, p. 1097.

SEC. 14. [Machinists.] That upon the passage of this Act the Secretary of the Navy shall appoint a board for the examination of men for the position of warrant machinists, one hundred of whom are hereby authorized. The said examination shall be open, first, to all machinists by trade, of good record in the naval service, and if a sufficient number of machinists from the Navy are not found duly qualified, then any machinist of good character, not above thirty years of age, in civil life shall be eligible for such examination and appointment to fill the remaining vacancies. All subsequent vacancies in the list of warrant machinists shall be filled by competitive examination before a board ordered by the Secretary of the Navy, and open to all machinists by trade who are in the Navy, and machinists of good character, not above thirty years of age, in civil life authorized by the Secretary of the Navy to appear before said board, and, where candidates from civil life and from the naval service possess equal qualifications, the preference shall be given to those from the naval service. [30 Stat. L. 1007.]

See the notes to sec. 1 of this Act, supra, p. 1092.

"Warrant machinists" were designated "machinists" by the Act of March 3, 1909, ch. 255, infra, p. 1099.

Warrant machinists are not on the list of line officers of the navy, and are not entitled to command. (1899) 22 Op. Atty.-Gen. 620.

SEC. 15. [Pay, retirement, rank, etc., of machinists.] That the pay of warrant machinists shall be the same as that of warrant officers, and they shall be retired under the provisions of existing law for warrant officers. Warrant machinists shall receive at first an acting appointment, which may be made permanent under regulations established by the Navy Department for other warrant officers. They shall take rank with other warrant officers according to date of appointment and shall wear such uniform as may be prescribed by the Navy Department. [30 Stat. L. 1007.]

See the notes to sec. 1 of this Act, supra, p. 1092.

As to "warrant machinists" see the note to the preceding sec. 14 of this Act.
SEC. 16. [Term of enlistment.] That hereafter the term of enlistment of all enlisted men of the Navy shall be four years: • • • [30 Stat. L. 1008.]

See the notes to sec. 1 of this Act, supra, p. 1092. The omitted part of this section amended R. S. sec. 1573 which is given as subsequently amended, infra, p. 1162. The term of enlistment was made four years by the Act of Aug. 22, 1912, ch. 335, infra, p. 1100.

SEC. 26. [Repeal.] That all acts and parts of acts, so far as they conflict with the provisions of this Act, are hereby repealed. [30 Stat. L. 1009.]

See the notes to sec. 1 of this Act, supra, p. 1092.

[Increase in active list of passed assistant and assistant paymasters.] • • • The active list of passed assistant and assistant paymasters of the Pay Corps shall hereafter consist of thirty and forty, respectively: Provided, That when such appointments of assistant paymasters are made from among those who served honorably as such in the late war with Spain the age limit may be increased to forty-five years. [30 Stat. L. 1038.]

This and the following paragraph are from the Naval Appropriation Act of March 3, 1899, ch. 421. The numbers here fixed supersede those provided by R. S. sec. 1376, noted supra, p. 1071, as well as those fixed by Act of Aug. 5, 1882, ch. 391, supra, p. 1087, and by Act of May 4, 1896, ch. 234, 30 Stat. L. 381, which provided: "The active list of assistant paymasters of the pay corps shall hereafter consist of twenty-five."

The numbers here given were superseded by the Act of March 3, 1903, ch. 1010, infra, p. 1097, and the Act of Aug. 22, 1912, ch. 335, infra, p. 1100.

The proviso of this paragraph may be regarded as temporary only.

[Admiral.] The President is hereby authorized to appoint, by selection and promotion, an Admiral of the Navy, who shall not be placed upon the retired list except upon his own application; and whenever such office shall be vacated by death or otherwise the office shall cease to exist. [30 Stat. L. 1045.]

See the note to the preceding paragraph of the text. By an Act of March 2, 1899, ch. 278, 30 Stat. L. 995, entitled, "An Act creating the office of admiral of the Navy," a provision identical with that of the text was enacted, but since this office was not included in those mentioned in the Navy Personnel Act of March 3, 1899, ch. 413, sec. 7, infra, p. —, it was re-enacted as given in the text.

The grade of admiral was re-established by the second paragraph of the Act of March 3, 1916, ch. 83, infra, p. 1106.

[Medical corps, number.] • • • The active list of surgeons shall hereafter consist of fifty-five, and that of passed assistant and assistant surgeons of one hundred and ten. Assistant surgeons shall rank with assistant surgeons in the Army: Provided, That the assistant surgeons under the age of fifty years appointed for temporary service during the war with Spain,
having creditable records, who are now in the Navy may be given permanent commissions. [31 Stat. L. 697.]

This is from the Naval Appropriation Act of June 7, 1900, ch. 859.
The number of surgeons was increased by the Act of March 3, 1903, ch. 1010, infra, this page.

Passed assistant and assistant surgeons.
-A passed assistant surgeon is an assistant surgeon who has received official notification that he has passed the examinations necessary before he is eligible to appointment as a full surgeon when a vacancy occurs. (1888) 19 Op. Atty.-Gen. 169.
A passed assistant surgeon and an assistant surgeon are officers of the same grade, belonging to different classes in that grade. (1888) 19 Op. Atty.-Gen. 169.

[Additional civil engineers.] * * * That the appointment of six additional civil engineers is hereby authorized, three to be appointed during the present calendar year, and the other three in the calendar year of nineteen hundred and three. [32 Stat. L. 671.]

This and the following paragraph of the text are from the Naval Appropriation Act of July 1, 1902, ch. 1385.
The number of engineers was increased by the Act of March 3, 1903, ch. 1010, infra, this page.

[Additional assistant naval constructors.] * * * That, in addition to the number of naval constructors and assistant naval constructors now authorized, the appointment of six assistant naval constructors, is hereby authorized, two to be appointed during the present calendar year and the remaining four in the calendar year of nineteen hundred and three. [32 Stat. L. 683.]

See the note to the preceding paragraph of the text.
An increase in the number was authorized by the Act of March 3, 1903, ch. 1010, infra, this page.
See also the eighth paragraph of the Act of March 3, 1915, ch. 83, infra, p. 1109.

[Increase in certain grades.] * * * The grades of the active list of the Navy hereinafter designated shall be so increased that there shall be thirty additional lieutenant-commanders, in all two hundred; fifty additional lieutenants, in all three hundred and fifty; such total numbers of lieutenants (junior grade) and ensigns as may qualify for said grades under existing law and the provisions of this Act; thirty additional surgeons with the rank of lieutenant-commander, in all eighty-five; one hundred and twenty additional passed assistant and assistant surgeons, with the rank, respectively, of Lieutenant and lieutenant (junior grade), in all two hundred and thirty; two additional pay inspectors, in all fifteen; thirty-six additional paymasters, in all seventy-six; twenty-six additional passed assistant and assistant paymasters, in all ninety-six; twenty-nine additional naval constructors and assistant naval constructors, in all seventy-five; one additional civil engineer, in all twenty-eight; and twelve assistant civil engineers, of whom six shall have the rank of lieutenant (junior grade) and six the rank of ensign. [32 Stat. L. 1197.]

This and the three paragraphs of the text following are from the Naval Appropriation Act of March 3, 1903, ch. 1010.
The active list of the pay corps of the Navy was increased by the Act of Aug. 22, 1912, ch. 335, infra, p. 1100.

Passed assistant and assistant paymasters.—Where a statute exacts that there shall be 28 additional passed assistant and assistant paymasters on the active list of the navy, the President in his discretion may direct that the whole number so added to the active list shall be of the higher grade. Williams v. U. S., (1912) 47 Ct. Cl. 316. See also (1908) 26 Op. Atty.-Gen. 511.

[Civil engineers — promotion.] * * * That promotions in the corps of civil engineers shall be after such examination as the Secretary of the Navy may prescribe. [32 Stat. L. 1197.]

See the note to the preceding paragraph of the text.

[Limit of yearly increase.] * * * The increase in the grades of lieutenant-commander and lieutenant provided for in this Act shall be filled by promotion each year of not exceeding twenty-five percentum of the total number of the increase in each of said grades; and not more than twenty-five assistant surgeons, not more than twenty assistant paymasters, nor more than five assistant naval constructors, nor more than three assistant civil engineers, in addition to those necessary to fill vacancies in said grades, shall be appointed in any one calendar year. [32 Stat. L. 1197.]

See the note to the second preceding paragraph of the text.

[Officers advanced in rank, etc., not affected.] * * * Nothing contained in this Act shall affect the officers of the Navy who may have been or may hereafter be advanced in rank under existing provisions of law by which they become extra numbers in their respective grades, or operate to vacate the commission of any officer now in the service. [32 Stat. L. 1198.]

See the note to the first paragraph of this Act, supra, p. 1097.

Acceptance of promotion.—The acceptance of a promotion is not necessary to consummate the appointment of an officer in the naval service to a higher grade. (1867) 12 Op. Atty.-Gen. 229.

[Refund of cost of outfits on enlistment.] * * * That hereafter the Secretary of the Navy may, in his discretion, require the whole or a part of the cost of outfits allowed upon enlistment to be refunded in cases where men are discharged during the first six months of enlistment for any cause other than disability incurred in line of duty. [34 Stat. L. 556.]

This is from the Naval Appropriation Act of June 29, 1906, ch. 3590.

[Refund of enlistment bounty.] * * * That the Secretary of the Navy may, in his discretion, require the whole or a part of the bounty allowed upon enlistment to be refunded in cases where men are discharged during the first year of enlistment by request, for inaptitude, as undesirable, or for disability not incurred in line of duty. [34 Stat. L. 1176.]

This is from the Naval Appropriation Act of March 2, 1907, ch. 2512.

A similar provision was made by the Act of June 29, 1906, ch. 3590, 34 Stat. L. 553.
[Hospital corps — pay of enlisted men.] The pay of enlisted men of the Hospital Corps shall be the same as that provided for the corresponding ratings of the seaman branch and other staff corps of the Navy. [35 Stat. L. 146.]

This and the following paragraph of the text are from the Navy Appropriation Act of May 13, 1908, ch. 166. Sec. 3 of the Act of June 17, 1898, ch. 463, noted under sec. 1 of said Act, supra, p. 1001, was superseded by the text.

[Nurse corps, female.] * * * The nurse corps (female) of the United States Navy is hereby established, and shall consist of one superintendent, to be appointed by the Secretary of the Navy, who shall be a graduate of a hospital training school having a course of instruction of not less than two years, whose term of office may be terminated at his discretion, and of as many chief nurses, nurses, and reserve nurses as may be needed: Provided, That all nurses in the nurse corps shall be appointed or removed by the Surgeon-General, with the approval of the Secretary of the Navy, and that they shall be graduates of hospital training schools having a course of instruction not less than two years. The appointment of superintendent, chief nurses, nurses, and reserve nurses shall be subject to an examination as to their professional, moral, mental, and physical fitness, and that they shall be eligible for duty at naval hospitals and on board of hospital and ambulance ships and for such special duty as may be deemed necessary by the Surgeon-General of the Navy. Reserve nurses may be assigned to active duty when the necessities of the service demand, and when on such duty shall receive the pay and allowances of nurses: Provided, That they shall receive no compensation except when on active duty. The superintendent, chief nurses, and nurses shall respectively receive the same pay, allowances, emoluments, and privileges as are now or may hereafter be provided by or in pursuance of law for the nurse corps (female) of the Army. [35 Stat. L. 146.]

See the note to the preceding paragraph of the text. See also the second following paragraph of the text.

[Machinists — title.] * * * The title of warrant machinist is hereby changed to machinist. [35 Stat. L. 771.]

This is from the Naval Appropriation Act of March 3, 1909, ch. 255. It superseded so much of the Act of March 3, 1899, ch. 413, secs. 14 and 15, supra, p. 1095, as designated machinists as "warrant machinists."

[Commutation of quarters to Nurse Corps.] * * * The Secretary of the Navy is authorized, in his discretion, to allow members of the Nurse Corps (female) of the navy fifteen dollars per month in lieu of quarters when government quarters are not available, and that the accounting officers of the Treasury are hereby authorized and directed to allow in the accounts of disbursing officers of the navy all payments heretofore made by them in accordance with orders of the Secretary of the Navy for commutation of
quarters to members of the Nurse Corps (female) of the navy at the rate herein specified. [36 Stat. L. 606.]

This is from the Naval Appropriation Act of June 24, 1910, ch. 378. See the second preceding paragraph of the text.

[Officers performing engineering duty on shore only, made additional numbers—retirement.] * * * That officers on the active list of the line of the United States Navy who, under authority of law, now perform engineering duty on shore only are hereby made additional to the numbers in the grades in which they are now serving, and shall be carried as additional to the numbers of each grade to which they may hereafter be promoted: Provided, That said officers shall be entitled to all the benefits of retirement under existing or future laws equally with other officers of like rank and service. [36 Stat. L. 1267.]

This is from the Naval Appropriation Act of March 4, 1911, ch. 239.

[Pay Corps increased.] * * * The grades of the active list of the Pay Corps of the Navy are hereby increased by ten additional paymasters, in all eighty-six paymasters, and by twenty additional passed assistant and assistant paymasters, in all one hundred and sixteen passed assistant and assistant paymasters: Provided, That the total increase of the Pay Corps of the Navy shall not exceed twenty during the first fiscal year. [37 Stat. L. 328.]

The provisions of this and the following sixteen paragraphs of the text are from the Naval Appropriation Act of Aug. 22, 1912, ch. 335.
Earlier provisions relating to an increase in the pay corps were made by the Act of March 3, 1903, ch. 1010, supra, p. 1097.

Paymaster's clerk.—A paymaster's clerk appointed by the paymaster, the Navy, is not a member of the pay corps. U. S. v. Mount, (1888) 124 U. S. 303, 8 S. Ct. 505, 31 U. S. (L. ed.) 463.

[Term of enlistment.] * * * That the term of enlistment of all enlisted men of the United States Navy other than those who are enlisted during minority shall be four years. [37 Stat. L. 330.]

See the note to the preceding paragraph of the text.
The term of enlistment originally fixed at five years by R. S. sec. 1418, supra, p. 1081, was reduced to four years by the Act of March 3, 1899, ch. 413, sec. 16, supra, p. 1096.

Under former Act.—An enlistment for “two years from the time when the ship shall last weigh anchor for sea” was regular for that term, although made before and the person enlisting served a while in fitting the vessel for sea. (1811) 1 Op. Atty.-Gen. 169.

[Extension of term of enlistment.] * * * That the term of enlistment of any enlisted man in the Navy may, by his voluntary written agreement, under such regulations as may be prescribed by the Secretary of the Navy with the approval of the President, be extended for a period of either one, two, three, or four full years from the date of expiration of the then
existing four-year term of enlistment, and subsequent to said date such
enlisted men as extend the term of enlistment as authorized in this section
shall be entitled to and shall receive the same pay and allowances in all
respects as though regularly discharged and reenlisted immediately upon
expiration of their term of enlistment, and such extension shall not operate
to deprive them upon discharge at the termination thereof of any right,
privilege, or benefit to which they would be entitled at the expiration of a
four-year term of enlistment. [37 Stat. L. 331.]

See the note to the second preceding paragraph of the text.

[Enlisted men — discharge before expiration of term.]* * * That
under such regulations as the Secretary of the Navy may prescribe, with
the approval of the President, any enlisted man may be discharged at any
time within three months before the expiration of his term of enlistment or
extended enlistment without prejudice to any right, privilege, or benefit
that he would have received, except pay and allowances for the unexpired
period not served, or to which he would thereafter become entitled, had he
served his full term of enlistment or extended enlistment: Provided,
That nothing in this Act shall be held to reduce or increase the pay and
allowances of enlisted men of the Navy now authorized pursuant to law.
[37 Stat. L. 331.]

See the note to the first paragraph of this Act, supra, p. 1100.
Enlisted men were to be permitted to purchase their discharge by the Act of
March 3, 1895, ch. 212, supra, p. 1056.

[Medical Reserve Corps established.]* * * That a Medical Reserve
Corps, to be a constituent part of the Medical Department of the Navy, is
hereby established under the same provisions, in all respects (except as may
be necessary to adapt the said provisions to the Navy), as those providing
a Medical Reserve Corps for the Army, and as set forth in the Act to
increase the efficiency of the Medical Department of the United States
Army, approved April twenty-third, nineteen hundred and eight. [37
Stat. L. 344.]

See the note to the first paragraph of this Act, supra, p. 1100.
For the Act of April 23, 1908, ch. 150, mentioned in the text, see War Depart-
ment and Military Establishment.
By the Act of March 4, 1913, ch. 148, infra, p. 1104, there was organized a Navy
Dental Reserve Corps, to operate under the provisions of this Act.

[Dental Corps — assistant dental surgeons.]* * * That the appointment
of not more than thirty assistant dental surgeons be, and the same is
hereby, authorized, said assistant dental surgeons to be a part of the Medi-
cal Department of the United States Navy, to serve professionally the per-
sonnel of the naval service, and to perform such other duties as may be
prescribed by competent authority. [37 Stat. L. 344.]

See the note to the first paragraph of the Act, supra, p. 1100, and see also the note
to the preceding paragraph of the text.

[Acting assistant dental surgeons — appointment — qualifications, etc.]
* * * That all original appointments herein authorized shall be made
by the Secretary of the Navy in the grade of acting assistant dental sur-
geon, and all appointees to such grade shall be citizens of the United States,
between twenty-four and thirty-two years of age, and shall be graduates of standard medical or dental colleges trained in the several branches of dentistry, of good moral character, of unquestionable professional repute, and before appointment shall pass satisfactory physical and professional examinations, including tests of skill in practical dentistry, of proficiency in the several usual subjects in a standard dental college course, and in such other subjects of general education as are now or may hereafter be required for admission to the Medical Corps of the Navy. [37 Stat. L. 344.]

See the note to the first paragraph of this Act, supra, p. 1100.

[Promotion to assistant dental surgeons — examinations.] * * * That at the end of three years from the passage of this Act all acting assistant dental surgeons who have had two or more years' service under their original appointment, as herein provided, shall undergo such physical and competitive professional examinations as the Secretary of the Navy may prescribe to determine their fitness to receive commissions in the Navy, and if found qualified they shall be appointed assistant dental surgeons, with the rank of lieutenant (junior grade), in the order of standing as determined by the professional examinations provided for in this Act. [37 Stat. L. 344.]

See the note to the first paragraph of this Act, supra, p. 1100.

[Appointment of acting assistant dental surgeons as assistant dental surgeons.] * * * That after the competitive examinations provided for in section three of this Act have been held, acting assistant dental surgeons thereafter appointed shall serve a probationary period of three years, and upon the completion of such period shall undergo such examinations as the Secretary of the Navy may prescribe to determine their fitness to receive commissions in the Navy, and, if found qualified, they shall be appointed assistant dental surgeons, with the rank of lieutenant (junior grade). [37 Stat. L. 344.]

See the note to the first paragraph of this Act, supra, p. 1100.

[Discharge on failure at examination.] * * * That if any acting assistant dental surgeon shall fail upon the examinations prescribed in this Act he shall be honorably discharged from the naval service, and the appointment of an acting dental surgeon may be revoked at any time in the discretion of the Secretary of the Navy. [37 Stat. L. 345.]

See the note to the first paragraph of this Act, supra, p. 1100.

[Rank and precedence.] * * * That all appointees authorized by this Act shall take rank and precedence in the same manner in all respects as in the case of appointees to the Medical Corps of the Navy, and shall not exercise command over persons in the Navy other than dental surgeons and such enlisted men as may be detailed to assist them by competent authority. [37 Stat. L. 345.]

See the note to the first paragraph of this Act, supra, p. 1100.

[Pay and allowances.] * * * That all officers of the dental corps authorized by this Act shall receive the same pay and allowances as officers
of corresponding rank and length of service in the Medical Corps of the Navy. [37 Stat. L. 345.]

See the note to the first paragraph of this Act, supra, p. 1100.
Pay and allowance generally, see subdivision X of this title, infra, p. 1171.

[Retirement — status of dentist at Naval Academy.] * * * That all officers of the dental corps authorized by this Act shall be eligible to retirement in the same manner and under the same conditions as officers of the Medical Corps of the Navy: Provided, That section fourteen hundred and forty-five of the Revised Statutes of the United States shall not be applicable to the officers herein authorized: And provided further, That the dentist now employed at the Naval Academy shall not be displaced by the operation of this Act and he shall have the same official status, pay, and allowances as may be provided for the senior dental surgeon at the Military Academy. [37 Stat. L. 345.]

See the note to the first paragraph of this Act, supra, p. 1100.
See further the second paragraph of the Act of March 4, 1913, ch. 146, infra, p. 1104.

[Temporary acting dental surgeons — number of dental corps — effect of appointment.] * * * That the Secretary of the Navy is hereby authorized to appoint, for temporary service, suitably qualified acting dental surgeons when necessary to the health and efficiency of the personnel of the Naval Service: Provided, That the total strength of the dental corps, including those appointed for temporary service under this Act, shall not exceed the proportion of one to each thousand of the authorized enlisted strength of the Navy and Marine Corps: Provided further, That appointments issued under authority of this Act may be revoked at any time, shall have no legal force or effect except for the time the temporary appointee is in active service, and shall include no right of retirement. [37 Stat. L. 345.]

See the note to the first paragraph of this section, supra, p. 1100.

[Appointments by President.] * * * That all appointments authorized by this Act, except the appointment of acting dental surgeons, shall be made by the President, by and with the advice and consent of the Senate. [37 Stat. L. 345.]

See the note to the first paragraph of this section, supra, p. 1100.

[Tests of qualifications — limitation of appointments. * * * That all laws and parts of laws inconsistent with the provisions of this Act be, and the same are hereby, repealed: Provided, That the tests of qualifications for appointment to the said reserve corps and to the dental corps may be varied to suit the subjects of such branch of the healing art or specialty of surgery of which specialists may be required and in the discretion of the Secretary of the Navy such specialists may be grouped separately: Provided further, That of the dental surgeons hereby authorized to be appointed to said Medical Reserve Corps and to the said Dental Corps, the whole number ordered to active duty shall not exceed the number the Secretary of the Navy may deem actually necessary to the health and efficiency of the
personnel of the Navy and Marine Corps and, in time of peace, the numer-
ber shall not exceed the proportion of one dental officer to one thousand
of said personnel. [37 Stat. L. 345.]

See the note to the first paragraph of this section, supra, p. 1100.

[Chief pharmacists — rank, pay, etc.] * * * That pharmacists shall,
after six years from date of warrant, be commissioned chief pharmacists
after passing satisfactorily such examination as the Secretary of the Navy
may prescribe, and shall, on promotion, have the rank, pay, and allowances
of chief boatswains. [37 Stat. L. 345.]

See the note to the first paragraph of this Act, supra, p. 1100.

[Dental Reserve Corps.] * * * That a Navy Dental Reserve Corps
is hereby authorized to be organized and operated under the provisions of
the Act approved August twenty-second, nineteen hundred and twelve,
providing for the organization and operation of a Navy Medical Reserve
Corps, and differing therefrom in no respect other than that the qualifica-
tion requirements of the appointees shall be dental surgeons and graduates
of reputable schools of medicine of dentistry instead of "graduates of
reputable schools of medicine," and so many of said appointees may be
ordered to temporary active service as the Secretary of the Navy may deem
necessary to the health and efficiency of the personnel of the Navy and
Marine Corps, providing the whole number of both regular corps and reserve
corps dental surgeons in active service shall not exceed, in time of peace,
one to each one thousand five hundred of the said personnel, and no dental
surgeon shall render service other than temporary service until his appoint-
ment shall have been confirmed by the Senate: Provided further, That
Dental Corps officers of permanent tenure shall be appointed from the
Dental Reserve Corps membership in accordance with the said provisions
of the said Act, and all such appointees shall be citizens of the United States
between twenty-two and thirty years of age, of good moral character, of
unquestionable professional repute, and before appointment shall pass satis-
factory physical and professional examinations, and when appointed shall
take rank and precedence in the same manner in all respects as in the case
of appointees to the Medical Corps of the Navy and shall receive corre-
spending pay and allowances and, when they reach the age of sixty-four
years, be entitled to retired pay. [37 Stat. L. 903.]

This and the following paragraph of the text are from the Navy Appropriation
Act of March 4, 1913, ch. 148.
The Act of Aug. 22, ch. 335, mentioned in this paragraph is given in the preceding
paragraphs of the text.

[Dental surgeons at Naval Academy — rank — retirement, etc.] * * * That the President is hereby authorized, by and with the advice and consent
of the Senate, to appoint the dentist now at the United States Naval Acad-
emy a dental surgeon in the Navy for duty at the United States Naval
Academy, to have the corresponding rank, pay, and allowances as the
senior dental surgeon now at the United States Military Academy: And
provided further, That he shall not be eligible for retirement before he has reached the age of seventy years except for physical disability incurred in the line of duty. [37 Stat. L. 931.]

See the note to the preceding paragraph of the text.

[Advertising for recruits.] • • • That authority is hereby granted to employ the services of an advertising agency or agencies in advertising for recruits under such terms and conditions as are most advantageous to the Government. [38 Stat. L. 395.]

This and the four paragraphs of the text following are from the Naval Appropriation Act of June 30, 1914, ch. 130.
Provisions similar to those of this paragraph appeared in the Act of March 4, 1913, ch. 335, 37 Stat. L. 894.

[Number of enlisted men.] • • • That hereafter the number of enlisted men of the Navy and Marine Corps provided for shall be construed to mean the daily average number of enlisted men in the naval service during the fiscal year. [38 Stat. L. 403.]

See the note to the preceding paragraph of the text.

[Naval chaplains — acting chaplains — rank — pay — commission.] • • • The grade of acting chaplain in the Navy is hereby authorized and created, and hereafter original appointments shall be made by the Secretary of the Navy, not to exceed the number hereinafter provided, in the grade of acting chaplains in the Navy after such examination as may be prescribed by the Secretary of the Navy, and while so serving acting chaplains shall have the rank, pay, and allowances of lieutenant, junior grade, in the Navy. After three years' sea service on board ship each acting chaplain before receiving a commission in the Navy shall establish to the satisfaction [of] the Secretary of the Navy by examination by a board of chaplains and medical officers of the Navy his physical, mental, moral, and professional fitness to perform the duties of chaplain in the Navy, and if found so qualified, shall be commissioned a chaplain in the Navy with the rank of lieutenant, junior grade. If any acting chaplain shall fail on the examinations herein prescribed he shall be honorably discharged from the naval service, and the appointment of any acting chaplain may be revoked at any time in the discretion of the Secretary of the Navy. [38 Stat. L. 403.]

See the note to the second preceding paragraph of the text.
Earlier provisions with respect of chaplains were made by R. S. secs. 1395-1398, supra, p. 1076.

[Number of chaplains — rank.] Hereafter the total number of chaplains and acting chaplains in the Navy shall be one to each twelve hundred and fifty of the total personnel of the Navy and Marine Corps, as fixed by law, including midshipmen, apprentice seamen, and naval prisoners, and of the total number of chaplains and acting chaplains herein authorized ten per centum thereof shall have the rank of captain in the Navy, twenty per
centum the rank of commander, twenty per centum the rank of lieutenant commander, and the remainder to have the rank of lieutenants and lieutenants, junior grade. [38 Stat. L. 403.]

See the note to the third preceding paragraph of the text.
The provisions of this paragraph as to the number of chaplains supersede those contained in R. S. sec. 1365, supra, p. 1076.

[Chaplains — rank — pay — allowances.] * * * Naval chaplains hereafter commissioned from acting chaplains shall have the rank, pay, and allowances of lieutenant, junior grade, in the Navy until they shall have completed four years' service in that grade, when, subject to examination as above prescribed, they shall have the rank, pay, and allowances of lieutenant in the Navy, and chaplains with the rank of lieutenant shall have at least four years' service in that grade before promotion to the grade of lieutenant commander, after which service, chaplains shall be promoted as vacancies occur to the grades of lieutenant commander, commander, and captain: Provided, That not more than seven acting chaplains shall be commissioned chaplains in any one year: And provided further, That no provision of this section shall operate to reduce the rank, pay, or allowances that would have been received by any person in the Navy except for the passage of this section, and that all laws or parts of laws inconsistent with the provisions of this section be, and the same are hereby, repealed. [38 Stat. L. 404.]

See the note to the first paragraph of this Act, supra, p. 1105.

[Recruiting seamen — minors.] * * * That hereafter no part of any appropriation for the naval service shall be expended in recruiting seamen, ordinary seamen, or apprentice seamen unless, in case of minors, a certificate of birth or a verified written statement by the parents, or either of them, or in case of their death a verified written statement by the legal guardian, be first furnished to the recruiting officer, showing applicant to be of age required by naval regulations, which shall be presented with the application for enlistment; except in cases where such certificate is unobtainable, enlistment may be made when the recruiting officer is convinced that oath of applicant as to age is credible; but when it is afterwards found, upon evidence satisfactory to the Navy Department, that recruit has sworn falsely as to age, and is under eighteen years of age at the time of enlistment, he shall, upon request of either parent, or, in case of their death, by the legal guardian, be released from service in the Navy, upon payment of full cost of first outfit, unless, in any given case, the Secretary, in his discretion, shall relieve said recruit of such payment. [38 Stat. L. 931.]

This and the following seven paragraphs of the text are from the Naval Appropriation Act of March 3, 1915, ch. 83.
Provisions similar to those of this paragraph were made by the Act of Aug. 22, 1912, ch. 336, 37 Stat. L. 332.

[Re-establishment of grades of Admiral and Vice-Admiral — officers entitled to promotion — pay — vacancies.] That hereafter the commander in chief of the United States Atlantic Fleet, the commander in chief of the United States Pacific Fleet, and the commander in chief of the Asiatic Fleet,
respectively, shall each, after being designated as such commander in chief by the President, and from the date of assuming command of such fleet until his relinquishment of such command, have the rank and pay of an admiral; and in each of the above-named fleets the officer serving as second in command thereof shall each, after being designated as such second in command by the President, and from the date of assuming duty as such second in command until his relinquishment of such duty, have the rank and pay of a vice admiral and the grades of admiral and vice admiral in the Navy are hereby reestablished and authorized for the purposes of this section. The annual pay of an admiral shall be $10,000, and of a vice admiral $9,000: Provided, That in time of peace officers to serve as commander in chief and as second in command of the three said fleets shall be designated from among the rear admirals on the active list of the Navy: Provided further, That nothing herein contained shall create any vacancy in any grade in the Navy nor increase the total number of officers allowed by existing law, and that when an officer is detached from duty as such commander in chief or as such second in command, as above provided, he shall return to his regular rank in the list of rear admirals and shall thereafter receive only the pay and allowances of such regular rank. [38 Stat. L. 941.]

See the note to the first preceding paragraph of the text. The grade of admiral and vice admiral ceased to exist by virtue of a proviso of R. S. sec. 1362, supra, p. 1068, but the appointment of an admiral was authorized by an Act of March 3, 1898, ch. 421, supra, p. 1096.

[Paymaster's clerk — title changed to pay clerk — appointment — pay and allowances.] The title of paymaster's clerk in the United States Navy is hereby changed to pay clerk, and hereafter all pay clerks shall be warranted from acting pay clerks, who shall be appointed from enlisted men in the Navy holding acting or permanent appointments as chief petty officers who have served at least three years as enlisted men, at least two years of which service must have been on board a cruising vessel of the Navy. All appointments as acting pay clerks shall be made by the Secretary of the Navy, and all such appointees, in addition to the qualifications above set forth, must be citizens of the United States. All acting appointments herein provided for shall be made permanent under the regulations established by the Secretary of the Navy: Provided, That paymasters' clerks now in the Navy whose total service as such is less than one year and who are citizens of the United States may, upon the passage of this Act, be given appointments as acting pay clerks without previous service as enlisted men: Provided further, That paymasters' clerks now in the service and former paymasters' clerks whose appointments have been revoked within six months next preceding the passage of this Act, who have had not less than one year's actual service as such, and who are citizens of the United States, may, upon the passage of this Act, be warranted as pay clerks without previous service as enlisted men or as acting pay clerks: And provided further, That pay clerks and acting pay clerks shall have the same pay, allowances, and other benefits as are now or may hereafter be allowed other warrant officers and acting warrant officers, respectively. [38 Stat. L. 942.]

See the note to the second preceding paragraph of the text. The provisions of this paragraph superseded those of the Naval Appropriation
Act of May 13, 1906, ch. 166, 36 Stat. L. 128, which, as amended by the Act of June 24, 1910, ch. 378, 36 Stat. L. 606, provided as follows:

"All paymasters' clerks shall, while holding appointment in accordance with law, receive the same pay and allowances and have the same rights of retirement as warrant officers of like length of service in the navy."

Pay of clerks.—This Act limits the time during which paymaster's clerks shall receive pay to the period when they shall be "on duty," while the amendment of June 24, 1900, provides that they shall be paid "while holding appointment in accordance with law." Poore v. U. S., (1914) 49 Ct. Cl. 192.

Where it appeared that the order was to "proceed to your home in the United States, and, upon your arrival at your home, your appointment as paymaster's clerk is revoked," such paymaster's clerk was entitled to compensation until he arrived at his home. Calongne v. U. S., (1914) 49 Ct. Cl. 240, following Davis v. U. S., (1912) 47 Ct. Cl. 195.


[Chief pay clerks — who may serve — rank, pay and allowances.] That all pay clerks shall, after six years' service as such, be commissioned chief pay clerks and shall on promotion have the rank, pay, and allowances of chief boatswain: Provided, That in computing the six years' service herein provided for credit shall be given for all service in the Navy as pay clerk, acting pay clerk, and paymaster's clerk: Provided further, That paymasters' clerks now in the Navy and former paymasters' clerks whose appointments have been revoked within six months next preceding the passage of this Act, who have had not less than six years' actual service as such, and who are citizens of the United States, may upon the passage of this Act be commissioned as chief pay clerks without previous service as enlisted men, acting pay clerks, or pay clerks. [36 Stat. L. 943.]

See the note to the first paragraph of this Act, supra, p. 1106.

Number of pay clerks, etc.—qualifications.] That the total number of chief pay clerks, pay clerks, and acting pay clerks allowed by this Act shall not exceed one for each two hundred and fifty enlisted men in the United States Navy now or hereafter allowed by law, and such chief pay clerks, pay clerks, and acting pay clerks shall be assigned to duty with pay officers under such rules as the Secretary of the Navy may prescribe: Provided, That no person shall be appointed a chief pay clerk, pay clerk, or acting pay clerk under any provisions contained in this Act until his physical, mental, moral, and professional qualifications have been satisfactorily established by examination before a board of examining officers appointed by the Secretary of the Navy, from officers of the pay corps when practicable and according to such regulations as he may prescribe: Provided further, That no person shall be appointed a chief pay clerk, pay clerk, or acting pay clerk unless his accumulated previous service in the Army, Navy, and Marine Corps, together with his possible future service prior to attaining the age of sixty-two years, will amount to at least thirty years, except that this proviso shall not apply to such persons as were serving in the Navy as paymasters' clerks during the period from September first, nineteen hundred and thirteen, to October thirty-first, nineteen hundred and thirteen. [38 Stat. L. 945.]

See the note to the first paragraph of this Act, supra, p. 1106.
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Limitation as to age of pay clerks. That the limitation as to age contained in section thirteen hundred and seventy-nine of the Revised Statutes of the United States, relating to appointment of assistant paymasters in the United States Navy, shall not apply to chief pay clerks and pay clerks appointed under the provisions of this Act, who must be between the ages of twenty-one and thirty-five years at the time of appointment as assistant paymasters in the United States Navy: Provided, That this shall not be construed as giving any preference in said appointment of assistant paymasters to said chief pay clerks and pay clerks except as to the limitation of age. [38 Stat. L. 943.]

See the note to the first paragraph of this Act, supra, p. 1106.

Repeal of conflicting laws. That section thirteen hundred and eighty-six, thirteen hundred and eighty-seven, and thirteen hundred and eighty-eight of the Revised Statutes, and all Acts and parts of Acts, so far as they are in conflict with the provisions of this Act, be, and the same are hereby, repealed. [38 Stat. L. 943.]

See the note to the first paragraph of this Act, supra, p. 1106.
R. S. secs. 1386, 1387 and 1388 in part repealed by the text are given supra, p. 1074.

Assistant naval constructors — eligibility of officers of line. Officers of the line of the Navy who have had not less than three years' service in the grade of ensign and have taken or are taking satisfactorily a post graduate course in naval architecture under orders from the Secretary of the Navy shall be eligible for transfer to the grade of assistant naval constructor: Provided, That there shall not be more than five such transfers in any one calendar year and that the total increase in the number of naval constructors and assistant naval constructors by reason of such transfers shall not exceed twenty-four. [38 Stat. L. 945.]

See the note to the first paragraph of this Act, supra, p. 1106.

V. GENERAL PROVISIONS RELATING TO OFFICERS

Sec. 1428. [Citizenship.] The officers of vessels of the United States shall in all cases be citizens of the United States. [R. S.]

Sections 1428–1442 constitute chapter 2 of title 15 of the Revised Statutes, "General Provisions Relating to Officers."
For general provisions relating to citizenship see CITIZENSHIP.

Service in the Confederate navy.—Citizens of the United States who resigned commissions in the navy of the United States and entered the Confederate service did not lose their citizenship by entering the Confederate service, and if otherwise qualified, are competent to be officers of vessels of the United States. (1865) 11 Op. Atty.-Gen. 317.

Sec. 1429. [Report of men entitled to honorable discharge.] It shall be the duty of every commanding officer of a vessel, on returning from a cruise, and immediately on his arrival in port, to forward to the Secretary of the Navy a list of the names of such of the crew who enlisted for three
years as, in his opinion, on being discharged, are entitled to an "honorable discharge" as a testimonial of fidelity and obedience; and he shall grant the same to the persons so designated. [R. S.]

Act of March 2, 1855, ch. 136, 10 Stat. L. 627.
For provisions relating to those entitled to honorable discharge, see R. S. sec. 1426, supra, p. 1085, and the notes thereto.

Sec. 1430. [To discourage sale of prize-money or wages.] Every commanding officer of a vessel is required to discourage his crew from selling any part of their prize-money, bounty-money, or wages, and never to attest any power of attorney for the transfer thereof until he is satisfied that the same is not granted in consideration of money given for the purchase of prize-money, bounty-money, or wages. [R. S.]

The provisions of all laws authorizing the distribution among captors of the proceeds of vessels captured and condemned as prize, and providing for the payment of bounty for the sinking and destruction of enemy's vessels, are repealed by Act of March 3, 1869, ch. 413, § 13, given under subdivision X of this title, supra, p. 1195.
See also Prize.

Sec. 1431. [Duty as to granting leave and liberty.] It shall be the duty of commanding officers of vessels, in granting temporary leave of absence and liberty on shore, to exercise carefully a discrimination in favor of the faithful and obedient. [R. S.]

Act of March 2, 1855, ch. 136, 10 Stat. L. 627.

Sec. 1432. [Acting as paymasters.] No commanding officer of any vessel of the Navy shall be required to perform the duties of a paymaster, passed assistant paymaster, or assistant paymaster. [R. S.]


Sec. 1433. [Consular powers.] The commanding officer of any fleet, squadron, or vessel acting singly, when upon the high seas or in any foreign port where there is no resident consul of the United States, shall be authorized to exercise all the powers of a consul in relation to mariners of the United States. [R. S.]

See further DIPLOMATIC AND CONSULAR OFFICERS.

Sec. 1434. [Command of squadrons.] The President may select any officer not below the grade of commander on the active list of the Navy, and assign him to the command of a squadron, with the rank and title of "flag-officer;" and any officer so assigned shall have the same authority and receive the same obedience from the commanders of ships in his squadron, holding commissions of an older date than his, that he would be entitled to receive if his commission were the oldest. [R. S.]


Sec. 1435. [Lieutenant-commanders, how assignable.] Lieutenant-commanders may be assigned to duty as first lieutenants of naval stations,
as navigation and watch officers on board of vessels of war, and as first lieutenants of vessels not commanded by lieutenant-commanders. [R. S.]


Sec. 1436. [Staff officers who have been chiefs of Bureaus.] Any staff officer of the Navy who has performed the duty of a chief of a Bureau of the Navy Department for a full term shall thereafter be exempt from sea duty, except in time of war. [R. S.]

For provisions relating to chiefs of bureaus of the Navy Department, see subdivision I of this title.

Sec. 1437. [Officers detailed for service of the War Department.] The President may detail, temporarily, three competent naval officers for the service of the War Department in the inspection of transport vessels, and for such other services as may be designated by the Secretary of War. [R. S.]

Provisions relating to the employment of naval officers in the coast survey were made by R. S. secs. 4654, 4657 and 4658, given under COAST AND GEODETIC SURVEY.

Sec. 1438. [Officers to act as store-keepers on foreign stations.] The Secretary of the Navy shall order a suitable commissioned or warrant officer of the Navy, except in the case provided in section fourteen hundred and fourteen, to take charge of the naval stores for foreign squadrons at each of the foreign stations where such stores may be deposited, and where a store-keeper may be necessary. [R. S.]

R. S. sec. 1414 mentioned in the text is given supra, p. 1090.

Sec. 1439. [Bonds.] Every officer so acting as store-keeper on a foreign station shall be required to give a bond, in such amount as may be fixed by the Secretary of the Navy, for the faithful performance of his duty. [R. S.]


Sec. 1440. [Accepting appointments in diplomatic service.] If any officer of the Navy accepts or holds an appointment in the diplomatic or consular service of the Government, he shall be considered as having resigned his place in the Navy, and it shall be filled as a vacancy. [R. S.]


Sec. 1441. [Officers dismissed, or resigning to escape dismissal.] No officer of the Navy who has been dismissed by the sentence of a court-martial, or suffered to resign in order to escape such dismissal, shall ever again become an officer of the Navy. [R. S.]


Effect of pardon.—"Whether an officer dismissed by sentence of a court-martial, who has been pardoned by the President, may again become an officer of the navy, notwithstanding this provision, is a question not without difficulty. It is not the
point specifically referred to in Mr. Myers's letter, and, therefore, I refrain from discussing it. But I do not hesitate to say that I think it can be shown that Congress did not intend by this clause to preclude the President from reappointing officers of the navy dismissed by sentence of a court-martial, to whom he has extended a pardon." (1884) 11 Op. Atty.-Gen. 19.

Sec. 1442. [Placing on furlough.] The Secretary of the Navy shall have authority to place on furlough any officer on the active list of the Navy. [R. S.]


Furlough on condition.—A furlough granted to a sailing master "on condition that he should relinquish from that date his pay and emoluments as a naval officer, until further orders," is an absolute furlough, the condition being void in law. (1823) 1 Op. Atty.-Gen. 592.

Sec. 1412. [Volunteer officers transferred entitled to credit for volunteer sea-service.] Officers who have been, or may be, transferred from the volunteer service to the Regular Navy shall be credited with the sea-service performed by them as volunteer officers, and shall receive all the benefits of such duty in the same manner as if they had been, during such service, in the Regular Navy. [R. S.]


See the following paragraph of the text.

The Act of Feb. 15, 1879, ch. 83, 20 Stat. L. 294, entitled "An act to Abolish the Volunteer Navy of the United States," was as follows:

"That it shall be the duty of the Secretary of the Navy to organize a board of five line officers of the Navy, none of whom shall be below the grade of captain, whose duty it shall be to make an examination of the line officers now composing the Volunteer Navy of the United States, which examination shall be such as is required in the examination of officers for promotion; and, further, that it shall be the duty of the Secretary of the Navy to organize a board of five medical officers of the Navy, none of whom shall be below the grade of lieutenant-commander, whose duty it shall be to make an examination of the eighteen acting and three retiring assistant surgeons now in the service, should they desire to present themselves, which examination shall be such as is required in the examination of medical officers for admission as assistant surgeons; and in all cases where said board shall find that such officers are professionally, morally, and physically qualified to perform the duties of their position, and shall so report to the Secretary of the Navy, it shall and may be lawful for the President of the United States by and with the advice and consent of the Senate to appoint such officers in the line and assistant surgeons in the Regular Navy of the United States. And in the cases of officers who may not be found to be either professionally, morally, or physically qualified to discharge the duties of their position, then said officers shall be mustered out of the service of the government, within six months from the passage of this act, with one year's pay: Provided, That in the event of physical disqualification which occurred in the line of duty, such officer may, upon the recommendation of a retiring board, be placed upon the retired list, with the pay to officers of like designation in the Regular Navy."

Construction.—The intention of that provision (section 3 of the Act of March 2, 1867, from which this section was taken) may be satisfactorily explained thus: By the statutes in force at the date of its enactment authorizing officers of the volunteer naval service to be transferred to the regular naval service, the transfers were confined to the four grades in the latter service, from ensign to lieutenant-commander, inclusive; and by the regulations of the navy a certain period of service (formerly two years, at present one year) was required of officers in those grades before, as a general rule, they were nominated for promotion to the next higher grades. (See Regulations of 1845, p. 46, par. 267; Regulations of 1870, p. 130, par. 299.) Besides, officers in the navy generally are credited with their sea service with a view to its being taken into consideration in their future assignment to duty; but, excepting those who belong to the four grades mentioned, they
derive no other advantage therefrom that
I am aware of. The design of the provi-
sion, referred to, then, was to give the
transferred officers the full benefit of their
former sea service, in so far as it might
go to complete the period of such service
required in their respective grades pre-
vious to nomination for promotion, and in
so far as it ought properly to be taken
into account in the matter of assignment
to duty. Beyond these advantages, the
provision would seem to confer nothing.

"The effect of the provision of 1867
unquestionably is to give the officers
selected from the volunteer service, after
their appointment in the regular navy, the
full benefit of the sea duty performed by
them while in that service. But except
so far as such duty may go to complete
the period of sea service required in the
four lower grades previous to nomination
for promotion, or may be properly taken
into account in the matter of assignment
to duty, I am not aware of any benefit
derivable therefrom, by law or usage, that
affects the relations of an officer to the
service. Very clearly it does not confer
upon the officers referred to the right to
have their commissions or their rank ante-

See also Zeigler's Case, (1878) 16 Op.
Atty-Gen. 45; Barton's Case, (1881) 17

Volunteer service in different grade.—
The claimant was appointed an acting
third assistant engineer in the volunteer
navy Feb. 8, 1862, and performed sea
service continuously until May 20, 1864,
when he was made a third assistant en-
geineer in the regular navy, and completed
two years of sea service as such Jan. 1,
1867. He was promoted to the grade of
second assistant engineer Oct. 6, 1869, to
take rank from Jan. 1, 1865. On July 1,
1870, he completed two years' sea service
in the latter grade, and on March 12,
1875, was promoted to the grade of passed
assistant engineer, to take rank from
Oct. 20, 1874. It was held that the credit
of his volunteer service, under this section,
did not entitle him to the benefits claimed
therefor as regards promotion to or pay in
his present grade. (1882) 17 Op. Atty-
Gen. 399.

[SEC. 1.] [Credit of time for regular, volunteer, and other service.]

• • • And all officers of the Navy shall be credited with the actual time
they may have served as officers or enlisted men in the regular or volunteer
Army or Navy, or both, and shall receive all the benefits of such actual
service in all respects in the same manner as if all said service had been
continuous and in the regular Navy in the lowest grade having graduated
pay held by such officer since last entering the service: Provided, That
nothing in this clause shall be so construed as to authorize any change in
the dates of commission or in the relative rank of such officers: Provided
further, That nothing herein contained shall be so construed as to give any
additional pay to any such officer during the time of his service in the volun-
teer army or navy. • • • [23 Stat. L. 473.]

This paragraph, known as the "Longevity Pay Act," and the following paragraph
of the text, are from the Naval Appropriation Act of March 3, 1883, ch. 97.

Provisions similar to those of the text appeared in the Act of Aug. 5, 1852, ch. 391,

By the Act of March 3, 1899, ch. 413, § 7, supra, p. 1094, it was provided that the
words "the relative rank of," whenever they appeared in the Revised Statutes, should
be changed to read "the rank of."

See further the second paragraph of the Act of May 13, 1908, ch. 166, infra, p. 1099.

Application of statute—Restriction to
lowest grade having graduated pay.—The
claimant was appointed acting assistant
paymaster in the volunteer navy Jan. 30,
1864; assistant paymaster, March 2, 1867;
passed assistant paymaster, Feb. 10, 1870;
and paymaster in the regular navy, May
29, 1882. He was continuously in the
navy from the time of his first appoint-
ment to the time of the suit. It was held
that the claimant did not have the right
to the pay of the several grades he might
have reached if his appointments in the
regular navy were treated as having been
made at the date of his entry into the
volunteer service. The statute deals with
grade for the length of service and the
additional pay which arises therefrom,
and not with the matter of regular salary,
and has no reference to benefits derived

Retroactive. The statute is retroactive in its operation. "It is, we think, quite impossible for the claimant to 'receive all the benefits . . . in all respects,' which the clause intends him to receive, if the clause should be held to be prospective only in its operation." Hawkins v. U. S., (1854) 19 Ct. Cl. 611. But see McDonald's Case, (1853) 17 Op. Atty.-Gen. 555.

Officers within Act—Officer dead when statute enacted. There is nothing either in the circumstances surrounding the passage of the Act, or the conditions existing at the time, or in the language used in the law itself, to induce Congress to believe that they intended to make the statute applicable to any but officers of the navy living at the time. Rich v. U. S., (1898) 33 Ct. Cl. 191.

Service in the army or navy. One who has served either in the army or the navy, a part of it, is entitled to receive compensation on the basis of services coming within the statute. U. S. v. Dunn, (1887) 120 U. S. 249, 7 S. Ct. 507, 30 U. S. (L. ed.) 667.

Service in the marine corps. One who has served as a drummer in the navy is entitled to credit for the time previously served by him as an enlisted man in the marine corps. U. S. v. Dunn, (1887) 120 U. S. 249, 7 S. Ct. 507, 30 U. S. (L. ed.) 667.

Civil Engineers in the navy prior to the Act of March 2, 1867, R. S. sec. 1413, supra, p. 1079, were officers and were in the naval service within the intent of this statute. Brown v. U. S., (1897) 32 Ct. Cl. 379.

Contract Surgeon. A contract surgeon in the army is not an officer within the meaning of the statute, and is not to be credited with such service in the computation of his longevity pay. The relations of the claimant to the army were dependent upon a contract of the ordinary sense of the term. He had no rank, but as a part of his compensation he was to receive the fuel and quarters of an assistant surgeon of the rank of first lieutenant, and mileage when traveling under orders and not with troops. But these incidents were a part of his compensation, and he received them because they were provided in the contract as a measure of compensation. Byrnes v. U. S., (1891) 26 Ct. Cl. 302.


Paymaster's clerk. A paymaster's clerk is an officer of the navy within the meaning of the statute. "We think the words "officers or enlisted men in the regular or volunteer army or navy, or both," was intended to include all men regularly in service in the army or navy, and that the expression 'officers or enlisted men' is not to be construed distributively as requiring that a person should be an enlisted man or an officer nominated and appointed by the President, or by the head of a department, but that it was meant to include all men in service, either by enlistment or regular appointment in the army or navy, We are of opinion that the word officer is used in that statute in the more general sense which would include a paymaster's clerk; that this was the intention of Congress in its enactment, and that the collocation of the words means this, except in the case of the contract in which it is apparent that they shall receive all the benefits of such actual service in all respects and in the same manner as if said service had been continuous and in the regular navy." U. S. v. Hendee, (1888) 124 U. S. 308, 8 S. Ct. 507, 31 U. S. (L. ed.) 465. See also Johnson v. Sayre, (1895) 158 U. S. 109, 15 S. Ct. 773, 39 U. S. (L. ed.) 914.

Apprentice. A warrant officer in the navy, a carpenter, is not entitled to be credited with the time he served as an apprentice in the navy yard. Such apprentices are not enlisted within the meaning of the statute. "In the absence of any law providing for the enlistment of boys into the navy, to be employed as apprentices in the navy yard, the fact that claimant's connection with the service was founded upon the ordinary contract of apprenticeship, that he took no oath, and was not subject to the performance of any military duty or subject to the restrictions of military life; that he was not amenable to the highest obligations of a soldier—continued service—and that his whole duty was the result of a contract or agreement made by him and his father, founded on the regulations of the navy, we determine as a conclusion of law that he does not come within the Act of March 3, 1863; it is admitted that they 'shall before dismissed.' Davis v. U. S., (1892) 23 Ct. Cl. 21.

The words "since last entering the service" do not imply that the officer to be entitled to the benefit of the statute must have entered the service more than once. Where an officer has entered the service twice, the second entry is the last entry and that entry is to be taken in applying the statute to his case: but where an officer has entered the service but once, that entry is to be taken as the

Lowest grade having graduated pay.—The plaintiff was a commander in the navy of the United States with the following dates of rank and commission: In the volunteer service—acting master's mate, May 7, 1861; acting ensign, Nov. 27, 1862; acting master, Aug. 11, 1864; in the regular service—master, March 12, 1868; lieutenant, Dec. 18, 1868; lieutenant-commander, July 3, 1870; commander, March 6, 1887. He had never received any benefit of longevity pay under this statute. Under the statute of July 16, 1862, in force up to June 30, 1870, the pay of lieutenants was not graduated, but by the Act of July 16, 1870, now R. S. sec. 1666, supra, p. 1171, their pay and that of lieutenant-commanders and other officers therein mentioned was graduated from and after June 30, 1870. It was held that as he was a lieutenant during some days preceding June 30, 1870, when the Act of July 16 took effect, the lowest grade he held having graduated pay was that of lieutenant. U. S. v. Green, (1891) 138 U. S. 293, 11 S. Ct. 299, 34 U. S. (L. ed.) 960.

A lieutenant-commander who has served as an officer in the regular navy from Sept. 21, 1860, by continuous service, held the rank of lieutenant-commander at the time graduated pay was given by statute to officers of that rank. By the provisions of this statute he is to be credited with his actual time of service and is to receive all the benefits of that service in all respects in the same manner as if all of that service had been continuous in the lowest grade having graduated pay held by him since last entering the service. U. S. v. Mullan, (1887) 123 U. S. 156, 8 S. Ct. 79, 31 U. S. (L. ed.) 140.

An officer served in the volunteer navy as acting master from July 15, 1862, to Dec. 16, 1862; as lieutenant from Dec. 16, 1862, to April 29, 1866; as lieutenant-commander from April 29, 1866, to Dec. 8, 1865, when he was honorably discharged; and as acting master from Nov. 19, 1866, to March 12, 1868; in the regular navy, as master, from March 12, 1868, to Dec. 18, 1868; as lieutenant from Dec. 18, 1868, to Feb. 26, 1876; and as lieutenant-commander from Feb. 26, 1876, to March 3, 1883. The annual compensation of master and lieutenant was fixed by statute, and was not, during the period of service as master or when he became a lieutenant in the regular navy, subject to be increased by length of previous service in any particular grade. But by the Act of July 15, 1870, ch. 295, now R. S. sec. 1556, infra, p. 1171, the pay for lieutenants and masters in the navy was graduated according to length of service in such position. When the Act of July 15, 1870, took effect the officer still held the position of lieutenant. But at the passage of the Act of March 3, 1883, he was lieutenant-commander, the pay of which position was likewise graduated, by the Act of 1870, according to length of service. It thus appears that when the rule of graduated pay was applied by the Act of 1870 to lieutenants, masters, and other officers of the navy, he held the position of lieutenant. That was not the lowest grade held by him after "last entering the service"; but it was the lowest held by him after the pay of officers of the navy was graduated by the Act of 1870 according to length of service. U. S. v. Rockwell, (1887) 120 U. S. 60, 7 S. Ct. 567, 30 U. S. (L. ed.) 561.

Actual time.—The provision that officers of the navy shall be credited with the actual time they may have served, excludes constructive service, and an officer dismissed and reappointed is not in actual service during the interval between his dismissal and reappointment within the intent of the statute, though a private Act previously passed provided that his service "shall be considered in every respect as though he has received a warrant" as of a time anterior to the date of his reappointment. Laws v. U. S., (1891) 27 Ct. Cl. 69. See also (1894) 21 Op. Atty.-Gen. 163.

Credit for former service.—The claimant was appointed acting master's mate Aug. 20, 1864, and served as such six years, seven months, and eight days. Prior to this time he had served in some inferior position in the navy about two years. Under a private Act he was duly appointed and commissioned a master on the retired list of the navy on March 28, 1871. It was held that the claimant was entitled to have his former service credited to him as master. Bradbury v. U. S., (1885) 20 Ct. Cl. 187.

This statute does not require or authorize a restatement of the pay accounts of an officer of the navy who served in the regular or volunteer army or navy, so as to give him credit in the grade held by him, prior to its passage, for the time he served in the army or navy before reaching that grade. Congress only intended to give him credit in the grade held by him, after these Acts took effect for all prior services, whether as an enlisted man or officer, counting such services, however separated by distinct periods of time, as if they had been continuous and in the regular navy in the lowest grade having graduated pay held by him since last entering the service. U. S. v. Foster, (1888) 128 U. S. 435, 9 S. Ct. 116, 32 U. S. (L. ed.) 486.

"The claimant sues for a higher rate of pay as an assistant paymaster in the navy than has been allowed him, and bases his claim on service in the volunteer and regular army of the United States for
five years, eight months, and eleven days before he was appointed into the navy, for which he has never been credited in the computation and allowance of his pay as assistant paymaster. ... When the claimant entered the navy, the pay of an assistant paymaster was, and continued to be until July 15, 1870: For the first five years after date of commission, at sea, $1,500; on other duty, $1,000; on leave or waiting orders, $800. After five years from date of commission, at sea, $1,500; on other duty, $1,200; on leave or waiting orders, $1,000. Since July 15, 1870, the pay of that officer has been: For the first five years after date of appointment, at sea, $1,700; on shore duty, $1,400; on leave or waiting orders, $1,000. After five years from such date, at sea, $1,900; on shore duty, $1,600; on leave or waiting orders, $1,200. When the claimant was appointed assistant paymaster, his previous military service entitled him, while he held that office, to receive the rate of pay allowed by law after five years from the date of his appointment." Jordan v. U. S., (1884) 19 Ct. Cl. 621.

On June 26, 1861, the claimant was appointed a master's mate in the volunteer navy of the United States and served in that capacity until May 25, 1862, when he was appointed an acting master, in which capacity he served until Nov. 29, 1866, when he was honorably discharged. On Feb. 11, 1871, he was warranted a boatswain in the regular navy and has ever since held that position. It was held that he must be considered as having, when appointed boatswain, already served through the first triennial period of graduated pay (see R. S. sec. 1556, infra, p. 1171), and as being entitled, from the date of his warrant, to the pay of the second period, and, in each succeeding three-year period, to the pay of his appointment, to the pay of the grade next above that. Hawkins v. U. S., (1884) 19 Ct. Cl. 611.

Credit for volunteer service.—The further proviso is limited to merely forbidding the allowance of additional pay for the time of volunteer service; it seems to indicate that the officer should, in the regular navy, have whatsoever benefit in the matter of pay would legitimately result in giving him credit for his voluntary service. Hawkins v. U. S., (1884) 19 Ct. Cl. 611.

Pay for retired officers.—The laws governing the pay of retired officers are not changed by this statute. An officer in the navy who was retired in the first five years of service from a rank having longevity pay, but who was continued on actual duty until he passed into his second five years of service, is not entitled, under the statute, to a greater rate of pay after active service ceases than seventy-five per centum of the pay of the grade or rank which he held at the time of retirement. Roget v. U. S., (1895) 148 U. S. 167, 13 S. Ct. 565, 37 U. S. (L. ed.) 493. See also Thorne v. U. S., (1885) 113 U. S. 310, 5 S. Ct. 491, 28 U. S. (L. ed.) 999.

Effect of resignation.—An officer of the navy who resigns one office the day before his appointment to a higher one, though in a different branch of the service, is only entitled to pay as of the lowest grade having graduated pay held by him since he entered the service. The habitual requirement of such a resignation by the Navy Department as a preliminary to a new appointment throws it beyond doubt that the actual service from the time of first entering the navy is for a single and continuous period within the meaning of the statute. U. S. v. Alger, (1894) 152 U. S. 384, 14 S. Ct. 635, 38 U. S. (L. ed.) 485, reaffirming on petition for rehearing, (1894) 151 U. S. 362, 14 S. Ct. 346, 38 U. S. (L. ed.) 192, and U. S. v. Stahl, (1894) 151 U. S. 366, 14 S. Ct. 347, 38 U. S. (L. ed.) 194.

The percentage of their pay allowed to officers for commutation of all allowances except for mileage and traveling expenses under orders constitutes no part of the pay proper of officers, and was designed to meet certain expenses that would necessarily be incurred in the discharge of their duties, the amount to be ascertained by reference to the amount statedly received by the officer as statutory pay at the time the general order allowing it was in force, and is not to be increased by the additional compensation allowed by this statute. U. S. v. Allen, (1887) 123 U. S. 345, 8 S. Ct. 163, 31 U. S. (L. ed.) 147. See also U. S. v. Philbrick, (1887) 120 U. S. 52, 7 S. Ct. 413, 30 U. S. (L. ed.) 559.

SEC. 2. [Shore duty, when allowed, and how ordered.] That hereafter no officer of the Navy shall be employed on any shore duty, except in cases specially provided by law, unless the Secretary of the Navy shall determine that the employment of an officer on such duty is required by the public interests, and he shall so state in the order of employment, and also the duration of such service, beyond which time it shall not continue. [32 Stat. L. 481.]

See the note to the preceding paragraph of the text. This section was modified by the following paragraph of the text. See also the provision of the Act of May 28, 1915, ch. 83, infra, p. 1160.
[Shore duty — contents of order.] • • • And the provisions of section two of the naval appropriation act approved March third, eighteen hundred and eighty-three, shall be so modified that hereafter orders of the Secretary of the Navy employing officers on shore duty shall state that such employment is required by the public interests, but need not state the duration of such service. [27 Stat. L. 245.]

This is from the Naval Appropriation Act of July 19, 1892, ch. 206. Section 2 of the Act of March 3, 1883, ch. 97, modified by this section, is given in the preceding paragraph of the text.

[Sec. 1.] [Benefit of previous service to officers reappointed.] • • • That all officers who have been or may be appointed to any corps of the Navy or to the Marine Corps after service in a different corps of the Navy or of the Marine Corps shall have all the benefits of their previous service in the same manner as if said appointments were a reentry into the Navy or into the Marine Corps: [29 Stat. L. 351.]

This and the following paragraph of the text are from the Naval Appropriation Act of June 10, 1896, ch. 399. A provision similar to that of the text, with the exception of its application to the Marine Corps, appeared in the Act of June 26, 1894, ch. 165, 28 Stat. L. 123.

Credit for time of service as cadet and at sea.—Credit should be given a person seeking promotion in the marine corps, as well as in the navy proper, for the time of service of such person as a cadet at the naval academy and at sea anterior to commission, in making the promotions provided for by the Act of March 3, 1899. (1899) 22 Op. Atty.-Gen. 377.

[Surgeons specially appointed.] • • • That such surgeons in the Navy not in line of promotion as may have been appointed to that position in accordance with a special act of Congress for meritorious services during yellow fever epidemics shall have all the benefits of their previous service in the same manner as if said appointments were a reentry into the Navy. [29 Stat. L. 361.]

See the note to the preceding paragraph of the text.

[Service as midshipman or cadet — credit.] • • • Hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be appointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps. [37 Stat. L. 891.]

This is from the Naval Appropriation Act of March 4, 1913, ch. 148.

[Officers performing engineering duty — officers of construction corps — eligibility for any shore duty.] Hereafter officers who now perform engineering duty on shore only and officers of the Construction Corps shall
VI. RETIRED OFFICERS AND MEN OF THE NAVY

Sec. 1443. [After forty years' service.] When any officer of the Navy has been forty years in the service of the United States he may be retired from active service by the President upon his own application. [R. S.]


Sections 1443-1445 constitute chapter 3 of title 15 of the Revised Statutes, "Retired Officers of the Navy."

Retirement after thirty years of active service was authorized by the Act of May 13, 1908, ch. 166, supra, p. 1069.

For provisions relating to the detailed of retired officers as teachers or professors in schools and colleges, see EDUCATION, vol. 3, p. 85.

Intermittent service.—An officer entered the navy Sept. 20, 1854; Feb. 8, 1865, was dismissed from the service; pursuant to a joint resolution of Congress was re-appointed lieutenant-commander by the President as of March 1, 1871; and, having applied Aug. 22, 1894, to be put on the retired list, was notified by an order of the acting secretary of the navy of Sept. 13, 1894, that he should regard himself as detached from duty on Sept. 20, and from that date would be transferred to the retired list in accordance with the provisions of this section. The attorney-general said that the officer had not been in the service of the United States for forty years, and that the period between Feb. 8, 1889, and March 1, 1871, when he was not in fact in the naval service, could not be counted as part of the forty years. Assuming that there had been no appointment to the place on the active list supposed to be vacated by the attempt to put him on the retired list, he must be regarded as still on the active list of the navy. (1894) 21 Op. Atty.-Gen. 103.

Civil engineers are officers of the navy entitled to be retired under the provisions of this section. The words "any officer of the navy" embrace by their generality officers in the several staff corps of the navy as well as officers in the line. (1881) 17 Op. Atty.-Gen. 126.

Sec. 1444. [After sixty-two years of age.] When any officer below the rank of Vice-Admiral is sixty-two years old, he shall, except in the case provided in the next section, be retired by the President from active service. [R. S.]


Application—"Any officer below the rank of vice-admiral" embraces in its generality officers of the general staff corps of the navy as well as officers of the line. (1881) 17 Op. Atty.-Gen. 126.


Sec. 1445. [Officers of certain ranks to be retired only for disability.] The two preceding sections shall not apply to any lieutenant-commander, lieutenant, master, ensign, midshipman, passed assistant surgeon, passed assistant paymaster, first assistant engineer, assistant surgeon, assistant
paymaster, or second assistant engineer; and such officers shall not be placed upon the retired list, except on account of physical or mental disability. [R. S.]

The titles of master and midshipman were changed to lieutenant and ensign respectively by the Act of March 3, 1883, ch. 97, § 1, supra, p. 1087.
The titles of first and second assistant engineers were changed to passed assistant and assistant engineers respectively by the Act of Feb. 24, 1874, ch. 35, § 1, 18 Stat. L. 17, and the officers of the engineer corps were transferred to the line by the Act of March 3, 1899, ch. 413, § 1, infra, p. 1091.
See further the Act of March 3, 1909, ch. 413, § 8, infra, p. 1126, and the notes thereto.

Sec. 1446. [Officers who have received a vote of thanks.] Officers on the active list, not below the grade of commander, who have, upon the recommendation of the President, received by name, during the war for the suppression of the rebellion, a vote of thanks of Congress for distinguished service, shall not be retired, except for cause, until they have been fifty-five years in the service of the United States. [R. S.]


From date of warrant.—In (1869) 13 Op. Atty.-Gen. 33, the attorney-general advised that a decision of a previous administration that the fifty years of service in a particular case should date from the time a warrant as midshipman was issued, and not from the time the officer first reported for duty, received orders from the Navy Department, and became entitled to pay as a midshipman, should not be disturbed.

Sec. 1447. [Officers rejected from promotion.] When the case of any officer has been acted upon by a board of naval surgeons and an examining board for promotion, as provided in Chapter Four of this Title, and he shall not have been recommended for promotion by both of the said boards, he shall be placed upon the retired list. [R. S.]

Act of April 21, 1864, ch. 63, 13 Stat. L. 53.

"Chapter Four of this Title" comprised R. S. secs. 1466-1510, given under subdivision VI of this title, infra, p. 1132.
Provisions relating to the discharge of officers unfit for promotion were made by the Act of Aug. 5, 1882, ch. 391.

There must be action by both boards, and both of them must fail to recommend an officer for promotion, before he is placed upon the retired list. (1864) 11 Op. Atty.-Gen. 106. See also Meade’s Case, (1867 12 Op. Atty.-Gen. 347.

Sec. 1448. [Retiring-board.] Whenever any officer, on being ordered to perform the duties appropriate to his commission, reports himself unable to comply with such order, or whenever, in the judgment of the President, an officer is incapacitated to perform the duties of his office, the President, at his discretion, may direct the Secretary of the Navy to refer the case of such officer to a board of not more than nine nor less than five commissioned officers, two-fifths of whom shall be members of the Medical Corps of the Navy. Said board, except the officers taken from the Medical Corps, shall be composed, as far as may be, of seniors in rank to the officer whose disability is inquired of. [R. S.]


"Any officer" embraces by its generality navy as well as officers in the line. (1881) 17 Op. Atty.-Gen. 126.
Warrant officers.—This section and those following, to and including R. S. sec. 1455, infra, apply to warrant officers, and they may be retired. Brown v. U. S., (1885) 113 U. S. 568, 5 S. Ct. 848, 28 U. S. (L. ed.) 1079.

Officers already on the retired list do not come within the provisions of this and the following sections. The retiring board is not authorized to inquire into the nature of the disabilities of such officers, but only into cases of officers on the active list which are referred thereto for examination. Thomley's Case, (1881) 17 Op. Atty.-Gen. 178.

Sec. 1449. [Powers and duties.] Said retiring-board shall be authorized to inquire into and determine the facts touching the nature and occasion of the disability of any such officer, and shall have such powers of a court-martial and of a court of inquiry as may be necessary. [R. S.]


Sec. 1450. [Oath of members.] The members of said board shall be sworn in each case to discharge their duties honestly and impartially. [R. S.]


Sec. 1451. [Findings.] When said retiring-board finds an officer incapacitated for active service, it shall also find and report the cause which, in its judgment, produced his incapacity, and whether such cause is an incident of the service. [R. S.]


Sec. 1452. [Revision by the President.] A record of the proceedings and decision of the board in each case shall be transmitted to the Secretary of the Navy, and shall be laid by him before the President for his approval or disapproval, or orders in the case. [R. S.]


Revision by Secretary of Navy.—The Secretary of the Navy has not power to revise the finding of the board and reverse the approval and action of the President thereon. Burchard v. U. S., (1884) 19 Ct. Cl. 137.

Subsequent reconsideration.—Where a naval retiring board, convened to inquire into the nature and cause of the disability of an officer, has once finished its work, rendered a complete judgment in the case, and adjourned, a subsequent reconsideration by the board, of its judgment, unless authorized or directed by proper authority, can have no legal effect. Rodney's Case, (1878) 16 Op. Atty.-Gen. 104.

Sec. 1453. [Disability by an incident of the service.] When a retiring-board finds that an officer is incapacitated for active service, and that his incapacity is the result of an incident of the service, such officer shall, if said decision is approved by the President, be retired from active service with retired pay, as allowed by Chapter Eight of this Title. [R. S.]


"Chapter Eight of this Title" mentioned in the text consisted of R. S. secs. 1556-1695, which are given, in so far as they are still in force, in subdivision X of this title, infra, p. 1171.

Application of section.—Officers on retired list.—Officers already on the retired list do not come within the provisions of this section. The retiring board is authorized to inquire into the disabilities of officers on the active list only. Thomley's Case, (1881) 17 Op. Atty.-Gen. 178.

Paymaster's clerk.—A paymaster's clerk, incapacitated for active service, and whose incapacity is the result of an incident of the service, is entitled to be retired under the provisions of this section. (1910) 28 Op. Atty.-Gen. 417.
**Sec. 1454. [Disability by other causes.]** When said board finds that an officer is incapacitated for active service and that his incapacity is not the result of any incident of the service, such officer shall, if said decision is approved by the President, be retired from active service on furlough-pay, or wholly retired from service with one year's pay, as the President may determine. [R. S.]


**Revision by Secretary of Navy.—** The Secretary of the Navy has not power to revise the finding of the board and reverse the approval and action of the President thereon. Burchard v. U. S., (1884) 19 Ct. Cl. 137.

"Leave" or "waiting-orders" pay.— Where a naval board finds an officer unfit for active service the legal effect of the finding is to put him "on leave or waiting orders," and the one year's pay to which he is entitled under this section is "leave" or "waiting-orders" pay. Hotchkiss v. U. S., (1888) 24 Ct. Cl. 18.

**Marine corps.—** The retirement of officers of the marine corps is not governed by this section, as different legislation is provided for the officers of that corps. See R. S. secs. 1622 and 1623, infra, p. 1222. Welles's Case, (1876) 15 Op. Atty.-Gen. 442.

**Sec. 1455. [Not to be retired without a hearing.]** No officer of the Navy shall be retired from active service, or wholly retired from the service, without a full and fair hearing before such Navy retiring-board, if he shall demand it, except in cases where he may be retired by the President at his own request, or on account of age or length of service, or on account of his failure to be recommended by an examining board for promotion. [R. S.]


**Sec. 1456. [Not to be retired for misconduct.]** No officer of the Navy shall be placed on the retired list because of misconduct; but he shall be brought to trial by court-martial for such misconduct. [R. S.]


Provisions relating to the discharge of an officer found unfit for promotion, where the unfitness was caused by his own misconduct, were made by the Act of Aug. 5, 1882, ch. 291, § 1, infra, p. 1125.

**Peculiar mental temperament.—** A finding of a retiring board "That said temperament of Paymaster Rodney, according to the evidence laid before the board, develops itself in an entire disregard of the laws, regulations, customs, and proprieties of the service, and has been manifested persistently while said Rodney was attached to the North Atlantic fleet, in language and conduct to the subversion of good order and discipline, and proceeds, in the opinion of the board, in part from fanaticism and in part from groundless belief that he is a victim of persecution," was held not to ground the incapacity of the officer for active service upon misconduct, but upon the peculiarity of his mental temperament. Rodney's Case, (1878) 15 Op. Atty.-Gen. 446.

**Sec. 1457. [Privileges and liabilities.]** Officers retired from active service shall be placed on the retired list of officers of the grades to which they belonged respectively at the time of their retirement, and continue to be borne on the Navy Register. They shall be entitled to wear the uniform of their respective grades, and shall be subject to the rules and articles for the government of the Navy and to trial by general court-martial. The names of officers wholly retired from the service shall be omitted from the Navy Register. [R. S.]


For provisions relating to the pay of retired officers see subdivision X of this title, infra, p. 1171.
For provisions relating to the rank of retired officers see subdivision VII of this title, infra, p. 1133.
For provisions relating to the right of retired officers to hold other office, see Public
Officers and Employees.

Grade defined.—The grade referred to in this section is that of the actual rank held by an officer and not that of the relative rank incidental to the temporary occupation of another and distinct office.

Pay on retirement.—A retired officer is a salaried officer, and when serving on a board as to which a statute prescribes for members who are “not salaried officers” a salary, and for members who are salaried officers “their actual necessary expenses,” he is entitled to the latter and not to the former. Franklin v. U. S., (1893) 29 Ct. Cl. 6.

The pay for captain, retired under the provisions of this section is that of the lower grade of rear admiral, equivalent to that of a brigadier-general in the army. Gibson v. U. S. (1904) 194 U. S. 182, 24 S. Ct. 613, 48 U. S. (L. ed.) 926.

Where one while holding a commission as captain in the navy, was appointed to the office of chief of the bureau of navigation, with the relative rank of commodore, in case of his retirement by reason of a disability incident to the service, or on his application, during his incumbency of that office, and while he is borne on the navy register as a captain, he should be placed on the retired list with the rank of captain, and on being thus retired he is entitled to 75 per centum of the seas-pay of officers of that rank. (1881) 17 Op. Atty.-Gen. 184; (1909) 27 Op. Atty.-Gen. 376.

Review by court.—Where a naval officer was retired by the President with the grade of captain and he believed himself entitled to retirement with the rank of rear admiral and sought to require the Secretary of the Navy, through a writ of mandamus, to place his name upon the retired list with the rank of rear admiral, it was held that a writ of error to the Supreme Court would not be allowed to review a judgment refusing the writ of mandamus. U. S. v. Myer, (1912) 39 App. Cas. (D. C.) 370, following U. S. v. Fisher, 36 App. Cas. (D. C.) 46.

Sec. 1458. [Vacancies by retirement.] The next officer in rank shall be promoted to the place of retired officer, according to the established rules of the service; and the same rule of promotion shall be applied successively to the vacancies consequent upon the retirement of an officer. [R. S.]


When a vacancy is filled by nomination to the Senate and confirmation by that body, the new appointee becomes one of the limited number of officers on the active list, and the one whom he supersedes becomes one of the officers on the retired list. Thompson v. U. S., (1893) 18 Ct. Cl. 604.

As to the effect of restoring the name of an officer to the list, from which it has been illegally removed, as regards others in their right to retain the relative positions to which they have been respectively advanced, see Caswell’s Case, (1851) 17 Op. Atty.-Gen. 21.

Sec. 1459. [Withdrawn from command.] Officers on the retired list shall be withdrawn from command, except in the case provided in sections fourteen hundred and sixty-three and fourteen hundred and sixty-four, and from the line of promotion on the active list. [R. S.]


R. S. secs. 1463, 1464, mentioned in the text, are given infra, p. 1123.

R. S. sec. 1460. This section was as follows:

"Sec. 1480. There may be allowed upon the retired list of the Navy nine rear-admirals by promotion on that list: Provided, That this section shall not prevent the Secretary of the Navy from promoting to the grade of rear-admiral on the retired list, in addition to the number herein provided, those commodores who have commanded squadrons by order of the Secretary of the Navy, or who have performed other highly meritorious service, or who, being at the outbreak of the late war of the rebellion disfranchised of any state which engaged in such rebellion, exhibited marked fidelity to the Union in adhering to the flag of the United States." Act of July 16, 1865, ch. 188, 12 Stat. L. 585; Act of July 25, 1866, ch. 231, 14 Stat. L. 222.
The words beginning, "or who, being," etc., were added to the section by Act of Aug. 15, 1878, ch. 302, 19 Stat. L. 204. It was superseded by the provisions of Act of Aug. 5, 1882, ch. 391, set forth infra, p. 1125, providing that "hereafter there shall be no promotion or increase of pay."

This section was construed in (1871)

**R. S. sec. 1461.** This section was as follows:

"Sec. 1461. Officers on the retired list of the Navy shall be entitled to promotion as their several dates upon the active list are promoted: Provided, That no promotion shall be made to the grade of rear-admiral upon the retired list while there shall be in that grade nine rear-admirals by promotion on that list, exclusive of those so promoted by reason of having commanded squadrons by order of the Secretary of the Navy, or of having performed other highly meritorious service. No promotion to the grade of rear-admiral on the retired list while there shall be in that grade the full number allowed by law." Act of Jun. 16, 1857, ch. 12, 11 Stat. L. 154; Act of March 2, 1867, ch. 174, 14 Stat. L. 517.

It was superseded by the provisions of Act of Aug. 5, 1882, ch. 391, set forth infra, p. 1125, which provides that "hereafter there shall be no promotion or increase of pay."

This section was construed in (1881)

**Sec. 1462. [Active duty.]** No officer on the retired list of the Navy shall be employed on active duty except in time of war. [R. S.]


See the second paragraph of the Act of Aug. 22, 1912, ch. 336, infra, p. 1131.

**Effect of section.**—This section states the general rule of statutes as to duty and pay of naval officers. White v. U. S., (1916) 239 U. S. 608, 36 S. Ct. 224, 60 U. S. (L. ed.) 464, affirming (1914) 49 Ct. Cl. 702.

**Active duty.**—Eligibility of retired officers to hold office under the United States civil service commission, see (1912) 29 Op. Atty.-Gen. 503.

**Sec. 1463. [Assigned to command of squadrons and ships.]** In time of war the President, by and with the advice and consent of the Senate, may detail officers on the retired list for the command of squadrons and single ships, when he believes that the good of the service requires that they shall be so placed in command. [R. S.]


**Sec. 1464. [Commanders of squadrons, from what grades selected.]** In making said details the President may select any officer not below the grade of commander and assign him to the command of a squadron, with the rank and title of "flag-officer;" and any officer so assigned shall have the same authority and receive the same obedience from the commanders of ships in his squadron holding commissions of an older date than his that he would be entitled to receive if his commission were the oldest. [R. S.]


**Sec. 1465. [When restored to active list.]** Retired officers so detailed for the command of squadrons and single ships may be restored to the active list, if, upon the recommendation of the President, they shall receive a vote
of thanks of Congress for their services and gallantry in action against the enemy, and not otherwise. [R. S.]


Sec. 1473. [Retired from position of chief of Bureau.] Officers who have been or who shall be retired from the position of chiefs of the Bureau of Medicine and Surgery, of Provisions and Clothing, of Steam Engineering, or of Construction and Repair, by reason of age or length of service, shall have the relative rank of commodore. [R. S.]


The bureau of provisions and clothing mentioned in the text was designated the bureau of supplies and accounts by the Act of July 19, 1892, ch. 206, § 1, supra, p. 1117.

By R. S. sec. 1471, infra, p. 1135, the chiefs of the bureaus mentioned in the text were to have the relative rank of commodore. However, the grade of commodore was not included in the active list of the line by the Navy Personnel Act of March 3, 1899, ch. 413, § 7, supra, p. 1094, which provided that chiefs of bureau should have the rank of rear-admiral.

The words "the relative rank of," wherever they appeared in the Revised Statutes, were changed to "the rank of" by the said Act of March 3, 1899, ch. 413, § 7, supra, p. 1094.

Sec. 1481. [When retired for age or length of service.] Officers of the Medical, Pay, and Engineer Corps, chaplains, professors of mathematics, and constructors, who shall have served faithfully for forty-five years, shall, when retired, have the relative rank of commodore; and officers of these several corps who have been or shall be retired at the age of sixty-two years, before having served for forty-five years, but who shall have served faithfully until retired, shall, on the completion of forty years from their entry into the service, have the relative rank of commodore. [R. S.]


The officers of the Engineer Corps were transferred to the line of the navy by the Act of March 3, 1899, ch. 413, §§ 1–7, supra, pp. 1091–1094.

As to the grade of commodore, and the words "relative rank," see the note to the preceding R. S. sec. 1473.

Sec. 1482. [Retired for causes incident to service.] Staff-officers, who have been or shall be retired for causes incident to the service before arriving at sixty-two years of age, shall have the same rank on the retired list as pertained to their position on the active list. [R. S.]


Sec. 1589. [Rear-admirals.] Rear-admirals on the retired list of the Navy, who were retired as captains when the highest grade in the Navy was captain, at the age of sixty-two years, or after forty-five years' service, and who, after their retirement, were promoted to the grade of rear-admiral, and performed the duties of that grade in time of war, shall be considered as having been retired as rear-admirals. [R. S.]


Effect of section.—By this section retired officers of the class described, who were promoted to the grade of rear-admiral, are to be considered as retired as rear-admirals, and the effect of this provision is to entitle them to the retired pay of that grade. But other officers thus promoted fall under the operation of R. S. sec. 1591, infra, p. 1189. (1883) 17 Op. Atty.-Gen. 495.
[Sec. 1.] [Promotions and increase of pay of retired officers prohibited.] • • • Hereafter there shall be no promotion or increase of pay in the retired list of the Navy but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired. [22 Stat. L. 286.]

This and the following paragraph of the text are from the Naval Appropriation Act of Aug. 5, 1882, ch. 391.

This paragraph superseded R. S. secs. 1480 and 1461, noted supra, p. 1122.

No increase in rank or pay on retired list.—This provision prevents either rank or pay of officers on the retired list from being increased in any way after such officers shall have been placed thereupon, and a transfer from the furlough-pay list to the retired list under R. S. sec. 1394, infra, p. 1190, can have no such effect. (1885) 10 Op. Atty.-Gen. 96. This statute does not warrant the implication that a retired officer was theretofore entitled under the law to an increase of pay upon promotion on the retired list. (1893) 17 Op. Atty.-Gen. 495.

[Discharge of officers unfit for promotion.] • • • That whenever on an inquiry had pursuant to law, concerning the fitness of an officer of the Navy for promotion, it shall appear that such officer is unfit to perform at sea the duties of the place to which it is proposed to promote him, by reason of drunkenness, or from any cause arising from his own misconduct, and having been informed of and heard upon the charges against him, he shall not be placed on the retired-list of the Navy, and if the finding of the board be approved by the President, he shall be discharged with not more than one year's pay. [22 Stat. L. 286.]

See the note to the preceding paragraph of the text.
See further R. S. sec. 1447, supra, p. 1119.

Power of President.—Power is given to the President to discharge an officer of the navy under this statute. Jouett v. U. S., (1883) 23 Ct. Cl. 255.

An act relating to the pay and retirement of mates in the United States Navy


[Retirement of mates—pay of mates.] That the law regulating the retirement of warrant officers in the Navy shall be construed to apply to the twenty-eight officers now serving as mates in the Navy, and the said mates shall be entitled to receive annual pay at the rates following: When at sea, one thousand two hundred dollars; on shore duty, nine hundred dollars; on leave or waiting orders, seven hundred dollars: Provided, however, That nothing herein contained shall be so construed as to authorize any increase of pay for any time prior to the passage of this Act. [28 Stat. L. 212.]

Retirement of warrant machinists, see the Act of March 3, 1899, ch. 413, sec. 15, supra, p. 1095.

Status of mates on retired list.—Mates whose names are borne on the retired list of officers of the navy in accordance with this act, are officers of the navy, but they are neither commissioned nor warrant officers, although with respect to the law regulating retirements they are placed by the Act of June 29, 1906 (given infra, div. VI, p. 1129), upon the same footing as warrant officers. (1907) 28 Op. Atty.-Gen. 433.

Although commissioned officers of the
navy are appointed by the President and with the advice and consent of the Senate, warrant officers by the President alone, and mates by the heads of departments, all are alike officers of the United States, and in accordance with this Act and the Act of June 29, 1906 (infra, div. VI, p. 1129) all are alike entitled to the benefits of the advance provided for by the last mentioned Act wherever otherwise qualified. (1907: 28 Op. Atty.-Gen. 433. While the effort of such advancement may not be to place the mates in a different grade they obtain the rank and retired pay belonging to the next higher grade in that service, being that of the lowest grade of warrant officers. (1907) 28 Op. Atty.-Gen. 433.

SEC. 8. [Applicants for voluntary retirement — average vacancies.] That officers of the line in the grades of captain, commander, and lieutenant-commander may, by official application to the Secretary of the Navy, have their names placed on a list which shall be known as the list of “Applicants for voluntary retirement,” and when at the end of any fiscal year the average vacancies for the fiscal years subsequent to the passage of this Act above the grade of commander have been less than thirteen, above the grade of lieutenant-commander less than twenty, above the grade of lieutenant less than twenty-nine, and above the grade of lieutenant (junior grade) less than forty, the President may, in the order of the rank of the applicants, place a sufficient number on the retired list with the rank and three-fourths the sea pay of the next higher grade, as now existing, including the grade of commodore, to cause the aforesaid vacancies for the fiscal year then being considered. [30 Stat. L. 1006.]

The foregoing sec. 8 and the following secs. 11 and 17 are from the Navy Personnel Act of March 3, 1899, ch. 412. See the notes to sec. 1 of this Act, supra, p. 1091.

So much of this section as reads, “with the rank and three-fourths the sea pay of the next higher grade, as now existing, including the grade of commodore,” was superseded by the Act of Aug. 22, 1912, ch. 355, supra, p. 1100, which provided that any officer retired under this section should be retired “with the rank and three-fourths the sea pay of the grade from which he is retired.”

Retirements under sections 8 and 9.— Under section 8 the retirements are to be made from the list of voluntary applicants and for the fiscal year then being considered. If the number of vacancies created by the retirement of voluntary applicants, then, under section 9 (noted infra, p. 1127), the board authorized to be appointed by the Secretary of the Navy is to convene on or about the last day of June of the current year, and from the records furnished enough retirements are to be arbitrarily made by this board to complete the number of vacancies for the fiscal year. In the case of the retirement of those who have voluntarily applied, the retirement takes effect on the last day of the fiscal year, which is June 30. The retirements under section 9 are not upon voluntary application. They are made by the board, and the officers to be retired are selected after an examination of their records as furnished by the navy department. It is therefore, provided, that this board shall meet on or about the 1st of June, evidently in order that the report of the board may be made to the President so that the retirements made in this section can also take effect at the end of the fiscal year. This interpretation results in making all the vacancies created under the provisions of the two sections, 8 and 9, of the act take effect on the last day of the fiscal year, and the promotions made to fill such vacancies go into effect on the day immediately following the last day of the fiscal year, viz., on the first day of July of the current year. (1899) 22 Op. Atty.-Gen. 657. See (1899) 22 Op. Atty.-Gen. 380, that the retirements applied to the fiscal year ending June 30, 1899, as well as to future years.

The voluntary retirement of officers of the navy under section 8 and the compulsory retirement of such officers under section 9, are to be made in the order of the rank of the applicants, regardless of the grade they are in. (1906) 25 Op. Atty.-Gen. 452.

Vacancies caused by voluntary retirement.— Vacancies caused by the retirement of officers of the navy upon their own application, after thirty years’ service, in accordance with the provisions contained in the Naval Appropriation Act of May
Vacancies caused by promotion to extra numbers should not be counted in determining the average vacancies enumerated in this section. (1908) 25 Op. Atty.-Gen. 452.

Sec. 9 of the Act was as follows:

"Sec. 9. [Board to determine retirements — number of retirements — promotions to fill vacancies — rank and pay of retired officer.] That should it be found at the end of any fiscal year that the retirements pursuant to the provisions of law now in force, the voluntary retirements provided for in this Act, and casualties are not sufficient to cause the average vacancies enumerated in section eight of this Act, the Secretary of the Navy shall, on or about the first day of June, convene a board of five rear-admirals, and shall place at its disposal the service and medical records on file in the Navy Department of all the officers in the grades of captain, commander, lieutenant-commander and lieutenant. The board shall then select, as soon as practicable after the first day of July, a sufficient number of officers from the before-mentioned grades, as constituted on the thirtieth day of June of that year, to cause the average vacancies enumerated in section eight of this Act. Each member of said board shall swear, or affirm, that he will, without prejudice or partiality, and having in view solely the special fitness of officers and the efficiency of the naval service, perform the duties imposed upon him by this Act. Its finding, which shall be in writing, signed by all the members, not less than four governing, shall be transmitted to the President, who shall thereupon, by order, make the transfers of such officers to the retired list as are selected by the board: Provided, That not more than five captains, four commanders, four lieutenant-commanders, and two lieutenants are so retired in any one year. The promotions to fill the vacancies thus created shall date from the thirtieth day of June of the current year: And provided further, That any officer retired under the provisions of this section shall be retired with the rank and three-fourths of the sea pay of the next higher grade, including the grade of commodore, which is retained on the retired list for this purpose." [30 Stat. L. 1006.]

It was repealed by a provision of the Act of March 3, 1915, ch. 83, 38 Stat. L. 938, other provisions of which Act are given, supra, p. 1106.

Retirements.—See the notes under section 8, supra, p. 1126.

The word "casualties" in this section refers, as ordinarily understood, to death, resignation, or dismissal, and does not include promotion. (1905) 25 Op. Atty.-Gen. 452.

Sec. 11. [Retired rank and pay of civil war veterans.] That any officer of the Navy, with a creditable record, who served during the civil war, shall, when retired, be retired with the rank and three-fourths the sea pay of the next higher grade. [30 Stat. L. 1006.]

See the note to the preceding section 8 of this Act.

Further provisions as to the retirement of officers who served during the civil war were made by the Act of June 29, 1906, ch. 3590, supra, p. 1098, and the Act of March 3, 1909, ch. 255, supra, p. 1099.

Purpose of statute.—The purpose of the statute was to bestow a suitable benefit upon officers who actually served in the civil war, or at least who voluntarily offered and obligated themselves to encounter its hardships and dangers. Jasper v. U. S., (1903) 38 Ct. Cl. 292.

The purpose of this section, when applied to mates, was not to retire them with three-fourths of the lowest sea pay given to a warrant officer, but to give them three-fourths of the varying sea pay of such officers, upon the same conditions, with conditions include length of previous service. (1908) 26 Op. Atty.-Gen. 590.

Pay and medical directors.—Under this section the pay director and the medical director will be retired with the rank and three-fourths the sea pay of the next higher rank, which is that of a rear-admiral, although this will result in a higher relative rank than that to which they are entitled in the active service. (1899) 22 Op. Atty.-Gen. 433.

Cadet midshipmen.—A cadet midshipman pursuing his studies at the naval academy during the civil war was held to be within the intent of this statute, "an officer of the navy, with a creditable record, who served during the civil war." Jasper v. U. S., (1904) 40 Ct. Cl. 70 overruling the former decision in the same case, (1903) 38 Ct. Cl. 202; Moser v. U. S. (1907) 42 Ct. Cl. 86.

But in Jasper v. U. S., (1908) 43 Ct. Cl. 368, the court's attention was called to
the Act of June 29, 1906, ch. 3560 (Retired rank and pay of civil war veterans), infra, div. VI, p. 1129. The court said: "In neither of the cases (Jasper v. U. S., (1904) 40 Ct. Cl. 76; Moser v. U. S., (1907) 42 Ct. Cl. 86), when under consideration, was the court's attention called to that statute and no reference was made thereto. But for this statute the court should feel constrained to adhere to its decision in this and the Moser cases, as under the rulings of the Supreme Court as well as of this court we think it may now be considered as fairly well settled that cadet midshipmen pursuing their studies at the naval academy during and since the civil war, were and are officers of the navy, and as such entitled, for the purpose both of longevity pay and for service retirement, to credit therefor. U. S. v. Baker, [1881], 125 U. S. 646; [6 S. Ct. 1022, 31 U. S. (L. ed.) 824]; U. S. v. Cook, [1888], 128 U. S. 254; [9 S. Ct. 108, 32 U. S. (L. ed.) 461]. * * * * The decisive words 'otherwise than as a cadet' are not in section 11 of the Act of 1899. Inasmuch, however, as cadets are officers, and by law made a part of the navy, we construed the section as including their time at the academy as service during the civil war' but within the meaning and intent of the Act. But the later statute in express terms excludes such service as civil war service and makes service during the civil war, otherwise than as a cadet, a condition precedent to the right to receive the benefit of the Act. The later Act controls, and operates to amend, if it does not supersede, said section 11 respecting the character of service required during the civil war as a basis for the rank and retired pay of the next higher grade. The Act goes further and in express terms applies to those who have heretofore been and may hereafter be retired, so that the language of the Act in express and unambiguous terms is retroactive, and therefore needs no interpretation. Indeed the Act may be considered as a legislative construction of section 11 and as such entitled to weight though not conclusive. The purpose of the Act clearly was to provide a particular class of officers of the navy, i.e., those not above the grade of captain, who served with credit as officers or as enlisted men in the regular or volunteer forces during the civil war otherwise than as cadets. Only those who thus served and who have 'heretofore been, or may hereafter be retired' are entitled upon retirement to the rank and retired pay of the next higher grade. As the claimant herein was retired prior to the passage of the Act, its provisions would apply to him if he had to his credit service during the civil war 'otherwise than as a cadet,' but as he has not, he is excluded from its provisions." See also U. S. v. Meyer, (1912) 32 App. Cas. (D. Ct.) 13.

A captain in the navy who is retired as a rear-admiral is entitled to receive three-fourths of the pay of the nine lower numbers of the eighteen rear-admirals and not the like proportion of the pay of the rear-admirals in the nine higher numbers in the list of rear admirals. Gibeon v. U. S., (1904) 194 U. S. 162, 24 S. Ct. 613, 48 U. S. (L. ed.) 926. See Lowe v. U. S., (1903) 38 Ct. Cl. 170, as to officers retired to grade of rear-admiral.


The retired pay for a mate in the navy is the retired pay of a warrant officer with the same length of previous service, which is three-fourths of the seas pay of such officer. (1908) 26 Op. Atty.-Gen. 599.

Necessity for actual service.—It is not essential to the right of an officer to be retired on the next higher grade that he was actually ordered into service during the civil war. Moser v. U. S., (1907) 42 Ct. Cl. 86.

Sec. 17. [Retirement of enlisted men or appointed petty officers.] That when an enlisted man or appointed petty officer has served as such thirty years in the United States Navy, either as an enlisted man or petty officer, or both, he shall, by making application to the President, be placed on the retired list hereby created, with the rank held by him at the date of retirement; and he shall thereafter receive seventy-five per centum of the pay and allowances of the rank or rating upon which he was retired: Provided, That if said enlisted man or appointed petty officer had active service in the Navy or in the Army or Marine Corps, either as volunteer or regular, during the civil or Spanish-American war, such war service shall be computed as double time in computing the thirty years necessary to entitle him to be retired: And provided further, That applicants for retirement under
this section shall, unless physically disqualified for service, be at least fifty years of age. [30 Stat. L. 1008.]

See the note to section 8 of this Act, supra, p. 1196.

Retired pay.—The retired pay intended by this statute is sea pay in accordance with the provision of R. S. sec. 1588, infra, p. 1187. Creighton v. U. S., (1892) 27 Ct. Cl. 327.

Samuel Gee, who was appointed a mate in the navy on November 12, 1869 and served in that rating until September 10, 1895, when he was retired, was properly placed on the retired list with the rank of mate and three-fourths of the sea pay of that grade. (1909) 27 Op. Atty.-Gen. 334.

An Act Providing for the retirement of petty officers and enlisted men of the Navy.


[Petty officers and enlisted men — service computed for retirement.] That in computing the necessary thirty years' time for the retirement of petty officers and enlisted men of the Navy, all service in the Army, Navy, or Marine Corps shall be credited. [34 Stat. L. 451.]

[Retired rank and pay of civil war veterans.] • • • That any officer of the Navy not above the grade of captain who served with credit as an officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the official register of the Navy, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Navy with the rank and retired pay of one grade above that actually held by him at the time of retirement: Provided, That this Act shall not apply to any officer who received an advance of grade at or since the date of his retirement or who has been restored to the Navy and placed on the retired list by virtue of the provisions of a special Act of Congress. [34 Stat. L. 554.]

This is from the Naval Appropriation Act of June 29, 1906, ch. 3590.

Provisions relating to the same subject were made by the Act of March 3, 1899, ch. 413, § 11, supra, p. 1127, and the Act of March 3, 1908, ch. 255, supra, p. 1099.

Application.—The advance by the President, by and with the consent of the Senate, provided for in this Act, will not entitle an officer to the pay of the higher grade to which he has been advanced unless he was "retired on account of wounds or disability incident to the service." Morse v. U. S. (1911) 46 Ct. Cl. 361, affirmed (1913) 229 U. S. 208, 33 S. Ct. 624, 57 U. S. (L. ed.) 1162.

A special Act (Act June 10, 1902, 32 Stat. L. 1444) which authorizes the Secretary of the Navy to transfer an officer on the retired list "from the half-pay list to the 75 per centum list under R. S. sec. 1588 will not operate to change his status from that of an officer retired for incapacity not incident to the service to that of an officer retired for incapacity incident to the service. Morse v. U. S., (1911) 46 Ct. Cl. 361, affirmed (1913) 229 U. S. 208, 33 S. Ct. 624, 57 U. S. (L. ed.) 1162.
This Act in express terms applies to officers who have been, as well as to officers who may hereafter be retired. Jasper v. U. S., (1908) 43 Ct. Cl. 368.

Construed with section 11, Act of March 3, 1869.—See the note Cadel midshipmen under section 11, supra, p. 1127.

Construction of proviso.—The proviso to this Act, which reads, "That this Act shall not apply to any officer who received an advance of grade at or since the date of his retirement," was held not to extend to an officer who had not been retired in the next higher grade, though he was retired prior to the passage of the Act. Jasper v. U. S., (1908) 43 Ct. Cl. 368.

The relative rank of a higher grade sometimes conferred upon officers on retirement is only an honorary distinction, serving merely to fix their places, in precedence, with fellow officers. Such officers do not bear the title of a higher grade, but retain the title actually held by them on retirement. (1906) 28 Op. Atty.-Gen. 56.

Retirement under other laws.—Where an officer of the Navy was retired under R. S. sec. 1454, supra, p. 1121, for incapacity not originating in the line of duty, and upon a full review of the facts the Secretary of the Navy found that the causes of his incapacity were incident to the service, and he was accordingly transferred by the President, by and with the advice and consent of the Senate, to the fifty per centum retired pay list under R. S. sec. 1594, infra, p. 1190, and later, by a private Act of Congress, was transferred to the seventy-five per centum pay list of retired officers under R. S. sec. 1598, infra, p. 1157, it was held that he could not thereafter be placed on the retired list with the retired pay of one grade above that actually held by him at the time of his retirement, under this Act, which authorizes such advancement to certain officers of the navy who have been retired on account of wounds or disability incident to the service. (1909) 27 Op. Atty.-Gen. 221.

Assistant engineers.—Passed assistant engineers of the navy entitled to advancement to the grade of chief engineers, and assistant engineers entitled to advancement to the grade of passed assistant engineers, under this Act, should be retired with a rank above that held by them respectively at the time of retirement, and with the pay of that rank. (1908) 26 Op. Atty.-Gen. 487.

A medical director in the navy who, after forty years of service, was retired with the relative rank of commodore, but with the retired pay of a medical director, did not thereby receive an advance of grade within the meaning of the proviso to this Act, and was therefore entitled to the increase of pay provided for by the Act. (1906) 26 Op. Atty.-Gen. 57.

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[Officers who have served as bureau chiefs—retired rank.] • • •

That any officer of the Navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired, shall be retired with the rank, pay and allowances authorized by law for the retirement of such bureau chief. [35 Stat. L. 128.]

This and the following paragraph of the text are from the Naval Appropriation Act of May 13, 1908, ch. 166.

See R. S. sec. 1473, supra, p. 1124, and the notes thereto.

Application.—The Act of May 3, 1908, did not extend to the special class of retired officers on active service under the Act of June 7, 1900 (a special act authorizing the temporary employment of retired officers during a specified period). Sears v. U. S., (1911) 46 Ct. Cl. 105.

The words "any officer of the navy who is now serving or shall hereafter serve as chief of a bureau in the Navy Department, and shall subsequently be retired," refer to the case of retirement during service as chief of bureau. (1910) 28 Op. Atty.-Gen. 531.

Rank on retirement.—Where one, while holding a commission as captain in the navy, was appointed to the office of chief of the bureau of navigation, with the relative rank of commodore, it was held by the Attorney-General that, in case of his retirement during his incumbency of that office, and whilst he was borne on the Navy Register as a captain, he should be placed on the retired list with the rank of captain, and that, on being thus retired, he would be entitled to 75 per centum of the sea-pay of officers of that rank. (1881) 17 Op. Atty.-Gen. 154. See also (1910) 28 Op. Atty.-Gen. 531.

[Retirement after thirty years' service.] • • • When an officer of the Navy has been thirty years in the service, he may, upon his own applica-
tion, in the discretion of the President, be retired from active service and placed upon the retired list with three-fourths of the highest pay of his grade. [35 Stat. L. 132.]

See the note to the preceding paragraph of the text.

Earlier provisions relating to this subject were made by R. S. secs. 1443 and 1444, supra, p. 1118.

Vacancies caused by voluntary retirement.—Vacancies caused by the retirement of officers of the Navy upon their own application, after thirty years of service, should not be considered in determining the number of vacancies required above the several grades in the line of the navy by section 8 of the Navy Personnel Act of March 3, 1899, ch. 413, supra, p. 1126. (1909) 27 Op. Atty.-Gen. 410.

Paymaster’s clerk.—Paymaster’s clerks are officers of the navy within the meaning of this provision. (1909) 27 Op. Atty.-Gen. 157.

[Rank and pay of retired officers — increased grade for civil war service.] • • • The provisions of the Act approved June twenty-ninth, nineteen hundred and six, entitled “An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and seven, and for other purposes,” providing for the retirement in the next higher grade of officers of the navy who served during the civil war, shall not operate to deprive any officer of the navy who has been, or may be, retired, since the passage of that Act, of the right to increased rank and pay to which, but for the passage of said Act, he would have been entitled. [35 Stat. L. 753.]

This is from the Naval Appropriation Act of March 3, 1909, ch. 255.

The provisions of the Act of June 29, 1908, ch. 3690 to which this paragraph refers are given, supra, p. 1129. See the notes thereto.

[Officers failing physical examination for promotion to be retired.] • • • Hereafter, if any officer of the United States Navy shall fail in his physical examination for promotion and be found incapacitated for service by reason of physical disability contracted in the line of duty, he shall be retired with the rank to which his seniority entitled him to be promoted. [36 Stat. L. 1267.]

This is from the Naval Appropriation Act of March 4, 1911, ch. 239.

[Officers retired to make vacancies — rank and pay.] • • • That hereafter any officer retired under the provisions of sections eight and nine of the Act approved March third, eighteen hundred and ninety-nine, an Act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States, shall be retired with the rank and three-fourths the sea pay of the grade from which he is retired. [37 Stat. L. 328.]

This and the following paragraph of the text are from the Act of Aug. 22, 1912, ch. 335.

Section 8 of the Act of March 3, 1899, ch. 413, is given supra, p. 1126, and section 9 of the same Act is noted as repealed under said section 8.
[Active duty—pay.] * * * Hereafter any naval officer on the retired list may, with his consent, in the discretion of the Secretary of the Navy, be ordered to such duty as he may be able to perform at sea or on shore, and while so employed in time of peace shall receive the pay and allowances of an officer of the active list of the same rank: Provided, That no such retired officer so employed on active duty shall receive, in time of peace, any greater pay and allowances than the pay and allowances which are now or may hereafter be provided by law for a lieutenant senior grade on the active list of like length of service: And provided further, That any such officer whose retired pay exceeds the highest pay and allowances of the grade of lieutenant, senior grade, shall, while so employed in time of peace, receive his retired pay only, in lieu of all other pay and allowances. [37 Stat. L. 329.]

See the note to the preceding paragraph of the text.

A provision of the Act of June 7, 1900, ch. 859, 31 Stat. L. 703, which may be regarded as temporary was as follows:

"During a period of twelve years from the passage of this Act any naval officer on the retired list may, in the discretion of the Secretary of the Navy, be ordered to such duty as he may be able to perform at sea or on shore, and while so employed shall receive the pay and allowances of an officer of the active list of the grade from which he was retired."

Pay for active duty.—A retired officer ordered to active duty is entitled only to the same pay that he was receiving at the time of retirement. Faust v. U. S., (1907) 42 Ct. Cl. 94.

Under the Act of June 7, 1900, noted above, it was held that the basis of longevity pay is the officer's capacity for duty and his performance of it. Longevity pay is for longevity in actual service, and extends only to officers on the active list. Faust v. U. S., (1907) 42 Ct. Cl. 94.

[Transfer of officers to active list.] * * * That the President be, and he is hereby, authorized, within two years of the date of the approval of this Act, by and with the advice and consent of the Senate, to transfer to the active list of the Navy or Marine Corps any officer who may have been transferred from the active to the retired list of the Navy under the provisions of section nine of said personal Act: Provided, That such officer shall be transferred to the place on the active list which he would have held if he had not been retired and shall be carried as an additional number in the grade to which he may be transferred or at any time thereafter promoted: Provided further, That such officer shall stand a satisfactory physical and professional examination as now prescribed by law: 2 And provided further, That any officer transferred to the active list shall not by the passage of this Act be entitled to back pay or allowances of any kind. [38 Stat. L. 939.]

This and the following paragraph of the text are from the Naval Appropriation Act of March 3, 1915, ch. 53.

A preceding provision of this paragraph repealed sec. 9 of the Act of March 3, 1889, ch. 413, noted under section 5 of said Act, supra, p. 1128.

[Call of retired enlisted men to active service.] * * * The Secretary of the Navy is authorized in time of war, or when, in the opinion of the President, war is threatened, to call any enlisted man on the retired list into active service for such duty as he may be able to perform. While so employed such enlisted men shall receive the same pay and allowances they
were receiving when placed on the retired list: *Provided*, That enlisted men on the retired list shall not be eligible for enlistment in or transfer to the naval reserve. [38 Stat. L. 944.]

See the note to the preceding paragraph of the text.
For provisions relating to the Naval Reserve see subdivision XII of this title, *infra*, p. 1234.

VII. RANK AND PRECEDENCE, PROMOTION AND ADVANCEMENT

Sec. 1466. [Relative rank of Navy and Army officers.] The relative rank between officers of the Navy, whether on the active or retired list, and officers of the Army, shall be as follows, lineal rank only being considered:
The Vice-Admiral shall rank with the Lieutenant-General.
Rear-admirals with major-generals.
Commodores with brigadier-generals.
Captains with colonels.
Commanders with lieutenant-colonels.
Lieutenant-commanders with majors.
Lieutenants with captains.
Masters with first lieutenants.
Ensigns with second lieutenants. [R. S.]


Sections 1466–1510 constitute chapter 4 of title 15 of the Revised Statutes, entitled as above.

Of these R. S. secs. 1473, 1481 and 1482, relating to retirement are given under the preceding subdivision VI of this title, *supra*, p. 1124.
The title "master" was changed to "lieutenant" by the Act of March 3, 1883, ch. 97, *supra*, p. 1097.
By the Act of March 3, 1909, ch. 413, sec. 7, *supra*, p. 1094, the words "the relative rank of" wherever they occurred in the Revised Statutes were amended to read "the rank of."

By the Navy Personnel Act of March 3, 1909, ch. 413, § 7, *supra*, p. 1094, the grade of commodore was omitted from the active list of the navy, but was retained on the retired list by a proviso annexed to said section.

Construction.—The expression "lineal rank only being considered," in this section, means simply that it is not necessary to specify and fix relative staff rank, since staff officers in both services possess assimilated lineal rank. (1906) 26 Op. Atty.-Gen. 16.

This section fixes the relative rank of officers of the army and of the navy. (1906) 26 Op. Atty.-Gen. 16.

Relative rank.—Since the rank of commodore was dropped from the service and the pay of a brigadier-general was given to the nine lower numbers of the rear admirals, who would otherwise have had the rank of commodores with the corresponding pay of brigadier-generals, a captain in the navy, retired as a rear-admiral, is entitled to three-fourths of the pay of rear-admirals of the nine lower numbers, corresponding to that of a brigadier-general.


Passed assistant surgeons, as well as assistant surgeons not passed, rank with captains in the army, and are entitled to the pay of a captain of the mounted class. U. S. v. Farenholt, (1907) 206 U. S. 226, 27 S. Ct. 629, 51 U. S. (L. ed.) 1036, affording (1906) 41 Ct. Cl. 517.

Power of Secretary of Navy.—The Secretary of the Navy, by virtue of his general power under the President to make rules and regulations for the government of the navy, may determine, with the force and effect of law, the relative rank of naval officers. Usually this is better done by general rules than by decisions in particular cases, but it may be done either way. (1900) 23 Op. Atty.-Gen. 155.

Marine corps.—The relation as to rank
which officers of the marine corps hold to other officers is prescribed by R. S. sec. 1003 (infra, div. XI, p. 1216), and could not be changed by any act of the President or of the Navy Department. (1906) 26 Op. Atty.-Gen. 16.

There is no statutory provision expressly regulating the relative rank and precedence of officers of the marine corps and officers of the several staff corps of the navy, but there are provisions which, with the long established and settled usage and practice of the army and navy, regulate it with the same certainty as if by enactment in terms. (1906) 26 Op. Atty.-Gen. 16.

Whatever will be the relative rank of an officer of the army to either line or staff officers of the navy, that would also be the relative rank as to them as officers of the marine corps. (1906) 26 Op. Atty.-Gen. 16.

Sec. 1467. [Rank according to date.] Line officers shall take rank in each grade according to the dates of their commissions. [R. S.]


Numbering commissions.—The numbering of naval commissions is not the act of the President and Senate, but of the Secretary of the Navy, to prevent questions of rank from arising among officers holding commissions of the same date. (1819) 1 Op. Atty.-Gen. 325.

Altering the number of commissions.—Whenever a change of the number of a commission is proposed, the person affected thereby ought to be heard as to the facts. (1819) 1 Op. Atty.-Gen. 325.

Fictitious date.—Where a fictitious date in an officer's commission would be attended with prejudice to other officers in the same grade, it must be deemed improper to thus date the commission, unless there is clear authority of law for so doing. (1873) 14 Op. Atty.-Gen. 191.

Remission of part of sentence of suspension.—An order remitting the unexecuted portion of the sentence of an officer of the navy, who had been suspended for two years, and was to retain his number and grade, does not have the effect of advancing him two numbers in grade, although during the time of his suspension from duty two officers with commissions dated subsequently to his had advanced above him in the grade he held at the time of his suspension. (1891) 20 Op. Atty.-Gen. 243.

Sec. 1468. [Commanding officers of vessels and stations.] Commanding officers of vessels of war and of naval stations shall take precedence over all officers placed under their command. [R. S.]


Sec. 1469. [Aid or executive officer.] The Secretary of the Navy may, in his discretion, detail a line officer to act as the aid or executive of the commanding officer of a vessel of war or naval station, which officer shall, when not impracticable, be next in rank to said commanding officer. Such aid or executive shall, while executing the orders of the commanding officer on board the vessel or at the station, take precedence over all officers attached to the vessel or station. All orders of such aid or executive shall be regarded as proceeding from the commanding officer, and the aid or executive shall have no independent authority in consequence of such detail. [R. S.]


Aids.—The duties of aids whether in the army or navy are personal to commanding officers. Crosey v. U. S., (1903) 38 Ct. Cl. 82.

Aids authorized by navy regulations are as much authorized by law as are the aids to generals by the statutes. Crosey v. U. S., (1903) 38 Ct. Cl. 82.

Sec. 1470. [Staff officers, when to communicate directly with commanding officer.] Staff officers, senior to the officer so detailed, shall have the right to communicate directly with the commanding officer. [R. S.]

Sec. 1471. [Chiefs of Bureaus.] The chiefs of the Bureau of Medicine and Surgery, Provisions and Clothing, Steam Engineering, and Construction and Repair shall have the relative rank of commodore while holding said position, and shall have, respectively, the title of Surgeon-General, Paymaster-General, Engineer-in-Chief, and Chief Constructor. [R. S.]


Various provisions relating to the appointment, etc., of chiefs of bureaus are given under subdivision I of this title, supra, p. 1043.

The bureau of provisions and clothing was designated the bureau of supplies and accounts by the Act of July 19, 1892, ch. 206, supra, p. 1056.

The grade of commodore was omitted from the active list of the line by the Act of March 3, 1899, ch. 413, sec. 7, supra, p. 1064.

By the last cited Act the words "the relative rank of" wherever they occurred in the Revised Statutes were amended to read "the rank of."

Pay of staff officers.—By the laws governing the navy, unlike those respecting the army, the pay of staff officers is fixed, generally, according to and by the designation or title of the office held by them, and does not depend upon their rank; so that the rank of staff officers of the navy is usually operative only in determining the relation of the different officers in the service to each other, in matters of precedence, privileges, and the like, and is generally called relative rank. Wood v. U. S., (1873) 15 Ct. Cl. 181.

Amenable to court-martial.—One who holds the office of paymaster-general and chief of a bureau is amenable to court-martial. No one but an officer of the navy can be appointed to that office, and the jurisdiction of court-martial extends to the trial and punishment of acts of military or naval officers which tend to bring disgrace and reproach upon the service of which they are members, whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business. Smith v. Whitney, (1886) 116 U. S. 167, 6 S. Ct. 570, 29 U. S. (L. ed.) 601. See also Smith v. U. S., (1891) 26 Ct. Cl. 143.

The chief of the bureau of medicine and surgery in the navy department is amenable to the jurisdiction of a naval court-martial upon charges and specifications preferred against him for acts done as such chief. (1885) 18 Op. Atty.-Gen. 176.

Effect of Navy Personnel Act.—The title of the heads of the existing staff bureaus of the navy are positively fixed by this section and are unchanged by the Navy Personnel Act of 1899, 30 Stat. L. 1904, supra, div. IV, p. 1091, which conferred the advanced rank and pay upon all bureau chiefs below the rank of rear-admiral. Under those laws, construed in connection with the statutes relating to retirement and with past usage in the service, the designated titles of staff bureau chiefs carry over from the active to the retired list. (1904) 25 Op. Atty.-Gen. 122.

Retired rank.—When the retirement of an officer occurs during service as the head of one of the staff bureaus, the retired officer is entitled under the law to be borne upon the navy register as a retired officer under that title permanently. A pay director of the navy who by appointment has become a paymaster-general, and who while holding that office reaches the retiring age, has the right to bear the title of paymaster-general, not only after he has reached the retiring age but is still performing the duties of that office, and not only after he is actually retired and detached from the office and before his term of appointment as paymaster-general has expired, but also after the latter date, and permanently, upon the retired list. (1904) 25 Op. Atty.-Gen. 294.

R. S. sec. 1472. This section was as follows:

"Sec. 1472. When the office of chief of bureau is filled by a line officer below the rank of commodore, said officer shall have the relative rank of commodore during the time he holds said office." Act of March 3, 1871, ch. 117, 16 Stat. L. 537.

It was superseded by section 7 of the Act of March 3, 1899, ch. 413, supra, p. 1094, which provided that "when the office of chief of bureau is filled by an officer below the rank or rear-admiral, said officer shall, while holding the said office, have the rank of rear-admiral," etc.

R. S. sec. 1473 is given supra, p. 1124.

Sec. 1474. [Medical Corps.] Officers of the Medical Corps on the active list of the Navy shall have relative rank as follows:

Medical directors, the relative rank of captain.
Medical inspectors, the relative rank of commander.
Surgeons, the relative rank of lieutenant-commander or lieutenant.
Passed assistant surgeons, the relative rank of lieutenant or master.
Assistant surgeons, the relative rank of master or ensign.  [R. S.]

As to the words "relative rank" and the change in the designation of master, see the note to R. S. sec. 1466, supra, p. 1153.
The rank of assistant surgeons was prescribed by the Act of June 7, 1900, ch. 669, supra, p. 1096.

Rank of medical director.—The highest officer in the medical corps being a medical director having the relative rank of captain, it is impossible to promote him to a higher place in such corps, though he may have a higher rank conferred upon him than that of captain. (1899) 22 Op. Atty.-Gen. 433.
Grades.—A passed assistant surgeon and an assistant surgeon are officers of one and the same grade, but belong to different classes in such grade. "There is nothing in section 1480, R. S., (infra, p. 1137) militating against the conclusion I have reached. The reference in that section to 'the grades established' in the six preceding sections for the staff corps of the navy is the identical language of the ninth section of the Act of March 3, 1871 (16 Stat. L. 536), which refers to the previous sections of that Act, in which grade and relative rank in the staff department of the navy are created together uno status; whereas in the Revised Statutes the two subjects are treated in distinct chapters. This effectually disposes of the argument that there was any establishing of grades in the sections assigning relative rank; the mistake of the revisers in using the expression 'grades established,' being too evident to admit of doubt. Besides, it would be taking an unwarrantable liberty with the language of the law to deduce from the use of the expression 'grades established' in the regulation of a matter merely ceremonial, an intention to make a change in the organization of the medical corps of the navy," (1888) 19 Op. Atty.-Gen. 169.

Sec. 1475. [Pay Corps.] Officers of the Pay Corps on the active list of the Navy shall have relative rank as follows:
Pay directors, the relative rank of captain.
Pay inspectors, the relative rank of commander.
Paymasters, the relative rank of lieutenant-commander or lieutenant.
Passed assistant paymasters, the relative rank of lieutenant or master.
Assistant paymasters, the relative rank of master or ensign.  [R. S.]

The words "the relative rank of" wherever they appeared in the Revised Statutes, were amended to read "the rank of" by the Navy Personnel Act of March 3, 1899, ch. 413, § 7, supra, p. 1094.
The title "master" was changed to "lieutenant" by the Act of March 3, 1883, ch. 97, supra, p. 1087.

Relative rank.—By the use of the term "relative rank," the grades of the pay corps of the navy are made equal to, but not identical with, the grades of the line with which they are by those terms associated. (1880) 16 Op. Atty.-Gen. 414.
Rank of pay inspector.—This section does not give to a pay inspector in the navy the grade of commander. It confers upon him the rank of commander by relation only to the rank of a line officer of that grade. (1880) 16 Op. Atty.-Gen. 414.

Pay.—There is nothing in this section which suggests that paymasters in the navy shall receive the pay of paymasters in the army. Stevens v. U. S., (1908) 41 Ct. Cl. 465.

R. S. sec. 1476. This section was as follows:
"Sec. 1476. Officers of the Engineer Corps on the active list shall have relative rank as follows:
"Of the chief engineers, ten shall have the relative rank of captain, fifteen that of commander, and forty-five that of lieutenant-commander or lieutenant.
"First assistant engineers shall have the relative rank of lieutenant or master,"
and second assistant engineers that of master or ensign.” Act of March 3, 1871, ch. 117, 16 Stat. L. 536.

It was superseded by Act of March 3, 1899, ch. 413, § 7, supra, p. 1094, transferring the officers of the engineer corps to the line.

Construed.—This section was construed 16 Op. Atty.-Gen. 414; (1883 18 Ct. Cl. or referred to in Rutherford v. U. S., 339; (1892) 20 Op. Atty.-Gen. 358.

(1877) 15 Op. Atty.-Gen. 634; (1890)

R. S. sec. 1477. This section was as follows:

"Sec. 1477. Of the naval constructors, two shall have the relative rank of captain, three of commander, and all others that of lieutenant-commander or lieutenant. Assistant naval constructors shall have the relative rank of lieutenant or master." Act of March 3, 1871, ch. 117, 16 Stat. L. 536.

It was superseded by Act of March 3, 1899, ch. 413, § 10, supra, p. 1095, prescribing the number and rank of naval constructors.

Sec. 1478. [Civil engineers.] Civil engineers shall have such relative rank as the President may fix. [R. S.]


The words "the relative rank of" wherever they appeared in the Revised Statutes, were amended to read "the rank of" by the Navy Personnel Act of March 3, 1899, ch. 413, § 7, supra, p. 1094.

See further the Act of March 3, 1903, ch. 1010, supra, p. 1097.

Until the power is exercised, civil engineers have no rank by which their relation to the officers or men in the navy can be determined. Granger's Case, (1878) 16 Op. Atty.-Gen. 203.

Staff corps.—Civil engineers are plainly included among those contemplated by R. S. sec. 1480 (infra, this page), as amended, as belonging to the "staff corps of the navy." They are "officers in the navy," possessing under the order made pursuant to this section, defined relative rank as such with other officers in the navy, and are not merely "civil officers connected with the navy." (1881) 17 Op. Atty.-Gen. 128.

Subject to court-martial.—Civil engineers in the navy are subject to trial by court-martial for official misconduct. (1876) 15 Op. Atty.-Gen. 597.

Sec. 1479. [Chaplains.] Chaplains shall have relative rank as follows:

Four, the relative rank of captain; seven, that of commander; and not more than seven, that of lieutenant-commander or lieutenant. [R. S.]


As to the words "the relative rank of," see the note to the preceding R. S. sec. 1478.

By the Act of March 3, 1899, ch. 413, § 13, infra, p. 1195, chaplains not having relative rank were to rank as lieutenants.

Further provisions relating to this subject were made by the Act of June 29, 1906, ch. 3590, infra, p. 1202, and the Act of June 30, 1914, ch. 130, supra, p. 1105, in part superseding the text.

Sec. 1480. [Professors of mathematics.] Professors of mathematics shall have relative rank as follows: Three, the relative rank of captain; four, that of commander; and five, that of lieutenant-commander or lieutenant.

The grades established in the six preceding sections for the staff corps of the Navy shall be filled by appointment from the highest members in each corps, according to seniority; and new commissions shall be issued to the officers so appointed, in which the titles and grades established in said sections shall be inserted; and no existing commission shall be vacated in the said several staff corps, except by the issue of the new commissions required by the provisions of this section; and no officer shall be reduced in rank or lose seniority in his own corps by any change which may be required under the provisions of the said six preceding sections: Provided, That the issuing of a new appointment and commission to any officer of the pay corps under the
provisions of this section shall not affect or annul any existing bond, but the same shall remain in force, and apply to such new appointment and commission. [R. S.]


This section as originally enacted ended with the words "lieutenant-commander or lieutenant." The provisions following such words were added by Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 244.

The words "the relative rank of" wherever they appeared in the Revised Statutes, were changed to "the rank of" by the Act of March 3, 1899, ch. 413, sec. 7, supra, p. 1094.

R. S. secs. 1481, 1482, relating to retirement, etc., are given under subdivision VI of this title, supra, p. 1124.

Relative rank.—See note to R. S. sec. 1466, supra, p. 1133, for amendment.

"Title"—"grade"—"rank."—As generally used in reference to the naval and military service, the word "title" signifies the name by which an officer, or the holder of an office, is designated and distinguished, and by which the officer has a right to be addressed; "grade," one of the divisions or degrees in the particular branch of the service, according to which officers therein are arranged; and "rank," the position of officers of different grades, or of the same grade, in point of authority, precedence, or the like, of one over another. Sometimes "rank" is used as synonymous with "grade," and the title of an officer (e. g., admiral, vice-admiral) may denote both his grade and his rank. (1880) 16 Op. Atty.-Gen. 414.

The designation "pay inspector" expresses both title and grade in the pay corps, and, accordingly, a commission in the following form: "John Doe, a pay inspector from the ______ day of ______, A. D., 187__, with the relative rank of commander," gives the appropriate title and grade of the officer named therein, and fully satisfies the requirement of this section in that regard. (1880) 16 Op. Atty.-Gen. 414.

The reference "to the grades established" in the six preceding sections for the staff corps of the navy is the identical language of the ninth section of the Act of March 3, 1871 (16 Stat. L. 536), which refers to the previous sections of that Act, in which grade and relative rank in the staff department of the navy are created together uno flago; whereas, in the Revised Statutes the two subjects are treated in distinct chapters. This effectually disposes of the argument that there was any establishing of grades in the sections assigning relative rank; the mistake of the revisers in using the expression "grades established" being too evident to admit of doubt. Besides, it would be taking an unwarrantable liberty with the language of the law to deduce from the use of the expression "grades established" in the regulation of a matter merely ceremonial, an intention to make a change in the organization of the medical corps of the navy." (1888) 19 Op. Atty.-Gen. 169.

The issuing of new commissions is limited to the cases named in the section. (1880) 16 Op. Atty.-Gen. 661.

Promotions in the medical corps.—The custom and practice of the Navy Department requiring competitive examinations of assistant surgeons, and assigning them positions on the navy register in the order of relative merit as ascertained and reported by the board of examiners authorized by existing law and regulations, is not under this section as amended correct; the effect of such law being to adopt the rule of seniority in regard to promotions from one grade to another in the medical corps of the navy. (1881) 17 Op. Atty.-Gen. 48.

Civil engineers, after an order made pursuant to R. S. sec. 1476, supra, p. 1137, are plainly included among those contemplated by this section as belonging to the "staff corps of the navy." (1881) 17 Op. Atty.-Gen. 126.

Sec. 1483. [Graduates of Naval Academy.] Graduates of the Naval Academy shall take rank according to their proficiency as shown by their order of merit at the date of graduation. [R. S.]


Similar provisions were made by R. S. sec. 1621, given under NAVAL ACADEMY. See the notes to said section.

Construed.—This section was construed or referred to in (1881) 17 Op. Atty.-Gen. 117; (1894) 21 Op. Atty.-Gen. 46.

R. S. sec. 1484. This section was as follows:

"Sec. 1484. Engineer officers graduated at the Naval Academy shall take precedence
with all other officers with whom they have relative rank, according to the actual
It was superseded by Act of March 3, 1889, ch. 413, §§ 1-7, supra, p. 1081, fixing
the rank of engineer officers transferred to the line of the navy.

Construct.—This section 1484 was con-
strued or referred to in (1877) 15 Op. Atty.-Gen. 46.

Sec. 1485. [Precedence by length of service.] The officers of the staff
corps of the Navy shall take precedence in their several corps, and in their
several grades, and with officers of the line with whom they hold relative
rank according to length of service in the Navy. [R. S.]

As to the words "relative rank," see the note to R. S. sec. 1480, supra, p. 1197.

The status of the staff corps appears to
be clearly defined by this section and R. S.
secs. 1486 and 1487, next following.

Sec. 1486. [Length of service, how estimated.] In estimating the
length of service for such purpose, the several officers of the staff corps
shall, respectively, take precedence in their several grades and with those
officers of the line of the Navy with whom they hold relative rank who have
been in the naval service six years longer than such officers of said staff corps
have been in said service; and officers who have been advanced or lost
numbers on the Navy Register shall be considered as having gained or lost
length of service accordingly: Provided, That nothing in this section shall
be so construed as to give to any officer of the staff corps precedence of, or
a higher relative rank than that of, another staff officer in the same grade
and corps, and whose commission in such grade and corps antedates that
of such officer. [R. S.]

The proviso was added to the section by Act of March 3, 1881, ch. 160, 21 Stat. L. 510.
As to the words "relative rank," see the note to R. S. sec. 1480, supra, p. 1197.

By the Act of March 4, 1913, ch. 146, infra, p. 1212, the provisions of this section
were not to apply to officers who should enter the navy after the passage of said Act.

The status of the staff corps appears to
be clearly defined by this section and R. S.
secs. 1485, supra and 1487, infra. (1894)

Effect of promotion by selection.—Under
the Act of July 25, 1866, ch. 231, R., who
had entered the naval service Oct. 5, 1850,
and stood No. 77 on the list of lieutenant-
commanders, was promoted to the grade
of commander; while L., who had entered
the service Feb. 17, 1841, and stood at
the date of said promotion No. 7 on the
said list, was not among those advanced
under that Act, and after the promotions
thereunder were completed stood No. 2 in
his grade (lieutenant-commander). Sub-
sequently, by promotion in due course,
both R. and L. attained the rank of cap-
tain, the former being senior by date of
commission. In estimating length of serv-
vice for the purpose of determining their
precedence with officers of the staff corps
holding the relative rank of captain, the
Attorney-General advised that R. should
be considered as having gained length of
service according to his promotion, but
that L. should not be considered as having
lost anything in length of service—the
effect of the promotion of the former offi-
cer upon the latter being purely an inci-
dental one. The clause in this section
that "officers who have been advanced or
lost numbers on the navy register shall be
considered as having gained or lost length
of service accordingly" cannot receive a
meaning in connection with the facts
stated that would in any way act as a
degradation of the officer over whom anoth-
er had been promoted, or to deprive
him of a right already acquired by honor-
able length of service. (1881) 17 Op.
Atty.-Gen. 56.

Effect of R. S. sec. 1484.—While section
1484 precedes this section, the Attorney-
General advised that it was in fact a
limitation or exception to section 1486;
and, when thus read together, all staff
officers are entitled to the benefit of the
six years' term of service, with the ex-
ception of those engineer officers who,
graduate at the naval academy, and whose term of service, like that of the line officers, begins at the commencement of the period of their education, and not, as with other staff officers, at the time when they actually enter upon their staff duties. (1877) 15 Op. Atty.-Gen. 336.

Sec. 1487. [Quarters.] No staff officer shall, in virtue of his relative rank or precedence, have any additional right to quarters. [R. S.]


As to the words "relative rank," see the note to R. S. sec. 1480, supra, p. 1137.

The status of the staff corps appears to be clearly defined by this section and R. Op. Atty.-Gen. 46. (1894) 21

Sec. 1488. [Military command.] The relative rank given by the provisions of this chapter to officers of the Medical, Pay, and Engineer Corps shall confer no authority to exercise military command. [R. S.]


As to the words "relative rank," see the note to R. S. sec. 1480, supra, p. 1137.

The Engineer Corps were transferred to the line of the Navy Personnel Act of March 3, 1899, ch. 413, §§ 1-7, supra, pp. 1091-1094.

Sec. 1489. [Processions, boards, etc.] In processions on shore, or courts-martial, summary courts, courts of inquiry, boards of survey, and all other boards, line and staff officers shall take precedence according to rank. [R. S.]


Sec. 1490. [Ensigns as steerage officers.] Ensigns shall be steerage officers, unless assigned to duty as watch and division officers. [R. S.]


R. S. sec. 1491. This section was as follows:

"Sec. 1491. The President may, if he shall deem it conducive to the interests of the service, give assimilated rank to boatswains, gunners, carpenters, and sailmakers, as follows: After five years' service, to rank with ensigns, and after ten years' service to rank with masters."


It was superseded by the subsequent provisions of the Act of March 3, 1899, ch. 413, § 12, infra, p. 1145; the Act of March 3, 1903, ch. 1010, infra, p. 1147; the Act of April 27, 1904, ch. 1623, infra, p. 1147; and the Act of March 3, 1909, ch. 255, infra, p. 1143.

R. S. sec. 1492. This section was as follows:

"Sec. 1492. The officers of the revenue-cutter service when serving, in accordance with law, as a part of the Navy, shall be entitled to relative rank, as follows: Captains, with and next after lieutenants commanding in the Navy; first lieutenants, with and next after lieutenants in the Navy; second lieutenants, with and next after masters in line in the Navy; third lieutenants, with and next after ensigns in the Navy."


It was superseded by provisions relating to the same subject made by the Act of April 12, 1902, ch. 501, § 2, given under COAST GUARD, vol. 2, p. 260.

OF PROMOTION AND ADVANCEMENT

Sec. 1493. [Physical examination.] No officer shall be promoted to a higher grade on the active list of the Navy, except in the case provided in the next section, until he has been examined by a board of naval surgeons and pronounced physically qualified to perform all his duties at sea. [R. S.]


Promotion in the marine corps.—This section does not invest the board of naval surgeons with authority to examine and pronounce upon any other cases than
those of officers on the active list of the navy. The examination of a retiring board under R. S. sec. 1823, infra, div. XI, p. 1529, "seems to be the only one to which an officer of the [marine] corps is by law subjected, in order to determine his fitness for active duty; and unless the officer is by this board found incapacitated for active service, and the finding is approved by the President (in which case he must be retired), he remains in the line of promotion on the active list as he was before, and is entitled to all the rights which belong to his position." (1881) 17 Op. Atty.-Gen. 117.

The President has power to review the action and finding of a board of naval surgeons. Meade's Case, (1867) 12 Op. Atty.-Gen. 347.

Sec. 1494. [Physical disqualification by wounds.] The provisions of the preceding section shall not exclude from the promotion to which he would otherwise be regularly entitled any officer in whose case such medical board may report that his physical disqualification was occasioned by wounds received in the line of his duty, and that such wounds do not incapacitate him for other duties in the grade to which he shall be promoted. — [R. S.]


The expression "wounds received in the line of his duty" is not restricted to any particular part of that duty, as to wounds received in battle or in some hazardous enterprise, and an officer thus disqualified for sea duty is eligible for promotion if his wounds do not incapacitate him for other duties in the grade to which he seeks promotion. (1900) 23 Op. Atty.-Gen. 324.

The words "other duties" refer to duties other than duties at sea. (1900) 23 Op. Atty.-Gen. 324.

Sec. 1495. [Examinations, when; and effect of.] Officers subject to examination before promotion to a grade limited in number by law shall not be entitled to examination in such a sense as to give increase of pay until designated by the Secretary of the Navy to fill vacancies in the higher grade; and officers eligible for promotion to a grade not limited in number shall not be entitled to examination until ordered to present themselves for examination or until a class, in which they are included, has been so ordered by the Secretary of the Navy. — [R. S.]


See for later provisions as to promotion of ensigns and assistant naval constructors, the Act of March 3, 1899, ch. 413, §§ 7 and 10, supra, pp. 1094, 1096.

Sec. 1496. [Examination of professional fitness.] No line officer below the grade of commodore, and no officer not of the line, shall be promoted to a higher grade on the active list of the Navy until his mental, moral, and professional fitness to perform all his duties at sea have been established to the satisfaction of a board of examining officers appointed by the President. — [R. S.]

Act of April 21, 1864, ch. 63, 13 Stat. L. 53.

The grade of commodore was omitted from the list of officers made by the Navy Personnel Act of March 3, 1899, ch. 413, § 7, infra, p. 1094.

Necessity for approval of President.— This section appears to contemplate only the action of a board, but it must be read with the others relating to the same subject matter. One of these is R. S. sec. 1502, infra, p. 1142, which demands that, to become operative, the board's decision shall be acted upon by the President. Jouett v. U. S., (1893) 28 Ct. Cl. 257.

Effect of R. S. sec. 1505.—Section 1506, infra, p. 1143, which provides that an officer "not found professionally qualified" shall be suspended and re-examined, does not conflict with or limit the examination concerning "mental, moral, and professional fitness," prescribed by this section. Davis v. U. S., (1889) 24 Ct. Cl. 442.
Sec. 1497. [Promotion to rear-admiral in time of peace.] In time of peace no person shall be promoted from the list of commodores to the grade of rear-admiral, on the active list, until his mental, moral, and professional fitness to perform all his duties at sea has been established as provided in the preceding section. [R. S.]

As to the grade of commodore, see the note to R. S. sec. 1466, supra, p. 1133.

Sec. 1498. [Examining board.] Such examining board shall consist of not less than three officers, senior in rank to the officer to be examined. [R. S.]

Act of April 21, 1864, ch. 63, 13 Stat. L. 53.

Sec. 1499. [Powers of.] Said board shall have power to take testimony and to examine all matter on the files and records of the Navy Department relating to any officer whose case may be considered by them. The witnesses, when present, shall be sworn by the president of the board. [R. S.]

Act of April 21, 1864, ch. 63, 13 Stat. L. 53.

Examination of the files and records of the Navy Department concerning the officer's career in the grade from which he is at the time seeking promotion, is authorized by this section. Davis v. U. S., (1869) 24 Ct. Cl. 442.

Sec. 1500. [Officer may be present and make statement.] Any officer whose case is to be acted upon by such examining board shall have the right to be present, if he so desires, and to submit a statement of his case on oath. [R. S.]

Act of April 21, 1864, ch. 63, 13 Stat. L. 53.

Failing to receive notice.—A naval officer, having appeared before an examining board, and the examination being temporarily suspended, was granted permission to go home and to be absent until notified by the board to appear. He failed to receive this notice until after the examination, which was resumed during his absence, had been concluded. As the officer had actually failed to be present at the time that his case was disposed of, he had been deprived, by the accidental circumstance of failing to receive the notice of the time at which the board recommenced its session, of a right that is deemed of great importance. As the vacancy caused by his retirement had not been filled, the Attorney-General advised that the act of the President directing his retirement was revocable. (1878) 16 Op. Atty.-Gen. 20.

Appearance in person.—Every officer of the navy whose eligibility to promotion is to be acted upon by an examining board under the provisions of R. S. secs. 1496, 1498, 1503 and 1505, has the right to be present at his examination. He must be duly notified of the time and place of his examination, and unless he waives his right or expresses a lack of desire to be present, he must be given leave of absence or permission to attend. No finding of the board adverse to his qualifications for promotion can be made without a personal examination of such officer unless he fails to appear after having been duly notified to do so. (1909) 27 Op. Atty.-Gen. 251.

Sec. 1501. [Record.] The statement of such officer, if made, and the testimony of the witnesses and his examination shall be recorded. [R. S.]

Act of April 21, 1864, ch. 63, 13 Stat. L. 53.

Sec. 1502. [Revision by the President.] Any matter on the files and records of the Navy Department, touching each case, which may, in the
opinion of the board, be necessary to assist them in making up their judgment, shall, together with the whole record and finding, be presented to the President for his approval or disapproval of the finding. [R. S.]

Act of April 21, 1864, ch. 63, 13 Stat. L. 53.

The nomination and confirmation of a naval officer for promotion, "subject to the required examination before being commissioned," do not take the case out of the operation of this section, which makes examinations subject to the approval of the President. Jouett v. U. S., (1893) 28 Ct. Cl. 257.

Sec. 1503. [No officer to be rejected without examination.] No officer shall be rejected until after such public examination of himself and of the records of the Navy Department in his case, unless he fails, after having been duly notified, to appear before said board. [R. S.]

Act of April 21, 1864, ch. 63, 13 Stat. L. 53.

Notice and personal appearance.—See notes under R. S. sec. 1500, supra, p. 1142.

Sec. 1504. [Report of recommendation.] Such examining board shall report their recommendation of any officer for promotion in the following form: "We hereby certify that _______ has the mental, moral, and professional qualifications to perform efficiently all the duties, both at sea and on shore, of the grade to which he is to be promoted, and recommend him for promotion." [R. S.]


See also the Act of June 18, 1878, ch. 267, infra, p. 1145.

Sec. 1505. [Failing in examination.] Any officer of the Navy on the active list below the rank of commander who, upon examination for promotion, is found not professionally qualified, shall be suspended from promotion for a period of six months from the date of approval of said examination, and shall suffer a loss of numbers equal to the average of six months' rate of promotion to the grade for which said officer is undergoing examination during the five fiscal years next preceding the date of approval of said examination, and upon the termination of said suspension from promotion he shall be reexamined, and in case of his failure upon such reexamination he shall be dropped from the service with not more than one year's pay: Provided, That the provisions of this Act shall be effective from and after January first, nineteen hundred and eleven. [R. S.]

As originally enacted this section was as follows:

"Sec. 1505. Any officer of the Navy on the active list below the grade of commander, who, upon examination for promotion, is not found professionally qualified, shall be suspended from promotion for one year, with corresponding loss of date when he shall be re-examined, and in case of his failure upon such re-examination he shall be dropped from the service."


It was amended to read as given in the text by an Act of March 11, 1912, ch. 55, 37 Stat. L. 73, entitled:

"An Act to amend section fifteen hundred and five of the Revised Statutes of the United States providing for the suspension from promotion of officers of the Navy if not professionally qualified."

The words "this Act" contained in the proviso of the text evidently refer to the amending Act.

Construction.—The words "shall be with corresponding loss of date," do not suspended from promotion for one year, mean that the loss of date is to be con-
Sec. 1506. [Advancement in number.] Any officer of the Navy may, by and with the advice and consent of the Senate, be advanced, not exceeding thirty numbers in rank, for eminent and conspicuous conduct in battle or extraordinary heroism; and the rank of officers shall not be changed except in accordance with the provisions of existing law, and by and with the advice and consent of the Senate. [R. S.]


That portion of the section after the words “extraordinary heroism,” was added by the amendatory Act of June 17, 1878, ch. 260, 20 Stat. L. 144.

Conclusive upon executive department.—When an officer has been advanced under this section by the President, by and with the advice and consent of the Senate, the action is conclusive upon the executive department of the government and the grounds thereof are not subject to re-examination. (1881) 17 Op. Atty.-Gen. 76. See (1869) 13 Op. Atty.-Gen. 1.

Consent of Senate necessary.—A naval officer may be advanced in rank for eminent and conspicuous conduct in battle, but only with the advice and consent of the Senate. Peck v. U. S., (1904) 39 Ct. Cl. 125.


Sec. 1507. [Promotion when grade is full.] Any officer who is nominated to a higher grade by the provisions of the preceding section, shall be promoted, notwithstanding the number of said grade may be full; but no further promotions shall take place in that grade, except for like cause, until the number is reduced to that provided by law. [R. S.]


Sec. 1508. [Officers receiving thanks of Congress.] Any line officer, whether of volunteers or of the regular Navy, may be advanced one grade, if, upon recommendation of the President by name, he receives the thanks of Congress for highly distinguished conduct in conflict with the enemy or for extraordinary heroism in the line of his profession. [R. S.]


Sec. 1509. [Effect of vote of thanks.] A vote of thanks by Congress to any officer of the Navy shall be held to affect such officer only; and whenever, as an incident thereof, an officer who would otherwise be retired is
retained on the active list, such retention shall not interfere with the regular promotion of others who would otherwise have been entitled by law to promotion. [R. S.]

Res. No. 96 of July 1, 1870, 16 Stat. L. 384.

**Sec. 1510. [Vacancies occasioned by death, etc., of officers thanked.]**
No promotion shall be made to fill a vacancy occasioned by the final retirement, death, resignation, or dismissal of an officer who has received a vote of thanks, unless the number of officers left in the grade where the vacancy occurs shall be less than the number authorized by law. [R. S.]

Res. No. 96 of July 1, 1870, 16 Stat. L. 384.

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**An act relative to examinations for promotions in the Navy.**


**[SEC. 1.] [Matters decided at previous examination not to be inquired into.]** That thereafter in the examination of officers in the Navy for promotion no fact which occurred prior to the last examination of the candidate whereby he was promoted, which has been enquired into and decided upon, shall be again enquired into, but such previous examination, if approved, shall be conclusive, unless such fact continuing shows the unfitness of the officer to perform all his duties at sea. [20 Stat. L. 165.]

Construction.—This section is prospective, enacting that thereafter facts passed upon and settled by previous boards are not to be again enquired into. Thompson v. U. S., (1883) 18 Ct. Cl. 604.

Effect on R. S. secs. 1499, 1502, 1503.—This statute makes the decision final so far as subsequent examining boards are concerned, but goes no further, and leaves the provisions of R. S. secs. 1499, 1502, 1503, supra, pp. 1142, 1143, operative as to the record of the officer and the files at the department subsequent to the former examination. Davis v. U. S., (1889) 24 Ct. Cl. 442.

**Sec. 2. [Where rule violated.]** The President of the United States may in cases wherein the rule herein prescribed has been violated order and direct the re-examination of the same. [20 Stat. L. 166.]

Retrospective operation.—This section is retrospective; that the President may, in cases where the rule prescribed in the first section has been violated, order and direct a re-examination. Thompson v. U. S., (1883) 18 Ct. Cl. 604.

Restoration to active list.—This section does not repeal the law limiting the force of the navy, and does not restore to active service an officer who had been retired by the findings of the board. "If it had intended also to grant to the executive power to restore Captain Thompson, and other officers situated like him, to the active list, it would have said so. The absence from the Act of a grant of such power, after Congress had been asked to bestow it, is conclusive proof that it did not intend to give it, but intended to retain the right to determine whether on the findings of the new tribunal, taken in connection with all other circumstances, it would be proper, in any particular case which might arise, to increase the active force of the navy. In our opinion the claimant's only remedy is in Congress." Thompson v. U. S., (1883) 18 Ct. Cl. 604.

**Sec. 12. [Chief warrant officers — promotions.]** That boatswains, gunners, carpenters, and sailmakers shall after ten years from date of warrant
be commissioned chief boatswains, chief gunners, chief carpenters, and
chief sailmakers, to rank with but after ensign: Provided, That the chief
boatswains, chief gunners, chief carpenters, and chief sailmakers shall on
promotion have the same pay and allowances as are now allowed a second
lieutenant in the Marine Corps: Provided, That the pay of boatswains,
gunners, carpenters and sailmakers shall be the same as that now allowed
by law: Provided further, That nothing in this Act shall give additional
rights to quarters on board ship or to command, and that immediately after
the passage of this Act boatswains, gunners, carpenters and sailmakers, who
have served in the Navy as such for fifteen years, shall be commissioned in
accordance with the provisions of this section, and thereafter no warrant
officer shall be promoted until he shall have passed an examination before
a board of chief boatswains, chief gunners, chief carpenters and chief
sailmakers, in accordance with regulations prescribed by the Secretary of
the Navy. [30 Stat. L. 1006.]

This is from the Act of March 3, 1899, ch. 413. See the notes to section 1 of this
Act, supra, p. 1091.
The time limit of ten years imposed by the first sentence of the text was reduced
to six years by the Act of April 27, 1904, ch. 1622, infra, p. 1147, and subsequent
provisions relating to the machinists were made by the Act of March 3, 1909, ch. 255,
infra, p. 1148.
R. S. sec. 1491 noted supra, p. 1140, was superseded by this section and other Acts
noted under said section.

Boatswains.—The statutes recognize two
classes of boatswains, those who may be
promoted in course to fill vacancies in
the next higher grade and those who be-
come qualified after six years' service to
examination for promotion and to become
47 Ct. Cl. 356.

[Assistant surgeons — rank.] * * * Assistant surgeons shall rank
with assistant surgeons in the Army. [31 Stat. L. 691.]

This is from the Naval Appropriation Act of June 7, 1900, ch. 859.
This provision was in part superseded by the first paragraph of the Act of March 3,
1903, ch. 1010, given under subdivision IV of this title supra, p. 1097.

[Advancement for service in war with Spain.] * * * That the
advancement in rank of officers of the Navy and Marine Corps, whenever
made, for service rendered during the war with Spain, pursuant, respect-
ively, to the provisions of sections fifteen hundred and six and sixteen
hundred and five of the Revised Statutes, shall not interfere with the regu-
lar promotion of officers otherwise entitled to promotion, but officers so
advanced, by reason of war service, shall, after they are promoted to higher
grades, be carried thereafter as additional to the numbers of each grade to
which they may at any time be promoted; and each such officer shall here-
after be promoted in due course, contemporaneously with and to take rank
next after the officer immediately above him; and all advancements made
by reason of war service shall be appropriately so designated upon the
official Navy list: Provided, however, That no promotion shall be made to
fill a vacancy occasioned by the promotion, retirement, death, resignation,
or dismissal of any officer who, at the time of such promotion, retirement,
death, resignation, or dismissal, is an additional member of his grade under the foregoing provisions. [31 Stat. L. 1108.]

This and the following paragraph of the text are from the Naval Appropriation Act of March 3, 1901, ch. 852.
R. S. sec. 1606 mentioned in the text is given supra, p. 1144.
R. S. sec. 1605 likewise mentioned in the text is given infra, p. 1217.

[Warrant officers eligible to grade of ensign.] * * * Whenever, in view of the vacancies in the grade of ensign on July thirtieth of any year unfilled by graduates of the Naval Academy, the Secretary of the Navy shall so recommend, the President may appoint to that grade, as of July thirtieth, from among the boatswains, gunners, or warrant machinists, not exceeding six in any one calendar year. No person shall be so appointed who is over thirty-five years of age; who has served less than six years as a warrant officer; who is not recommended by a commanding officer under whom he has served; nor until he shall have passed such competitive examination as may be prescribed by the Navy Department. [31 Stat. L. 1129.]

See the note to the preceding paragraph of the text.
The title of warrant machinist was changed to machinist by a provision of the Act of March 3, 1900, ch. 255, supra, p. 1099.
The number of ensigns was increased from six—the number fixed by the text—to twelve by the Act of March 3, 1903, ch. 1010, given in the following paragraph of the text.
The term of six years fixed by the text as required to be served before promotion to ensign, was reduced to four, by the Act of April 27, 1904, ch. 1622, given in the second paragraph of the text following.
R. S. sec. 1491 noted supra, p. 1140, was superseded by the text and by other Acts noted under said section.

[Appointment of ensigns from warrant officers.] * * * Hereafter in each calendar year there may, under the restrictions imposed by existing law, be appointed from the boatswains, gunners, and warrant machinists of the Navy twelve ensigns. [32 Stat. L. 1197.]

This is from the Naval Appropriation Act of March 3, 1903, ch. 1010.
The title of warrant machinist was changed to machinist by a provision of the Act of March 3, 1900, ch. 255, supra, p. 1099.
The provisions of the text superseded in part those relating to the number of ensigns contained in the Act of March 3, 1901, ch. 852, given in the preceding paragraph of the text.

[Sec. 1.] [Eligibility of warrant officers for appointment as ensigns.]
* * * That subject to the restrictions imposed by existing law, boatswains, gunners, and warrant machinists shall be eligible for appointment to the grade of ensign after four years’ service as warrant officers, and boatswains, gunners, carpenters, and sailmakers shall be eligible for appointment as chief boatswains, chief gunners, chief carpenters, and chief sailmakers after six years from date of warrant. [33 Stat. L. 346.]

This is from the Naval Appropriation Act of April 27, 1904, ch. 1622.
As to warrant machinists see the note to the preceding paragraph of the text.
An Act To extend the provisions of the Act of March third, nineteen hundred and one, to officers of the Navy and Marine Corps advanced at any time under the provisions of sections fifteen hundred and six and sixteen hundred and five for eminent and conspicuous conduct in battle.


[Navy and marine corps — officers advanced for heroism, etc., to be carried as additional numbers on promotion.] That officers of the Navy and Marine Corps advanced in rank for eminent and conspicuous conduct in battle or extraordinary heroism, and who since such advancement have been or may hereafter be promoted, shall from the date of the passage of this Act be carried as additional numbers of each grade in which they serve. [34 Stat. L. 296.]

The provisions of the Act of March 3, 1901, ch. 882, mentioned in the title of this Act, are given supra, p. 1148. R. S. secs. 1506 and 1605, likewise mentioned in the title, are given supra, p. 1144, and infra, p. 1217.

[Chaplains.] • • • That naval chaplains hereafter appointed shall have the rank, pay, and allowances of lieutenant (junior grade) in the Navy until they shall have completed seven years of service, when they shall have the rank, pay, and allowances of lieutenant in the Navy; and lieutenants shall be promoted, whenever vacancies occur, to the grade of lieutenant-commander, which shall consist of five numbers, and when so promoted shall receive the rank, pay, and allowances of lieutenant-commander in the Navy: Provided further, That nothing herein contained shall be held or construed to increase the number of chaplains as now authorized by law or to reduce the rank or pay of any now serving. [34 Stat. L. 554.]

This is from the Naval Appropriation Act of June 29, 1906, ch. 3590.

Further provisions relating to chaplains were made by R. S. sec. 1479, supra, p. 1137, the Act of March 3, 1899, ch. 413, § 13, infra, p. 1195, and the Act of June 30, 1914, ch. 130, supra, p. 1105.

Pay of chaplain.—The annual pay of a chaplain in the navy is that of a lieutenant. (1862) 10 Op. Atty.-Gen. 332.

[Machinists — rank — officers eligible to grade of ensign.] • • • All machinists shall, after six years from date of warrant, be commissioned chief machinists, to rank with, but after, ensign, and shall, on promotion, have the same pay and allowances as are allowed chief boatswains, chief gunners, chief carpenters, and chief sailmakers, and no machinist shall be promoted until he shall have passed such examination before a board as the Secretary of the Navy may prescribe, and no warrant officer, heretofore or hereafter promoted six years from date of warrant, shall suffer a reduction in pay which, but for such promotion, would have been received by him: Provided, That chief boatswains, chief gunners, and chief machinists shall
be eligible for appointment to the grade of ensign under the restrictions imposed by law upon the appointment of boatswains, gunners, and warrant machinists to that grade. [35 Stat. L. 771.]

This is from the Naval Appropriation Act of March 3, 1909, ch. 255. The title of warrant machinist was changed to machinist by a further provision of this Act, supra, p. 1099.

Other provisions relating to this subject were made by the Act of March 3, 1899, ch. 413, § 12, supra, p. 1145; the Act of March 3, 1901, ch. 852, supra, p. 1147; the Act of March 3, 1903, ch. 1010, supra, p. 1147, and the Act of April 27, 1904, ch. 1622, supra, p. 1147.

[Application of provisions relating to precedence.] • • • That section fourteen hundred and eighty-six of the Revised Statutes shall not apply in the case of officers who enter the Navy after the passage of this Act and all such officers shall take precedence when of the same grade according to their respective dates of commission in that grade. [37 Stat. L. 892.]

This is from the Naval Appropriation Act of March 4, 1913, ch. 148. R. S. sec. 1486 mentioned in the text is given supra, p. 1139.

VIII. VESSELS, NAVY YARDS, AND NAVAL STATIONS

R. S. sec. 1529. This section was as follows:

"SEC. 1529. The vessels of the navy of the United States shall be divided into four classes, and shall be commanded as nearly as may be as follows:


This section and R. S. sec. 1530, in the following note, were superseded by Act of March 3, 1901, ch. 832, given infra, p. 1157.

Sections 1529–1546 constitute chapter 5 of title 15 of the Revised Statutes, "Vessels and Navy Yards."

R. S. sec. 1530. This section was as follows:

"SEC. 1530. Steamships of forty guns or more shall be classed as first rates, those of twenty guns and under forty as second rates, and all those of less than twenty guns as third rates." Act of June 12, 1855, ch. 153, 11 Stat. L. 319.


It was superseded, together with R. S. sec. 1529, given in the preceding note, by the Act of March 3, 1901, ch. 852, infra, p. 1157.

Sec. 1531. [Rule for naming.] The vessels of the Navy shall be named by the Secretary of the Navy, under the direction of the President, according to the following rule:

Sailing-vessels of the first class shall be named after the States of the Union, those of the second class after the rivers, those of the third class after the principal cities and towns, and those of the fourth class as the President may direct.

Steamships of the first class shall be named after the States of the Union, those of the second class after the rivers and principal cities and towns, and those of the third class as the President may direct. [R. S.]


The classification to which reference is made in the text was made by R. S. secs. 1529, 1530, noted supra, this page, which were superseded by the Act of March 3, 1901,
Sec. 1532. [Two vessels not to bear the same name.] Care shall be taken that not more than one vessel in the Navy shall bear the same name. [R. S.]


Sec. 1533. [Names of purchased vessels.] The Secretary of the Navy may change the names of any vessels purchased for the Navy by authority of law. [R. S.]


Sec. 1534. [Vessels kept in service in time of peace:] The President is authorized to keep in actual service in time of peace, such of the public armed vessels as, in his opinion, may be required by the nature of the service, and to cause the residue thereof to be laid up in ordinary in convenient ports. [R. S.]


Sec. 1535. [How officered and manned.] Vessels in actual service, in time of peace, shall be officered and manned as the President may direct, subject to the provisions of section fifteen hundred and twenty-nine. [R. S.]

R. S. sec. 1529 mentioned in the text is noted supra, p. 1149, and was superseded by the Act of March 3, 1901, ch. 852, infra, p. 1157.

Sec. 1536. [Cruising to assist distressed navigators.] The President may, when the necessities of the service permit it, cause any suitable number of public vessels adapted to the purpose to cruise upon the coast in the season of severe weather and to afford such aid to distressed navigators as their circumstances may require; and such public vessels shall go to sea fully prepared to render such assistance. [R. S.]


Sec. 1537. [Patented articles connected with marine engines.] No patented article connected with marine engines shall hereafter be purchased or used in connection with any steam-vessels of war until the same shall have been submitted to a competent board of naval engineers, and recommended by such board, in writing, for purchase and use. [R. S.]

Act of July 18, 1861, ch. 8, 12 Stat. L. 268.

Sec. 1538. [Repairs on hull and spars.] Not more than three thousand dollars shall be expended at any navy-yard in repairing the hull and spars of any vessel, until the necessity and expediency of such repairs and the probable cost thereof are ascertained and reported to the Navy Department by an examining board, which shall be composed of one captain or commander in the Navy, designated by the Secretary of the Navy, the naval
constructor of the yard where such vessel may be ordered for repairs, and two master workmen of said yard, or one master workman and an engineer of the Navy, according to the nature of the repairs to be made. Said master workmen and engineer shall be designated by the head of the Bureau of Construction and Repair. [R. S.]


The Naval Appropriation Act of March 3, 1915, ch. 83, 38 Stat. L. 945, contained provisions similar to those appearing in like Acts for previous years, reading as follows:

"That no part of this sum shall be applied to the repair of any wooden ship when the estimated cost of such repairs, to be appraised by a competent board of naval officers, shall exceed ten per centum of the estimated cost, appraised in like manner, of a new ship of the same size and like material: Provided further, That no part of this sum shall be applied to the repair of any other ship when the estimated cost of such repairs, to be appraised by a competent board of naval officers, shall exceed twenty per centum of the estimated cost, appraised in like manner, of a new ship of the same size and like material: Provided further, That nothing herein contained shall deprive the Secretary of the Navy of the authority to order repairs of ships damaged in foreign waters or on the high seas, so far as may be necessary to bring them home."

Reports of the Secretary of the Navy with respect of repairs, etc., on vessels were required by the Act of March 2, 1907, ch. 2512, and the Act of March 3, 1909, ch. 255, given under subdivision I of this title, supra, p. 1060.

Sec. 1539. [Repairs on sails and rigging.] Not more than one thousand dollars shall be expended in repairs on the sails and rigging of any vessel, until the necessity and expediency of such repairs and the estimated cost thereof have been ascertained and reported to the Navy Department by an examining board, which shall be composed of one naval officer, designated by the Secretary of the Navy, and the master rigger and the master sail-maker of the yard where such vessel may be ordered. [R. S.]


Sec. 1540. [Sale of vessels unfit to be repaired.] The President may direct any armed vessel of the United States to be sold when, in his opinion, such vessel is so much out of repair that it will not be for the interest of the United States to repair her. [R. S.]

See the note to the following R. S. sec. 1541.

Sec. 1541. [Sale of unserviceable vessels and materials.] The Secretary of the Navy is authorized and directed to sell, at public sale, such vessels and materials of the United States Navy as, in his judgment, cannot be advantageously used, repaired, or fitted out; and he shall, at the opening of each session of Congress, make a full report to Congress of all vessels and materials sold, the parties buying the same, and the amount realized therefrom, together with such other facts as may be necessary to a full understanding of his acts. [R. S.]


Further provisions relating to the sale of unserviceable vessels and materials were made by the Act of Aug. 5, 1882, ch. 391, § 2, infra, p. 1153; the Act of March 3, 1883, ch. 141, § 5, infra, p. 1154; and the Act of June 30, 1890, ch. 640, § 1, infra, p. 1156.

Exchange of vessels.—There cannot be an exchange of a vessel belonging to the navy, which has been condemned as unfit for naval purposes, for another vessel, notwithstanding the exchange might be of advantage to the public service, as the
disposition of such vessel is controlled by this statute. (1874) 14 Op. Atty.-Gen. 369.

Private sale by officer of the navy.— In Steele v. U. S., (1885) 113 U. S. 128, 5 S. Ct. 396, 28 U. S. (L ed.) 952, it was held that this section and R. S. sec. 3618 (title PUBLIC MONEYS), conferred upon the Secretary of the Navy the only authority by which he could dispose of the materials of the United States navy. A private sale by a naval constructor at a grossly inadequate price, without survey, inspection, or appraisement, was without authority and void, and the fact that the account had been settled by the officers of the Navy Department did not cure the unauthorized acts.

Sec. 1542. [Commandants of navy-yards.] The President may select the commandants of the several navy-yards from officers not below the grade of commander. [R. S.]


Sec. 1543. [Master workmen.] The persons employed at the several navy-yards to superintend the mechanical departments, and heretofore known as master mechanics, master carpenters, master joiners, master blacksmiths, master boiler-makers, master sail-makers, master plumbers, master painters, master c鹘ks, master masons, master boat-builders, master sparmakers, master block-makers, master laborers, and the superintendents of rope-walks shall be men skilled in their several duties and appointed from civil life, and shall not be appointed from the officers of the Navy. [R. S.]

Act of June 17, 1868, ch. 61, 15 Stat. L. 69.

Sec. 1544. [Laborers, how selected.] Laborers shall be employed in the several navy-yards by the proper officers in charge with reference to skill and efficiency, and without regard to other considerations. [R. S.]


Construction.—This section must be construed in connection with R. S. sec. 1754 (title CIVIL SERVICE, vol. 2, p. 151), which provides that persons honorably discharged from the military or naval service by reason of disability, etc., incurred in the line of duty, shall be preferred for appointments to civil offices where they are found to possess the necessary business capacity to properly discharge the duties of such office. (1809) 27 Op. Atty.-Gen. 184.

R. S. sec. 1545. This section was as follows:

"Sec. 1545. Salaries shall not be paid to any employe in any of the navy-yards, except those who are designated in the estimates. All other persons shall receive a per diem compensation for the time during which they may be actually employed."


It was repealed by the Act of March 3, 1909, ch. 255, 35 Stat. L. 755, a part of which, given infra, p. 1158, made other provisions with respect of this subject.

Sec. 1546. [Requiring contributions for political purposes at navy-yards.] No officer or employe of the Government shall require or request any working man in any navy-yard to contribute or pay any money for political purposes, nor shall any working man be removed or discharged for political opinion; and any officer or employe of the Government who shall offend against the provisions of this section shall be dismissed from the service of the United States. [R. S.]

[Force at navy-yards not to be increased within sixty days before election.] * * * And no increase of the force at any navy-yard shall be made at any time within sixty days next before any election to take place for President of the United States, or members of Congress, except when the Secretary of the Navy shall certify that the needs of the public service make such increase necessary at that time which certificate shall be immediately published when made. [19 Stat. L. 69.]

This is from the Naval Appropriation Act of June 30, 1876, ch. 159.

[Sec. 1.] [Washington and Boston navy-yards, how continued.] * * * That the navy-yard at Washington, District of Columbia, may, at the discretion of the Secretary of the Navy, be maintained as a manufacturing yard for the Bureaus of Equipment and Recruiting and Ordnance, and that work may be continued in the rope-walk in the Boston navy-yard: And provided further, That nothing herein shall be held to interfere with the permanent improvement of any navy-yard as now authorized by law, or the expenditure for such purpose of any money appropriated by Congress therefore. [22 Stat. L. 289.]

This and the following paragraph of the text are from the Naval Appropriation Act of Aug. 5, 1882, ch. 391.

Sec. 2. [Use or sale of old material — examination of vessels — vessels unfit for service stricken from Register.] * * * And no old material of the Navy shall hereafter be sold or exchanged by the Secretary of the Navy, or by any officer of the Navy, which can be profitably used by reworking or otherwise in the construction or repair of vessels, their machinery, armor, armament, or equipment; but the same shall be stored and preserved for future use. And when any such old material can not be profitably used as aforesaid, the same shall be appraised and sold at public auction after public notice and advertisement shall have been given according to law under such rules and regulations and in such manner as the said Secretary may direct. The net proceeds arising from the sales of such old materials shall be paid into the Treasury. It shall be the duty of the Secretary of the Navy annually to report in detail to Congress, in his annual report, the proceeds of all sales of materials, stores, and supplies, made under the provisions of this act, and the expenses attending such sales. It shall also be the duty of the Secretary of the Navy, as soon as may be after the passage of this act, to cause to be examined by competent boards of officers of the Navy, to be designated by him for that duty, all vessels belonging to the Navy not in actual service at sea, and vessels at sea as soon as practicable after they shall return to the United States, and hereafter all vessels on their return from foreign stations, and all vessels in the United States as often as once in three years, when practicable; and said boards shall ascertain and report to the Secretary of the Navy, in writing, which of said vessels are unfit for further service, or, if the same are unfinished in any navy-yard, those which can not be finished without great and disproportionate expense, and shall in such report state fully the grounds and reasons for their opinion. And it shall be the duty of the
Secretary of the Navy, if he shall concur in opinion with said report, to strike the name of such vessel or vessels from the Navy Register and report the same to Congress. [22 Stat. L. 296.]

See the note to the preceding paragraph of the text. For earlier provisions with respect of this subject see R. S. sec. 1541, supra, p. 1151, and the note thereto.

Mandamus to compel acceptance of bid. — See note under section 5, Act of March 3, 1883, ch. 141, infra, p. 1154.

[Sec. 1.] [Naval training station at Coasters' Harbor Island.] • • • For repairing and extending wharf and the erection of boat-houses on Coasters' Harbor Island, five thousand dollars, and the cession by the State of Rhode Island to the United States of said Island for use as a Naval Training Station is hereby accepted. [22 Stat. L. 32.]

This is from the Sundry Civil Appropriation Act of Aug. 7, 1882, ch. 433. See also the Act of March 2, 1895, ch. 186, infra, p. 1156.

[Sec. 1.] [Adoption of life saving dress.] • • • and the Secretary of the Navy is authorized and empowered, within his discretion, to constitute and introduce, as a portion of the equipment of the Navy, the life saving dress adopted and approved by the Life Saving Service of the United States. [22 Stat. L. 475.]

This is from the Naval Appropriation Act of March 3, 1883, ch. 97. The Life Saving Service was consolidated with the Revenue-Cutter Service to form the Coast Guard by the Act of Jan. 26, 1915, ch. 20. See CoAST GUARD, vol. 2, p. 262.

Sec. 5. [Vessels stricken from Navy Register — appraisal and sale.] It shall be the duty of the Secretary of the Navy to cause to be appraised, in such manner as may seem best, all vessels of the Navy which have been stricken from the Navy Register under the provisions of the act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes, approved August fifth, eighteen hundred and eighty-two. And if the said Secretary shall deem it for the best interest of the United States to sell any such vessel or vessels, he shall, after such appraisal, advertise for sealed proposals for the purchase of the same, for a period not less than three months, in such newspapers as other naval advertisements are published, setting forth the name and location and the appraised value of such vessel, and that the same will be sold, for cash, to the person or persons or corporation or corporations offering the highest price therefor above the appraised value thereof; and such proposals shall be opened on a day and hour and at a place named in said advertisement, and record thereof shall be made. The Secretary of the Navy shall require to accompany each bid or proposal a deposit in cash of not less than ten per centum of the amount of the offer or proposal, and also a bond, with two or more sureties to be
approved by him, conditioned for the payment of the remaining ninety per
centum of the amount of such offer or proposal within the time fixed in the
advertisement. And in case default is made in the payment of the remain-
ing ninety per centum, or any part thereof, the Secretary, within the pre-
scribed time thereof, shall advertise and resell said vessel under the pro-
visions of this act. And in that event said cash deposit of ten per centum
shall be considered as forfeited to the government, and shall be applied,
first, to the payment of all costs and expenditures attending the advertise-
ment and resale of said vessel; second, to the payment of the difference, if
any, between the first and last sale of said vessel; and the balance, if any,
shall be covered into the Treasury: Provided, however, That nothing herein
contained shall be construed to prevent a suit upon said bond for breach of
any of its conditions. Any vessel sold under the foregoing provisions shall
be delivered to the purchaser upon the full payment to the Secretary of
the Navy of the amount of such proposal or offer; and the net proceeds of
such sale shall be covered into the Treasury. But no vessel of the Navy shall
hereafter be sold in any other manner than herein provided, or for less than
such appraised value, unless the President of the United States shall other-
wise direct in writing. [22 Stat. L. 599.]

This is from the Deficiency Appropriation Act of March 3, 1883, ch. 141.
The provisions of the Act of Aug. 5, 1882, ch. 391, § 2, to which reference is
made in the text, are given supra, p. 1153. See also R. S. sec. 1641, supra, p. 1151, and the
note thereto.

Mandamus to compel acceptance of bid.
 — Where a vessel is offered for sale and
the Secretary of the Navy advertises for
proposals for purchase, one who makes
the highest bid, which is refused, cannot
maintain a mandamus proceeding to com-
pel the Secretary to deliver the vessel to
him. The discretion of the Secretary is
not ended by the receipt and opening of
the bids, even though they satisfied all the
conditions prescribed. U. S. v. Daniels,
(1913) 231 U. S. 218, 34 S. Ct. 84,
58 U. S. (L. ed.) 101, affirming (1911)

SEC. 2. [Steel for construction of vessels.] That in the construction of
all naval vessels the steel material shall be of domestic manufacture, and of
the quality and characteristics best adapted to the various purposes for
which it may be used, in accordance with specifications approved by the

This was a part of the Act of Aug. 3, 1886, ch. 849. As originally enacted this
section was as follows:

"SEC. 2. That the vessels hereinbefore authorized to be constructed shall be built of
steel of domestic manufacture, having a tensile strength of not less than sixty thou-
sand pounds per square inch, and an elongation in eight inches of not less than twenty-
five per centum."

It was amended to read as given in the text by the Naval Appropriation Act of
May 4, 1898, ch. 234.

[Consolidation of Torpedo Station and Naval War College.] * * *
Training Station, Coasters’ Harbor Island, Rhode Island: * * * to
enable the naval war college to be conducted at said island up to January
first, eighteen hundred and eighty-nine: * * * Provided, That the
Secretary of the Navy is hereby authorized to consolidate and place under
one command the torpedo station and the naval war college at Newport, Rhode Island after said date. [25 Stat. L. 459.]

This is from the Naval Appropriation Act of Sept. 7, 1888, ch. 991.

[Sec. 1.] [Sale of condemned naval supplies, etc.] * * * The Secretary of the Navy is hereby authorized to sell, after advertisement of the sale for such time as in his judgment the public interests may require, condemned naval supplies, stores, and materials, either by public auction or by advertisement for sealed proposals for the purchase of the same. [26 Stat. L. 194.]

This is from the Naval Appropriation Act of June 30, 1890, ch. 640. See R. S. sec. 1541, supra, p. 1151, and the notes thereeto.

[Naval training station—quarters.] * * * Naval Training Station, Coasters' Harbor Island, Rhode Island (for apprentices): * * * Provided, That no part of the personnel of the training force shall be quartered on shore except in case of sickness. [28 Stat. L. 827.]

This is from the Naval Appropriation Act of March 2, 1895, ch. 186.

An Act Providing for a naval training station on the island of Yerba Buena (or Goat Island), in the harbor of San Francisco, California, and for other purposes.

[Act of April 24, 1896, ch. 120, 29 Stat. L. 96.]

[Sec. 1.] [Additional training station in San Francisco harbor.] That the Secretary of the Navy be, and he is hereby, authorized to establish a training station for naval apprentices on the island of Yerba Buena (or Goat Island), in the harbor of San Francisco, California; and said Secretary is authorized to designate two officers of the Navy, and the Secretary of War is authorized to designate one officer of the Army, said three officers to constitute a board, who shall select and assign so much of said island as may be necessary for the purpose of establishing said naval training station; and the site so selected, when approved by the President, shall be, by virtue of this Act, transferred to the Navy Department for the purposes of said naval training station. [29 Stat. L. 96.]

Section 2 of this Act relating to the number of enlisted men is given supra, p. 1089.

[Model tank for experiments.] * * * For making plans, examining and preparing the ground and other preliminary work toward the construction of a model tank, with all buildings and appliances, to be built upon the grounds of the navy yard at Washington, District of Columbia, under the Bureau of Construction and Repair of the Navy Department, which
shall conduct therein the work of investigating and determining the most suitable and desirable shapes and forms to be adopted for United States naval vessels, seven thousand five hundred dollars: Provided, That upon the authorization of the Secretary of the Navy experiments may be made at this establishment for private shipbuilders, who shall defray the cost of material and of labor of per diem employees for such experiments: And provided further, That the results of such private experiments shall be regarded as confidential and shall not be divulged without the consent of the shipbuilder for whom they may be made. [29 Stat. L. 372.]

This is from the Naval Appropriation Act of June 10, 1896, ch. 399.

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[Names of battleships.] That hereafter all first-class battleships and monitors owned by the United States shall be named for the States, and shall not be named for any city, place, or person until the names of the States, shall have been exhausted: Provided, That nothing herein contained shall be so construed as to interfere with the names of States already assigned to any such battleship or monitor. [30 Stat. L. 390.]

This is from the Naval Appropriation Act of May 4, 1898, ch. 234. So much of this Act as related to the naming of monitors was repealed by a provision of the Act of May 13, 1908, ch. 166, infra, p. 1158. See further R. S. sec. 1531, supra, p. 1149.

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[Classification of vessels — rules for assignment to command of vessels and squadrons.] • • • That the President of the United States be, and he is hereby, authorized to establish, and from time to time to modify, as the needs of the service may require, a classification of vessels of the Navy, and to formulate appropriate rules governing assignments to command of vessels and squadrons. [31 Stat. L. 1133.]

This is from the Naval Appropriation Act of March 3, 1901, ch. 852. The provisions of the text superseded those of R. S. secs. 1529–1530 noted supra, p. 1149.

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[Pay of civilian employees appointed for duty in various islands.] • • • The Secretary of the Navy, in his discretion, is authorized to pay all civilian employees appointed for duty in the Philippine, Hawaiian, and Samoan islands, the island of Guam, and the island of Porto Rico, from the date of their sailing from the United States until they report for duty to the officer under whom they are to serve, and while returning to the United States by the most direct route and with due expedition, a per diem compensation corresponding to their pay while actually employed; and in cases where the appointee is not to fill an existing vacancy his pay while traveling may be charged to the annual appropriation of the bureau concerned. [32 Stat. L. 663.]

This is from the Naval Appropriation Act of July 1, 1902, ch. 1368.
[Consolidation of power plants.] * * * The Secretary of the Navy is hereby authorized, in his discretion, to consolidate the several power plants in any or all of the several navy-yards and stations at each navy-yard and station under the Bureau of Yards and Docks for the generation and distribution of light, heat, and power for all the purposes of the Navy. To the above end all such plants may be transferred from other bureaus to the Bureau of Yards and Docks. [33 Stat. L. 337.]

This is from the Naval Appropriation Act of April 27, 1904, ch. 1022.

[Monitors — restriction on naming, removed.] * * * So much of the Act entitled "An Act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and ninety-nine, and for other purposes," approved May fourth, eighteen hundred and ninety-eight, as provides that monitors owned by the United States shall be named for the States, and shall not be named for any city, place or person until the names of the States shall have been exhausted, is hereby repealed, and monitors now owned by the United States or hereafter built may be named as the President may direct. [35 Stat. L. 159.]

This is from the Naval Appropriation Act of May 13, 1908, ch. 166. The provision of the Act of May 4, 1898, ch. 234, repealed in part by the text is given supra, p. 1167.

[Secretary of the Navy to fix, etc., pay of clerical, drafting, etc., force — leaves for per diem employees.] * * * That hereafter the rates of pay of the clerical, drafting, inspection, and messenger force at navy-yards and naval stations and other stations and offices under the Navy Department shall be paid from lump appropriations and shall be fixed by the Secretary of the Navy on a per annum or per diem basis as he may elect; that the number may be increased or decreased at his option and shall be distributed at the various navy-yards and naval stations by the Secretary of the Navy to meet the needs of the naval service, and that such per diem employees may hereafter, in the discretion of the Secretary of the Navy, be granted leave of absence not to exceed fifteen days in any one year, which leave may, in exceptional and meritorious cases, where such an employee is ill, be extended, in the discretion of the Secretary of the Navy, not to exceed fifteen days additional in any one year; that the total amount expended annually for pay for such clerical, drafting, inspection, and messenger force shall not exceed the amounts specifically allowed by Congress under the several lump appropriations, and that the Secretary of the Navy shall each year, in the annual estimates, report to Congress the number of persons so employed, their duties, and the amount paid to each. [35 Stat. L. 754.]

This and the following paragraph of the text are from the Naval Appropriation Act of March 3, 1909, ch. 255.


This Act superseded a provision of the Naval Appropriation Act of May 30, 1908, ch. 227, 35 Stat. L. 505, which was as follows: "That the Secretary of the Navy shall submit to Congress detailed estimates for all such classified civil-service employees that may be required to be employed during the fiscal year nineteen hundred and ten,
and annually thereafter, and no such classified civil-service employees shall be employed during the fiscal year nineteen hundred and ten, or in any subsequent fiscal year, and paid from such lump appropriations except under specific authorization granted by law from year to year based upon estimates as herein required."

This Act likewise superseded a provision of the Naval Appropriation Act of July 1, 1902, ch. 1368, 32 Stat. L. 663, which was as follows: "That the accounting officers of the Treasury are hereby authorized and directed to allow, in the settlement of the accounts of disbursing officers involved, payments made under the appropriation "Emergency fund" to civilian employees appointed by the Navy Department for duty in and serving at naval stations maintained in the island possessions during the fiscal year nineteen hundred and two, and until such time as Congress shall make specific appropriation for the pay of such employees."


Navy yard closed at noon.—In (1899) 22 Op. Atty.-Gen. 472, it was held that on April 6, 1899, the Washington navy yard being closed at noon, pursuant to an executive order, in connection with the ceremonies attending the interment of the bodies of soldiers and sailors whose lives were lost in the war with Spain, the per diem employees of the yard were entitled to receive compensation for the entire day.

Under R. S. sec. 1545—Effect of suspension.—Under R. S. sec. 1545, supra, p. 1152, repealed by this Act, it was held that one engaged at a per diem compensation was under the express provisions of the second clause of the section entitled to such compensation for the time during which he was actually employed, but to that only. A suspension by the commandant of the navy yard was in effect his discharge from the employment in which he was engaged, and the fact that subsequent to his suspension the Secretary of the Navy appointed a board to investigate and report upon the charges against him, was no recognition of his status as a then employee of the government, and could not operate to confer upon him the right to compensation for the time during which he was not actually employed. Murphy v. U. S., (C. C. A. 9th Cir. 1897) 79 Fed. 255, 48 U. S. App. 261, 24 C. C. A. 567.

[Employees at navy yards and stations—preference for reinstatement.] * * * That persons employed in the clerical, drafting, and inspection force at navy-yards and stations discharged for lack of work or insufficiency of funds shall for one year thereafter be preferred for employment in such navy-yards and stations in the clerical, drafting, inspection, and messenger forces. [35 Stat. L. 755.]

See the note to the preceding paragraph of the text.

[Detail of line under staff officers.] * * * That line officers may be detailed for duty under staff officers in the manufacturing and repair departments of the navy-yards and naval stations, and all laws or parts of laws in conflict herewith are hereby repealed. [36 Stat. L. 614.]

This is from the Naval Appropriation Act of June 24, 1910, ch. 378.

[Heat, etc., to Young Men's Christian Association buildings at yards.] * * * That the Secretary of the Navy is authorized, in his discretion, to furnish hereafter, without charge, heat and light for the Young Men's Christian Association buildings in navy yards and stations. [36 Stat. L. 1274.]

This is from the Naval Appropriation Act of March 4, 1911, ch. 239.
[Disposition of worthless papers in files of vessels.] • • • 
The Act “to authorize and provide for the disposal of useless papers in executive departments,” approved February sixteenth, eighteen hundred and eighty-nine, is hereby amended so that accumulations in the files of vessels of the Navy of papers that, in the judgment of the commander in chief of the fleet, are not needed or useful in the transaction of current business and have no permanent value or historical interest may be disposed of by the commander in chief of the fleet by sale, after advertisement for proposals, as waste papers if practicable, or if not practicable, then otherwise, as may appear best for the interests of the Government, the commander in chief of the fleet to make report thereon to the Secretary of the Navy; provided always that no papers less than two years old from the date of the last indorsement thereon and no correspondence, or the related papers, with officers or representatives of a foreign government shall be destroyed or disposed of by such commander in chief of the fleet. [37 Stat. L. 329.]

This and the following paragraph of the text are from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.
The Act of Feb. 16, 1889, ch. 171, relating to the disposition of useless papers in the executive departments and amended by the text is given under Executive Departments, vol. 3, p. 200.

[Duties of enlisted men on battleships when docked, etc., limited.] • • • 
No enlisted men or seamen, not including commissioned and warrant officers, on battleships of the Navy, when such battleships are docked or laid up at any navy yard for repairs, shall be ordered or required to perform any duties except such as are or may be performed by the crew while at sea or in a foreign port. [37 Stat. L. 355.]

See the note to the preceding paragraph of the text.

[Additional pay to employees while on leave not allowed.] • • • 
That employees while taking their leaves of absence shall not receive compensation for services rendered during the period of such leave of absence in addition to leave pay. [37 Stat. L. 893.]

This is from the Navy Appropriation Act of March 4, 1913, ch. 148.

[Disposition of useless papers at yards and stations.] • • • 
That the Act “To authorize and provide for the disposal of useless papers in the executive departments,” approved February sixteenth, eighteen hundred and eighty-nine, is hereby amended so that accumulations in the files of navy yards and naval stations that, in the judgment of the Secretary of the Navy, are not needed or useful in the transaction of current business and have no permanent value or historical interest may be disposed of by the Secretary of the Navy by sale, after advertisement for proposals as waste paper if practicable, or if not practicable then otherwise as may appear best for the interests of the Government, the said Secretary to make detailed report to the Congress in every case of the papers destroyed; provided always that no papers less than two years old from the date of the
last indorsement thereon shall be destroyed or disposed of by the Secretary of the Navy, except in the manner provided in said act of February sixteenth, eighteen hundred and eighty-nine. [33 Stat. L. 929.]

This is from the Naval Appropriation Act of March 3, 1916, ch. 83.

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IX. GENERAL PROVISIONS RELATING TO THE NAVY

Sec. 1547. [Regulations.] The orders, regulations, and instructions issued by the Secretary of the Navy prior to July 14, 1862, with such alterations as he may since have adopted, with the approval of the President, shall be recognized as the regulations of the Navy, subject to alterations adopted in the same manner. [R. S.]

Sections 1547-1555 constitute chapter 7 of title 15 of the Revised Statutes.
R. S. sec. 1562 is noted as repealed under R. S. sec. 1551, infra, p. 1182.
R. S. sec. 1553 was embodied in section 42 of the Penal Laws and repealed by section 341 thereof. See PENAL LAWS.
R. S. secs. 1554, 1555, relating to captured flags and the presentation thereof, are given under Flags, vol. 5, p. 361.


Conformity to law.—A regulation must be in pursuance of law upon a subject-matter which the law has not determined, adjusted, or defined; and must be in conformity to law, when a law exists upon the subject of the regulation. Symonds v. U. S., (1886) 21 Ct. Cl. 148, affirmed (1887) 120 U. S. 46, 7 S. Ct. 411, 30 U. S. (L. ed.) 557. See also (1894) 21 Op. Atty.-Gen. 46.

Persons amenable to regulations.—For the government of those persons in the navy whom they immediately affect, the regulations are prescribed. They cannot limit or alter the rights of others who are not amenable to them, and not subject to the orders of the Secretary of the Navy. They extend to and govern only those persons who are in the naval service. (1880) 16 Op. Atty.-Gen. 494.

Approval of President.—Under this section all navy regulations issued since July 14, 1862, require the approval of the President. (1904) 26 Op. Atty.-Gen. 270.

Sec. 1548. [Copy to be furnished to officers.] The Secretary of the Navy shall cause each commissioned or warrant officer of the Navy, on his entry into the service, to be furnished with a copy of the regulations and general orders of the Navy Department then in force, and thereafter with a copy of all such as may be issued. [R. S.]

Act of July 17, 1862, ch. 204, 12 Stat. L. 610.

Sec. 1549. [Regulations of supplies.] It shall be the duty of the President to make, subject to the provisions of law concerning supplies, such regulations for the purchase, preservation, and disposition of all articles, stores, and supplies for persons in the Navy, as may be necessary for the safe and economical administration of that branch of the public service. [R. S.]

Purpose and effect.—Under former regulations pursers might procure clothing, groceries, stores and supplies for the use of the navy, on their own account, and dispose of the same to the officers and seamen for their own benefit. Abuses grew out of this system, and Congress interfered and gave fixed salaries to pursers, and provided that all such purchases should be made with public money and on public account, under such directions and regulations as the executive should prescribe for that purpose. The effect of the new law was to repeal the old regulations in relation to pursers and to authorize new directions and regulations in their place. Strong v. U. S., (1867) 6 Wall. 788, 18 U. S. (L. ed.) 740.

Sec. 1550. [Appointment of persons to disburse money on foreign stations.] No person shall be employed or continued abroad, to receive and pay money for the use of the naval service on foreign stations, whether under contract or otherwise, who has not been, or shall not be, appointed by and with the advice and consent of the Senate. [R. S.]


Sec. 1551. [Insane of the Navy.] The Secretary of the Navy may cause persons in the naval service or Marine Corps, who become insane while in the service, to be placed in such hospital for the insane, in his opinion, will be most convenient and best calculated to promise a restoration of reason. And he may pay to any such hospital, other than the Government Hospital for the Insane in the District of Columbia, the pay which may from time to time be due to such insane person, and he may, in addition thereto, pay to such institution, from the annual appropriation for the naval service, under the head of contingent enumerated, any deficiency of a reasonable expense, not exceeding one hundred dollars per annum. [R. S.]


R. S. sec. 1552. This section was as follows:

"Sec. 1552. The secretary of the Navy may establish, at such places as he may deem necessary, suitable depots of coal, and other fuel, for the supply of steamships of war." [R. S.]


It was repealed by an Act of March 4, 1913, ch. 148, 37 Stat. L. 898.

See the note to R. S. sec. 1547, supra, p. 1161.

Sec. 284. [Settlement of accounts of paymasters of lost or captured public vessels.] In every case of the loss or capture of a vessel belonging to the Navy of the United States, the proper accounting officers of the Treasury, under the direction of the Secretary of the Navy, are authorized, in the settlement of the accounts of the paymaster of such vessel, to credit him with such portion of the amount of the provisions, clothing, small stores, and money, with which he stands charged on the books of the Fourth Auditor of the Treasury, as they shall be satisfied was inevitably lost by such capture or loss of a public vessel; and such purser [paymaster!] shall be fully exonerated by such credit from all liability on account of the provisions, clothing, small stores, and money so proved to have been captured or lost. [R. S.]


The word "paymaster" was inserted by Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 317, in place of the word "purser" appearing in the section as originally enacted.

"Sections 284-290 constitute a part of chapter 4 of title 7 of the Revised Statutes.

"The Auditors."
Sec. 285. [Disbursements, etc., by order of commanding officer of Navy.] Every disbursement of public moneys, or disposal of public stores, made by a disbursing officer pursuant to an order of any commanding officer of the Navy, shall be allowed by the proper accounting officers of the Treasury, in the settlement of the accounts of the officer, upon satisfactory evidence of the making of such order, and of the payment of money or disposal of stores in conformity with it; and the commanding officer by whose order such disbursement or disposal was made, shall be held accountable for the same. [R. S.]


Sec. 286. [Fixing date of loss of missing vessels.] The proper accounting officers of the Treasury are authorized, under the direction of the Secretary of the Navy, in settling the accounts of seamen, and others, not officers, borne on the books of any vessel in the Navy which shall have been wrecked, or which shall have been unheard from so long that her wreck may be presumed, or which shall have been destroyed or lost with the rolls and papers necessary to a regular and exact settlement of such accounts, to fix a day when such wreck, destruction, or loss shall be deemed to have occurred. [R. S.]


Sec. 287. [Accounts of petty officers, seamen, etc., on lost vessel.] The proper accounting officers of the Treasury are authorized, in settling the accounts of the petty officers, seamen, and others, not officers, on board of any vessel in the employ of the United States, which by any casualty, or in action with the enemy, has been or may be sunk or otherwise destroyed, together with the rolls and papers necessary to the exact ascertainment of the several accounts of the same at the date of such loss, to assume the last quarterly return of the paymaster of any such vessel as the basis for the computation of the subsequent to those on board to the date of such loss, if there be no official evidence to the contrary. Where such quarterly return has, from any cause, not been made, the accounting officers are authorized to adjust and settle such accounts on principles of equity and justice. [R. S.]


An order by the Secretary of the Navy to an officer, as to the disbursement of funds, was held to be within this section. U. S. v. Jones. (1854) 2 Hayw. & H. 160, 26 Fed. Cas. No. 15493c, affirmed (1855) 18 How. 92, 15 U. S. (L. ed.) 274.

Sec. 288. [Compensation for personal effects lost.] The proper accounting officers of the Treasury Department are authorized, in settling the accounts of the petty officers, seamen, and others, not officers, on board of any vessel in the employ of the United States, which, by any casualty, or in action with the enemy, has been or may be sunk or otherwise destroyed, to allow and pay to each person, not an officer, employed on the vessel so sunk or destroyed, and whose personal effects have been lost, a sum not
exceeding sixty dollars, as compensation for the loss of his personal effects. [R. S.]


A permanent appropriation is provided by R. S. sec. 3689 for “indemnity to seamen and marines for lost clothing.” See Estimates, Appropriations, and Reports, vol. 3, p. 141.

Sec. 289. [Payment of accounts of deceased petty officers, seamen, etc., of lost vessel.] In case of the death of any such petty officer, seaman, or other person, not an officer, such payment shall be made to the widow, child or children, father, mother, or brothers and sisters jointly, following that order of preference; such credits and gratuity to be paid out of any money in the Treasury not otherwise appropriated. [R. S.]


Sec. 290. [Allowance for effects of officer of lost vessel.] In case any officer of the Navy or Marine Corps on board a vessel in the employ of the United States which, by any casualty, or in action with the enemy, at any time since the nineteenth day of April, eighteen hundred and sixty-one, has been or may be sunk or destroyed, shall thereby have lost his personal effects, without negligence or want of skill or foresight on his part, the proper accounting officers are authorized, with the approval of the Secretary of the Navy, to allow to such officer a sum not exceeding the amount of his sea-pay for one month as compensation for such loss. But the accounting officers shall in all cases require a schedule and certificate from the officer making the claim for effects so lost. [R. S.]


An act to provide for the deposit of the savings of seamen of the United States Navy.


[Sect. 1.] [Deposit of savings by petty officers and seamen, with paymasters.] That any enlisted man or appointed petty officer of the Navy may deposit his savings, in sums not less than five dollars, with the paymaster upon whose books his account is borne; and he shall be furnished with a deposit-book, in which the said paymaster shall note, over his signature, the amount, date, and place of such deposit. The money so deposited shall be accounted for in the same manner as other public funds, and shall pass to the credit of the appropriation for “Pay for the Navy,” and shall not be subject to forfeiture by sentence of court-martial, but shall be forfeited by desertion, and shall not be permitted to be paid until final payment on discharge, or to the heirs or representatives of a deceased sailor, and that such deposit be exempt from liability for such sailor’s debts: Provided, That the Government shall be liable for the amount deposited to the person so depositing the same. [25 Stat. L. 657.]

Earnings only.—Accumulated savings of any amount may be received from enlisted men or petty officers for deposit, provided they represent the earnings of such a person as an enlisted man or petty officer in the navy. (1897) 21 Op. Atty.-Gen. 498.

Marine corps.—This Act does not extend to enlisted men of the marine corps. (1890) 19 Op. Atty.-Gen. 616.
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SEC. 2. [Interest.] That for any sums not less than five dollars so deposited for the period of six months or longer, the sailor, on his final discharge, shall be paid interest at the rate of four per centum per annum. [25 Stat. L. 658.]

SEC. 3. [Regulations by Secretary of Navy.] That the system of deposits herein established, shall be carried into execution under such regulations as may be established by the Secretary of the Navy. [25 Stat. L. 658.]

An act to provide for the reimbursement of officers and seamen for property lost or destroyed in the naval service of the United States.

[Act of March 2, 1893, ch. 190, 28 Stat. L. 962.]

[Adjustment of losses by shipwreck, etc., of officers and men in naval service.] That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain, and determine the value of the private property belonging to officers, petty officers, seamen, and others in the naval service of the United States which has been or may hereafter be lost and destroyed in the naval service by shipwreck or other marine disaster, under the following circumstances:

First. When such loss or destruction was without fault or negligence on the part of the claimant.

Second. Where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of any officer authorized to give such order or direct such shipment.

And the amount of such loss or losses which have accrued prior to the passage of this Act so ascertained and determined upon settlement by the proper accounting officers of the Treasury shall be paid out of any money in the Treasury not otherwise appropriated, and all losses that shall hereafter accrue shall be certified by the Secretary of the Treasury at the commencement of each regular session to the Speaker of the House of Representatives who shall lay the same before Congress for consideration, and shall be in full for all such loss or damage: Provided, That any claim which shall be presented and acted upon under authority of this Act shall be held as finally determined, and shall never thereafter be reopened or considered: And provided further, That this Act shall not apply to losses sustained in time of war: And provided further, That the liability of the Government under this Act shall be limited to such articles of personal property as are required by the United States Naval Regulations, and in force at the time of loss or destruction, for such officers, petty officers, seamen, or others engaged in the public service, in the line of duty: And provided further, That the amounts which have been paid to persons in the naval service under sections two hundred and eighty-eight, two hundred and eighty-nine, and two hundred and ninety of the Revised Statutes shall be deducted in the settlement of all claims under this Act: And provided further, That the value of the article or articles lost or destroyed shall be their value at the date of loss or destruction: And provided further, That all claims now existing shall be presented within two years, and not after,
from the passage of this Act; and all such claims hereafter arising be presented within two years from the occurrence of the loss or destruction. That nothing in this Act shall be construed to authorize the reopening or payment of any claims for losses of private property on vessels sunk or otherwise destroyed prior to August twentieth, eighteen hundred and eighty-four. [28 Stat. L. 962.]


Sec. 25. [Oath of allegiance.] That the oath of allegiance now provided for the officers and men of the Army and Marine Corps shall be administered hereafter to the officers and men of the Navy. [30 Stat. L. 1009.]

This is from the "Navy Personnel" Act of March 3, 1899, ch. 413. See the notes to section 1 of this Act, supra, p. 1091.

The oath of officers and enlisted men of the marine corps was prescribed by R. S. sec. 1609, infra, p. 1218.

An Act authorising certain officers of the Navy and Marine Corps to administer oaths.


[Oaths may be administered by certain officers.] That judges-advocate of naval general courts-martial and courts of inquiry, and all commanders in chief of naval squadrons, commandants of navy-yards and stations, officers commanding vessels of the Navy, and recruiting officers of the Navy, and the adjutant and inspector, assistant adjutant and inspector, commanding officers, and recruiting officers of the Marine Corps be, and the same are hereby, authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration. [28 Stat. L. 639, as amended by 31 Stat. L. 1086.]

This Act originally read as follows:

"That judges-advocate of naval general courts-martial and courts of inquiry, and all commanders in chief of naval squadrons, commandants of navy-yards and stations, and officers commanding vessels of the Navy, and the adjutant and inspector, commanding officers and recruiting officers of the Marine Corps be, and the same are hereby, authorized to administer oaths for the purposes of the administration of naval justice and for other purposes of naval administration."

It was amended to read as given in the text by an Act of March 3, 1901, ch. 834, 31 Stat. L. 1086.

An Act To promote the administration of justice in the Navy.


[Sec. 1.] [Courts to try enlisted men for minor offenses.] That courts for the trial of enlisted men in the Navy and Marine Corps for minor offenses now triable by summary court-martial may be ordered by the commanding officer of a naval vessel, by the commandant of a navy-yard or
station, by a commanding officer of marines, or by higher naval authority. [35 Stat. L. 621.]

SEC. 2. [Deck courts — composition of — powers.] That such courts shall be known as "deck courts," and shall consist of one commissioned officer only, who, while serving in such capacity shall have power to administer oaths, to hear and determine cases, and to impose, in whole or in part, the punishments prescribed by article thirty of the Articles for the Government of the Navy: Provided, That in no case shall such courts adjudge discharge from the service or adjudge confinement of [sic] forfeiture of pay for a longer period than twenty days. [35 Stat. L. 621.]

Article 30 of the Articles for the Government of the Navy mentioned in the text is given in ARTICLES FOR THE GOVERNMENT OF THE NAVY, vol. 1, p. 431.

SEC. 3. [Recorder to be detailed.] That any person in the Navy under command of the officer by whose order a deck court is convened may be detailed to act as recorder thereof. [35 Stat. L. 621.]

SEC. 4. [Review, etc., of sentence.] That the officer within whose command a deck court is sitting shall have full power as reviewing authority to remit or mitigate, but not to commute, any sentence imposed by such court; but no sentence of a deck court shall be carried into effect until it shall have been so approved or mitigated, and such officer shall have power to pardon any punishment such court may adjudge. [35 Stat. L. 621.]

SEC. 5. [Procedure, etc.] That the courts hereby authorized shall be governed in all details of their constitution, powers, and procedure, except as herein provided, by such rules and regulations as the President may prescribe. [35 Stat. L. 621.]

SEC. 6. [Record of proceedings — review of record by judge-advocate-general.] That the records of the proceedings of the courts hereby authorized shall contain such matters only as are necessary to enable the reviewing authorities to act intelligently thereon, except that if the party accused demands it within thirty days after the decision of the deck court shall become known to him, the entire record or so much as he desires shall be sent to the reviewing authority. Such records, after action thereon by the convening authority, shall be forwarded directly to, and shall be filed in, the Office of the Judge-Advocate-General of the Navy, where they shall be reviewed, and, when necessary, submitted to the Secretary of the Navy for his action. [35 Stat. L. 621.]

Records of courts-martial.—Any person having an interest in the record for naval court-martial on file in the Navy Department, is entitled to have an exemplified copy of it after the proceedings are consummated by the action of the revisory authority. Public justice and private right require that the Secretary of the Navy and his subordinate officers shall not withhold this testimony in regard to the contents of such a record when required to give it by the summons of a state court. (1865) 11 Op. Atty.-Gen. 137.

SEC. 7. [Right of objection, etc.] That no person who objects thereto shall be brought to trial before a deck court. Where such objection is made
by the person accused, trial shall be ordered by summary or by general court-martial, as may be appropriate. [35 Stat. L. 621.]

SEC. 8. [Adjudging punishments — use of irons abolished.] That the courts authorized to impose the punishments prescribed by article thirty of the Articles for the Government of the Navy may adjudge either a part or the whole, as may be appropriate, of any one of the punishments therein enumerated: Provided, That the use of irons, single or double, is hereby abolished, except for the purpose of safe custody or when part of a sentence imposed by a general court-martial. [35 Stat. L. 621.]

The abolishment of the use of irons is also found in the Naval Appropriation Act of May 13, 1908, ch. 166, 35 Stat. L. 132.
Article 30 of the Articles for the Government of the Navy mentioned in this section is given under ARTICLES FOR THE GOVERNMENT OF THE NAVY, vol. 1, p. 431.

SEC. 9. [Court-martial proceedings may be set aside.] That the Secretary of the Navy may set aside the proceedings or remit or mitigate, in whole or in part, the sentence imposed by any naval court-martial convened by his order or by that of any officer of the Navy or Marine Corps. [35 Stat. L. 621.]

Effect of order remitting unexecuted portion of sentence.—An order remitting the unexecuted portion of the sentence of a lieutenant-commander of the U. S. navy who had been suspended for two years, and was to retain his number and grade, does not have the effect of advancing him two numbers in grade, although during the time of his suspension from duty two officers with commissions dated subse-

quently to his had been advanced above him in the grade of lieutenant-commander. (1891) 20 Op. Atty.-Gen. 243.

Constructive pardon.—The order of the Secretary of the Navy to an officer, while under sentence of suspension to attend a court-martial as a witness, does not operate as a constructive pardon. (1854) 6 Op. Atty.-Gen. 714.

SEC. 10. [Authority to convene.] That general courts-martial may be convened by the President, by the Secretary of the Navy, by the commander in chief of a fleet or squadron, and by the commanding officer of any naval station beyond the continental limits of the United States. [35 Stat. L. 621.]

The provisions of this section superseded those of article 38 of the Articles for the Government of the Navy, noted in vol. 1, p. 433.


Power of Secretary of the Navy.—The Secretary of the Navy is invested with power to convene a court-martial at the request of an officer, but also with discretion as to whether it shall be convened. It is a privilege and not a right that a naval officer shall have charges against him investigated by a court of inquiry and again by a court-martial. Mullan v. U. S., (1907) 42 Ct. Cl. 157, affirmed (1909) 212 U. S. 516, 29 S. Ct. 330, 53 U. S. (L. ed.) 632.


Rules of evidence.—In trials before naval courts-martial it is proper to adhere to the rules of evidence in the common-law courts of criminal jurisdiction. (1830) 2 Op. Atty.-Gen. 344.

Review by civil courts.—Where the court-martial has jurisdiction of the person accused, and of the offense charged, and has acted within the scope of its lawful powers, its decision and sentence cannot be reviewed by the civil courts. by writ of habeas corpus or otherwise.
On review by the civil courts the only questions that can be inquired into are whether the court-martial was legally constituted, had jurisdiction and proceeded according to law. In re Crain, (C. C. Mass. 1897) 84 Fed. 788.

Civil courts are precluded from setting aside or reviewing the proceedings and sentences of courts-martial where it affirmatively appears that they are legally constituted and had jurisdiction of the offense charged. Mullan v. U. S., (1907) 42 Ct. Cl. 157, affirmed (1909) 213 U. S. 518, 29 S. Ct. 330, 53 U. S. (L. ed.) 632.

SEC. 11. [Court of inquiry, etc., may issue process, etc.] That a naval court-martial or court of inquiry shall have power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or District where such naval court shall be ordered to sit may lawfully issue. [35 Stat. L. 621.]

SEC. 12. [Witnesses — punishment for failure to appear — fees, etc.—incriminating testimony.] That any person duly subpoenaed to appear as a witness before a general court-martial or court of inquiry of the Navy, who willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or produce documentary evidence, which such person may have been legally subpoenaed to produce, shall be deemed guilty of a misdemeanor, for which such person shall be punished on information in the district court of the United States; and it shall be the duty of the United States District Attorney, on the certification of the facts to him by such naval court to file an information against and prosecute the persons so offending, and the punishment of such person, on conviction, shall be a fine of not more than five hundred dollars or imprisonment not to exceed six months, or both, at the discretion of the court: Provided, That this shall not apply to persons residing beyond the State, Territory, or District in which such naval court is held, and that the fees of such witnesses and his mileage at the rates provided for witnesses in the United States district court for said State, Territory, or District shall be duly paid or tendered said witness, such amounts to be paid by the Bureau of Supplies and Accounts out of the appropriation for compensation of witnesses: Provided further, That no witness shall be compelled to incriminate himself or to answer any question which may tend to incriminate or degrade him. [35 Stat. L. 622.]

Civilian witness.—A naval court-martial, or judge advocate thereof, has no power to compel a civilian who is not subject to the articles for the government of the navy to appear and testify before such court. (1880) 19 Op. Atty.-Gen. 501.

SEC. 13. [Allowance to prisoners.] That persons confined in prisons in pursuance of the sentence of a naval court-martial shall, during such confinement, be allowed a reasonable sum, not to exceed three dollars per month, for necessary prison expenses, and shall upon discharge be furnished with suitable civilian clothing and paid a gratuity, not to exceed twenty-five dollars: Provided, That such allowances shall be made in amounts to be fixed by, and in the discretion of, the Secretary of the Navy and only in cases where the prisoners so discharged would otherwise be unprovided with suitable clothing or without funds to meet their immediate needs. [35 Stat. L. 622.]

Section 14 of this Act amended section 34 of the Articles for the Government of the Navy, given under that title in vol. 1, p. 432.

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SEC. 15. [Arrest of deserters by civil officers.] That it shall be lawful for any civil officer having authority under the laws of the United States or of any State, Territory, or District to arrest offenders, to summarily arrest a deserter from the Navy or Marine Corps of the United States and deliver him into the custody of the naval authorities. [35 Stat. L. 622.]

SEC. 16. [Depositions.] That the depositions of witnesses may be taken on reasonable notice to the opposite party, and when duly authenticated, may be put in evidence before naval courts, except in capital cases and cases where the punishment may be imprisonment or confinement for more than one year as follows: First, depositions of civilian witnesses residing outside the State, Territory, or District in which a naval court is ordered to sit; second, depositions of persons in the naval or military service stationed or residing outside the State, Territory, or District in which a naval court is ordered to sit, or who are under orders to go outside of such State, Territory, or District; third, where such naval court is convened on board a vessel of the United States, or at a naval station not within any State, Territory, or District of the United States, the depositions of witnesses may be taken and used as herein provided whenever such witnesses reside or are stationed at such a distance from the place where said naval court is ordered to sit, or are about to go to such a distance as, in the judgment of the convening authority, would render it impracticable to secure their personal attendance. [35 Stat. L. 622.]

SEC. 17. [Approval of sentences.] That all sentences of summary courts-martial may be carried into effect upon the approval of the senior officer present, and all sentences of deck courts may be carried into effect upon approval of the convening authority or his successor in office. [35 Stat. L. 623.]

SEC. 18. [Repeal.] That all Acts or parts of Acts inconsistent herewith are hereby repealed. [35 Stat. L. 623.]

[Discharged naval prisoners — transportation — civilian clothing.]

That the Secretary of the Navy is hereafter authorized to transport to their homes or places of enlistment, as he may designate, all discharged naval prisoners; the expense of such transportation shall be paid out of any money that may be to the credit of prisoners when discharged; where there is no such money, the expense shall be paid out of money received from fines and forfeitures imposed by naval courts-martial: Provided further, That the Secretary of the Navy is hereby authorized to furnish naval prisoners upon discharge suitable civilian clothing in case, and only where, said discharged prisoners would otherwise be unprovided with suitable clothing to meet their immediate needs. [35 Stat. L. 756.]

This and the following paragraph of the text are from the Naval Appropriation Act of March 3, 1909, ch. 255.
The Naval Appropriation Act of March 3, 1915, ch. 83, 38 Stat. L. 943, provided, as did similar Acts for preceding years, as follows:
"That the Secretary of the Navy is authorized to commute rations for such general courts-martial prisoners in such amounts as seem to him proper, which may vary in accordance with the location of the naval prison, but which shall in no case exceed 30 cents per diem for each ration so commuted."

[Sales of stores to officers, men, and civilian employees.] • • • That hereafter such stores as the Secretary of the Navy may designate may be procured and sold to officers and enlisted men of the Navy and Marine Corps, also to civilian employees at naval stations beyond the continental limits of the United States and in Alaska, under such regulations as the Secretary of the Navy may prescribe. [35 Stat. L. 768.]

See the note to the preceding paragraph of the text. Somewhat similar provisions have appeared in Appropriation Acts for previous years. The text apparently superseded a provision of the Naval Appropriation Act of March 3, 1906, ch. 1481, 33 Stat. L. 1107 (which was similar to the Act of April 27, 1904, ch. 1822, 33 Stat. L. 340), which was as follows: "That pay department stores may be sold to civilian employees at naval stations beyond the continental limits of the United States and in Alaska, under such regulations as the Secretary of the Navy may prescribe."

[Profit on sales from ship's stores.] • • • That hereafter a profit not to exceed fifteen per centum may be charged on sales from ships' stores, such profit to be expended in the discretion of the Secretary of the Navy, under such regulations as he may prescribe, for the amusement, comfort, and contentment of the enlisted force, and to be accounted for to the Bureau of Supplies and Accounts, Navy Department: [36 Stat. L. 619.]

This is from the Naval Appropriation Act of June 24, 1910, ch. 378.

[Exchange of typewriters, etc.] • • • That hereafter wornout type-writing and computing machines for the naval establishment may be exchanged as a part of the purchase price of new ones. [37 Stat. L. 346.]

This is from the Naval Appropriation Act of Aug. 22, 1912, ch. 335.

X. PAY, EMOLUMENTS, AND ALLOWANCES

Sec. 1556. [Pay of officers and men on active list.] The commissioned officers and warrant officers on the active list of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employes in the Navy, shall be entitled to receive annual pay at the rates herein stated after their respective designations:

Sections 1556-1596 constitute chapter 8 of title 15 of the Revised Statutes entitled as above given. This section has been almost entirely superseded by subsequent provisions. The Navy Personnel Act of March 3, 1899, ch. 413, § 13, infra, p. 1196, provided that commissioned officers of the line of the navy and of the medical and pay corps on the active list should receive the same pay and allowances, except forage, as were or might be provided by law for officers of the corresponding rank in the army. Said section 13, however, has been almost entirely repealed or superseded, as indicated in the notes thereon.
The Naval Appropriation Act of March 3, 1909, ch. 255, 35 Stat. L. 754, contained the following provision:

"The accounting officers of the Treasury are hereby authorized and directed to allow in settlement of accounts of disbursing officers involved, payments made to officers of the navy while on temporary leaves of absence since March third, eighteen hundred and ninety-nine, not involving detachment from duty, and not in excess of leaves of absence allowed by law to officers of the army without reduction in pay." Book v. U. S., (1896) 91 Ct. Cl. 272.

The sea pay of a warrant officer under this section was a variable quantity, ranging in varying sums from $1,200 to $1,800 per annum, according to length of service. (1905) 26 Op. Atty-Gen. 599.

Grades of pay.—This statute recognized three grades of pay for naval services according as the services were more or less arduous: First, the most meritorious, set pay; second, shore-duty pay for services at navy yards, ordnance yards, navy department, etc.; third, less arduous, "leave or waiting orders" pay.

The periods of five years' service mentioned in this section for increased pay, were "grades" within the meaning of R. S. sec. 1588, infra, p. 1187, fixing the pay of retired officers at seventy-five per cent. of the sea pay of the grade or rank held at the time of retirement. Thorley v. U. S., (1883) 18 Ct. Cl. 111, affirmed (1886) 113 U. S. 810, 5 S. Ct. 491, 28 U. S. L. ed. 999.

Pay of particular officers.—See the notes under Act of May 13, 1908, ch. 166, infra, p. 1203.

[The Admiral.] "The Admiral, thirteen thousand dollars."

The pay of the Admiral was fixed at $13,500 by the Act of May 13, 1908, ch. 166, infra, p. 1203. Subsequent provisions relating to this subject were made by the second paragraph of the Act of March 3, 1915, ch. 83, supra, p. 1106.

[vice-admiral.] "The Vice-Admiral, when at sea, nine thousand dollars; on shore duty, eight thousand dollars; on leave, or waiting orders, six thousand dollars."

By a proviso of R. S. sec. 1302, supra, p. 1068, the grade of Vice-Admiral was to cease to exist when the office became vacant, but the grade was re-established and the salary fixed by the second paragraph of the Act of March 3, 1915, ch. 83, supra, p. 1106.

[rear-admirals.] "Rear-admirals, when at sea, six thousand dollars; on shore duty, five thousand dollars; on leave, or waiting orders, four thousand dollars."

This provision was superseded by the Act of March 3, 1899, ch. 413, § 7, supra, p. 1094, and § 13, infra, p. 1195, and by the Act of May 13, 1908, ch. 166, infra, p. 1203.

[Commanders.] "Commanders, when at sea, five thousand dollars; on shore duty, four thousand dollars; on leave, or waiting orders, three thousand dollars."

The grade of commodore is omitted from the active list of the line by Act of March 3, 1899, ch. 413, § 7, supra, p. 1094, and the rate of pay for commodores was fixed by the Act of May 13, 1908, ch. 166, infra, p. 1203.

[Captains.] "Captains, when at sea, four thousand five hundred dollars; on shore duty, three thousand five hundred dollars; on leave, or waiting orders, two thousand eight hundred dollars."

The rate of pay for captains was fixed by the Act of May 13, 1908, ch. 166, infra, p. 1203.

[Commanders.] "Commanders, when at sea, three thousand five hundred dollars; on shore duty, three thousand dollars; on leave, or waiting orders, two thousand three hundred dollars."

The rate of pay for commanders was fixed by the Act of May 13, 1908, ch. 166, infra, p. 1203.

[Lieutenant-commanders.] "Lieutenant-commanders, during the first four years after date of commission, when at sea, two thousand eight hundred dollars; on shore duty, two thousand four hundred dollars; on leave, or waiting orders, two thousand
dollars; after four years from such date, when at sea, three thousand dollars; on
shore duty, two thousand six hundred dollars; on leave, or waiting orders, two
thousand two hundred dollars."

The rate of pay for lieutenant-commanders was fixed by the Act of May 13, 1908,
ch. 166, infra, p. 1203. [Lieutenants.] "Lieutenants, during the first five years after date of commission,
when at sea, two thousand four hundred dollars; on shore duty, two thousand dollars;
on leave, or waiting orders, one thousand six hundred dollars; after five years from
such date, when at sea, two thousand six hundred dollars; on shore duty, two thou-
sand two hundred dollars; on leave, or waiting orders, one thousand eight hundred
dollars."

The rate of pay for lieutenants was fixed by the Act of May 13, 1908, ch. 166, infra,
p. 1203. [Masters.] "Masters, during the first five years after date of commission, when at
sea, one thousand eight hundred dollars; on shore duty, one thousand five hundred
dollars; on leave, or waiting orders, one thousand two hundred dollars; after five
years from such date, when at sea, two thousand dollars; on shore duty, one thousand
seven hundred dollars; on leave, or waiting orders, one thousand four hundred
dollars."

The title of master was changed to lieutenant by the Act of March 3, 1883, ch. 97,
§ 1, supra, p. 1067, and the rate of pay of lieutenants was fixed by the Act of May 13,
1908, ch. 166, infra, p. 1203. [Ensigns.] "Ensigns, during the first five years after date of commission, when at
sea, one thousand two hundred dollars; on shore duty, one thousand dollars; on
leave, or waiting orders, eight hundred dollars; after five years from such date, when at
sea, one thousand four hundred dollars; on shore duty, one thousand two hundred
dollars; on leave, or waiting orders, one thousand dollars."

The rate of pay for ensigns was fixed by the Act of May 13, 1908, ch. 166, infra,
p. 1203. [Midshipmen.] "Midshipmen, after graduation, when at sea, one thousand dollars;
on shore duty, eight hundred dollars; on leave, or waiting orders, six hundred dollars."

Midshipmen were designated ensigns by the second paragraph of the Act of March 3,
1883, ch. 97, § 1, supra, p. 1067, and the rate of pay for ensigns was fixed by the
Act of May 13, 1908, ch. 166, infra, p. 1203. [Cadet midshipmen.] "Cadet midshipmen, five hundred dollars."
L. 334.

The title of "cadet midshipmen" was changed to "naval cadets" by Act of Aug. 5,
1882, ch. 391, § 1, and again to "midshipmen" by Act of July 1, 1902, ch. 1368. See
the notes to R. S. sec. 1512, given under Naval Academy, ante, p. 1007.
The pay of midshipmen was fixed by the fourth paragraph of the Act of May 13,
1908, ch. 166, infra, p. 1203.

[Mates.] Mates, when at sea, nine hundred dollars; on shore duty, seven
hundred dollars; on leave, or waiting orders, five hundred dollars.

The rate of pay for mates was increased by the Act of Aug. 1, 1894, ch. 176, supra,
p. 1125, and the Act of May 13, 1908, ch. 166, infra, p. 1208. [Fleet-officers.] "Fleet-surgeons, fleet-paymasters, and fleet-engineers, four thousand
four hundred dollars."

[Medical directors and inspectors; pay directors and inspectors.] "Medical directors,
medical inspectors, pay directors, and pay inspectors, and chief engineer having
the same rank as pay director and pay inspector, when on duty at sea, four thousand
four hundred dollars. When not at sea, the same as surgeons and paymasters, respect-
ively."
[Surgeons, paymasters, and chief engineers.] "Surgeons, paymasters, and chief
engineers who have the same rank with paymasters, during the first five years after
date of commission, when at sea, two thousand eight hundred dollars; on shore duty,
two thousand four hundred dollars; on leave, or waiting orders, two thousand dollars;
during the second five years after such date, when at sea, three thousand two hundred
dollars; on shore duty, two thousand eight hundred dollars; on leave or waiting
orders, two thousand four hundred dollars; during the third five years after such
date, when at sea, three thousand five hundred dollars; on shore duty, three thousand
two hundred dollars; on leave, or waiting orders, two thousand six hundred dollars;
during the fourth five years after such date, when at sea three thousand seven hundred
dollars; on shore duty, three thousand six hundred dollars; on leave, or waiting orders, two thousand eight hundred dollars; after twenty years from such date, when at sea, four thousand two hundred dollars; on shore duty, four thousand dollars; on leave, or waiting orders, three thousand dollars."

[Passed assistant surgeons, passed assistant paymasters, and first assistant engineers.] "Passed assistant surgeons, passed assistant paymasters, and first assistant engineers, during the first five years after date of appointment, when at sea, two thousand dollars; on shore duty, one thousand eight hundred dollars; on leave, or waiting orders, one thousand five hundred dollars; after five years from such date, when at sea, two thousand two hundred dollars; on shore duty, two thousand dollars; on leave, or waiting orders, one thousand seven hundred dollars."

[Assistant surgeons, assistant paymasters, second assistant engineers.] "Assistant surgeons, assistant paymasters, and second assistant engineers, during the first five years after date of appointment, when at sea, one thousand seven hundred dollars; on shore duty, one thousand four hundred dollars; on leave, or waiting orders, one thousand dollars; after five years from such date, when at sea, one thousand nine hundred dollars; on shore duty, one thousand six hundred dollars; on leave, or waiting orders, one thousand two hundred dollars."

[Assistant surgeons qualified for promotion.] "Assistant surgeons of three years' service, who have been found qualified for promotion by a medical board of examiners, the pay of passed assistant surgeons."


The foregoing six paragraphs quoted in this note were superseded by section 13 of the Act of March 3, 1899, ch. 413, infra, p. 1195, which provided that officers of the line of the Navy and Medical and Pay Corps should receive the same pay, allowances, etc., as might be provided for officers of the corresponding rank in the Army, and by sections 1-7 of said Act, supra, p. 1081, which transferred the officers of the Engineer Corps to the line of the Navy, and by the Act of May 13, 1908, ch. 166, infra, p. 1293, fixing the pay of commissioned officers of the active list of the Navy.

[Naval constructors.] Naval constructors, during the first five years after date of appointment, when on duty, three thousand two hundred dollars; on leave, or waiting orders, two thousand two hundred dollars; during the second five years after such date, when on duty, three thousand four hundred dollars; on leave, or waiting orders, two thousand four hundred dollars; during the third five years after such date, when on duty, three thousand seven hundred dollars; on leave, or waiting orders, two thousand seven hundred dollars; during the fourth five years after such date, when on duty, four thousand dollars; on leave, or waiting orders, three thousand dollars; after twenty years from such date, when on duty, four thousand two hundred dollars; on leave, or waiting orders, three thousand two hundred dollars.

For other provisions relating to the rank, etc., of naval constructors and assistant naval constructors see the Act of March 3, 1899, ch. 413, § 10, supra, p. 1086, and the notes thereto.

[Assistant naval constructors.] Assistant naval constructors, during the first four years after date of appointment, when on duty, two thousand dollars; on leave, or waiting orders, one thousand five hundred dollars; during the second four years after such date, when on duty, two thousand two hundred dollars; on leave, or waiting orders, one thousand seven hundred dollars; after eight years from such date, when on duty, two thousand six hundred dollars; on leave, or waiting orders, one thousand nine hundred dollars.

See the note to the preceding paragraph of the text.

"Chartered during the first five years after date of commission, when at sea, two thousand five hundred dollars; on shore duty, two thousand dollars; on leave, or waiting orders, one thousand six hundred dollars; after five years from
such date, when at sea, two thousand eight hundred dollars; on shore duty, two thousand three hundred dollars; on leave, or waiting orders, one thousand nine hundred dollars."

Other provisions relating to chaplains were made by the first paragraph of the Act of June 29, 1906, ch. 3596, infra, p. 1205, and the Acts referred to in the note thereto.

[Professors of mathematics and civil engineers.] Professors of mathematics and civil engineers, during the first five years after date of appointment, when on duty, two thousand four hundred dollars; on leave, or waiting orders, one thousand five hundred dollars; during the second five years after such date, when on duty, two thousand seven hundred dollars; on leave, or waiting orders, one thousand eight hundred dollars; during the third five years after such date, when on duty, three thousand dollars; on leave, or waiting orders, two thousand one hundred dollars; after fifteen years from such date, when on duty, three thousand five hundred dollars; on leave, or waiting orders, two thousand six hundred dollars.

Further provisions relating to civil engineers and assistant civil engineers were made by the Act of March 3, 1903, ch. 1010, infra, p. 1202, and the Act of June 29, 1906, ch. 3596, infra, p. 1202.

[Warrant officers.] Boatswains, gunners, carpenters, and sail-makers, during the first three years after date of appointment, when at sea, one thousand two hundred dollars; on shore duty, nine hundred dollars; on leave, or waiting orders, seven hundred dollars; during the second three years after such date, when at sea, one thousand three hundred dollars; on shore duty, one thousand dollars; on leave, or waiting orders, eight hundred dollars; during the third three years after such date, when at sea, one thousand four hundred dollars; on shore duty, one thousand three hundred dollars; on leave, or waiting orders, nine hundred dollars; during the fourth three years after such date, when at sea, one thousand six hundred dollars; on shore duty, one thousand three hundred dollars; on leave, or waiting orders, one thousand dollars; after twelve years from such date, when at sea, one thousand eight hundred dollars; on shore duty, one thousand six hundred dollars; on leave, or waiting orders, one thousand two hundred dollars.

The pay of all warrant officers was increased twenty-five per centum by the Act of May 13, 1908, ch. 166, infra, p. 1205.
By the Act of March 3, 1899, ch. 413, § 15, supra, p. 1095, it was provided that the pay of warrant machinists was to be the same as that of warrant officers, and by the Act of March 3, 1909, ch. 255, supra, p. 1099, warrant machinists were designated machinists.
See further the Act of March 3, 1899, ch. 413, § 12, supra, p. 1145.

[Secretaries.] Secretaries to the Admiral and the Vice-Admiral, each two thousand five hundred dollars.
Secretaries to commanders of squadrons, two thousand dollars.
Secretary of the Naval Academy, one thousand eight hundred dollars.

By a proviso of R. S. sec. 1362, supra, p. 1068, the grades of Admiral and Vice-Admiral were to cease to exist when the office became vacant. However, the appointment of an Admiral was authorized by the Act of March 3, 1899, ch. 421, supra, p. 1096, and the grades of Admiral and Vice-Admiral were re-established by the Act of March 3, 1918, ch. 98, supra, p. 1106.
By the Act of May 4, 1878, ch. 91, supra, p. 1086, the appointment from civil life of secretaries as clerks to the Admiral, or Vice-Admiral, when on sea service, or commanders of squadrons, was forbidden and provision was made for the detail of officers as secretaries and clerks.

[Clerks to commanders of squadrons, etc.] "Clerks to commanders of squadrons and commanders of vessels, seven hundred and fifty dollars."


See the note to the foregoing text paragraph.

[Clerks to commandants of yards and stations.] "First clerks to commandants of navy-yards, one thousand five hundred dollars.

Second clerks to commandants of navy-yards, one thousand two hundred dollars.

Clerk to commandant of navy-yard at Mare Island, one thousand eight hundred dollars.

Clerks to commandants of stations, one thousand five hundred dollars."


[Clerks to paymasters of yards and stations.] "Clerks to paymasters at navy-yards, Boston, New York, Philadelphia, and Washington, one thousand six hundred dollars; Kittery, Norfolk, and Pensacola, one thousand four hundred dollars; Mare Island, one thousand eight hundred dollars.

Clerks to paymasters, at other stations, one thousand three hundred dollars."


[Clerks to paymasters of receiving-ships, etc.] "Clerks to paymasters of receiving-ships at Boston, New York, and Philadelphia, one thousand six hundred dollars; at Mare Island, one thousand eight hundred dollars; of other receiving-ships, one thousand three hundred dollars."


[Clerks to paymasters of vessels.] "Clerks to paymasters on vessels of the first rate, one thousand three hundred dollars; on vessels of the second rate, one thousand one hundred dollars; on vessels of the third rate, and supply-vessels and store-ships, one thousand dollars."


[Clerks to fleet paymasters.] "Clerks to fleet paymasters, one thousand one hundred dollars."


[Clerks to paymasters at Asylum and Academy.] "Clerks to paymasters at the Naval Academy and Naval Asylum, one thousand three hundred dollars."


[Clerks to inspectors.] "Clerks to inspectors in charge of provisions and clothing, at navy-yards, Boston, New York, Philadelphia, and Washington, one thousand six hundred dollars; to inspectors in like charge at other inspections, one thousand three hundred dollars."

The foregoing seven paragraphs here quoted were superseded by the Act of March 3, 1909, ch. 255, 35 Stat. L. 756, which repealed so much of this section as related to pay of clerks to commandants of navy-yards and naval stations, and by that part of said Act given infra, p. 1158, which made other provisions relating to the appointment, pay, etc., of the clerical force of yards, stations, etc.

[Cadet engineers.] "Cadet engineers: before final academic examination, five hundred dollars; after final academic examination, and until warranted as assistant engineers, when on duty at sea, one thousand dollars; on shore duty, eight hundred dollars; on leave, or waiting orders, six hundred dollars." [R. S.]


The title of undergraduates at the Naval Academy was changed from "cadet midshipmen" to "naval cadets" by the Act of Aug. 5, 1882, ch. 391, § 1, and again to "midshipmen" by the Act of July 1, 1902, ch. 1368. See NAVAL ACADEMY, ante, p. 1017. The pay of midshipmen was fixed by the Act of May 13, 1908, ch. 166, infra, p. 1208.

Sec. 1557. [Furlough pay.] Officers on furlough shall receive only one-half of the pay to which they would have been entitled if on leave of absence. [R. S.]


Sec. 1558. [No additional allowances, except as herein specified.] The pay prescribed in the two preceding sections shall be the full and entire
compensation of the several officers therein named, and no additional allowance shall be made in favor of any of said officers on any account whatever, except as hereinafter provided. [R. S.]


Construction.—This section is not retrospective in its operation. U. S. v. Philbrick, (1887) 120 U. S. 52, 7 S. Ct. 413, 30 U. S. (L. ed.) 559.

Sec. 1559. [Volunteer service.] When a volunteer naval service is authorized by law, the officers therein shall be entitled to receive the same pay as officers of the same grades, respectively, in the Regular Navy. [R. S.]


Transfer of volunteer officer to regular navy.—A volunteer officer transferred to the regular navy is not entitled to hold a commission dated as of the date of his volunteer commission; he must take his place upon the register according to the rank given him by his commission as an officer of the regular navy. Barton's Case, (1881) 17 Op. Atty.-Gen. 189.

Sec. 1560. [Commencement of pay — original entry.] The pay of an officer of the Navy, upon his original entry into the service, except where he is required to give an official bond, shall commence upon the date of his acceptance of his appointment; but where he is required to give such bond his pay shall commence upon the date of the approval of his bond by the proper authority. [R. S.]

R. S. sec. 1561. This section was as follows:

"Sec. 1561. When an officer is promoted in course to fill a vacancy, and is in the performance of the duties of the higher grade from the date he is to take rank, he may be allowed the increased pay from such date." Act of July 15, 1870, ch. 295, 16 Stat. L. 333; Act of June 5, 1872, ch. 306, 17 Stat. L. 226.

It was superseded by the Act of June 22, 1874, ch. 392, § 1, infra, p. 1191.

Sec. 1562. [In cases of delayed examination.] If an officer of a class subject to examination before promotion shall be absent on duty, and by reason of such absence, or of other cause not involving fault on his part, shall not be examined at the time required by law or regulation, and shall afterward be examined and found qualified, the increased rate of pay to which his promotion would entitle him shall commence from the date when he would have been entitled to it had he been examined and found qualified at the time so required by law or regulation; and this rule shall apply to any cases of this description which may have heretofore occurred. And in every such case the period of service of the party, in the grade to which he was promoted, shall, in reference to the rate of his pay, be considered to have commenced from the date when he was so entitled to take rank. [R. S.]


Construction.—This section provides for certain cases where the pay of an officer shall run from a date anterior to that of his commission, but advancement in rank "for eminent or conspicuous conduct in battle or extraordinary heroism," under R. S. sec. 1506, supra, p. 1144, is not one of them. The President may for other purposes insert an antecedent date in the body of the commission, but antecedent date can affect an officer's pay only in the cases authorized by statute. Young v. U. S., (1884) 19 Ct. Cl. 145.

An appointment to an office in the army when validly made, may in so far as concerns rank and pay, relate back, by force of this section, but it does not follow
that the office itself vests at an earlier time than the date of the commission. (1911) 29 Op. Atty.-Gen. 254.

Purpose of provision.—The provisions of this section were enacted to relieve officers absent on duty when the time arrived for their promotion on examination from the manifest injustice of keeping them out of the pecuniary and other benefits of promotion until such time as the exigencies or conveniences of the service admitted of their examination. The period of delay is often long, and during the delay other officers who entered the navy at later dates, more favorably stationed, are examined, and but for the provisions of this section would take rank above and receive higher pay than their less fortunate fellow officers of longer service. Howell v. U. S., (1890) 25 Ct. Cl. 288.

Prize money.—An officer entitled to be promoted before a battle, but not promoted until afterwards, is entitled to have his prize money based on the pay which he would have been entitled to receive had he been promoted. Manila Bay, (1901) 36 Ct. Cl. 206.

Relation to R. S. sec. 1505.—This section does not extend to officers who, upon examination being found not qualified, must be "suspended from promotion for one year, with corresponding loss of date when re-examined" under R. S. sec. 1505, supra, div. VII, p. 1143. "It certainly is the intention of section 1502 (although passed with the purpose of relieving a party against the consequence of the misfortune of not being able to be present when his right of examination accrues) to hold him responsible for all the effects consequent upon his own neglect or failure." Austin v. U. S., (1885) 20 Ct. Cl. 269; Smith v. U. S., (1818) 50 Ct. Cl. 244. Sec (1880) 16 Op. Atty-Gen. 587.


Sec. 1563. [Advances to persons on distant stations.] The President of the United States may direct such advances, as he may deem necessary and proper, to such persons in the naval service as may be employed on distant stations where the discharge of the pay and emoluments to which they are entitled cannot be regularly effected. [R. S.]


Marine corps.—"We think that Congress intended to give to marines the benefit of the legislation in section 1563, R. S." Reid v. U. S., (1883) 18 Ct. Cl. 625.

Sec. 1564. [Person acting as paymaster, when office vacant in ship at sea.] Any person performing the duties of paymaster, acting assistant paymaster, or assistant paymaster, in a ship at sea, or on a foreign station, or on the Pacific coast of the United States, by appointment of the senior officer present, in case of vacancy of such office, in accordance with the provisions of section thirteen hundred and eighty-one, and not otherwise, shall be entitled to receive the pay of such grade while so acting. [R. S.]

Act of July 17, 1861, ch. 4, 12 Stat. L. 258.

R. S. sec. 1561 mentioned in the text is given supra, p. 1072.

Compensation for two officers.—This section and R. S. sec. 1581, supra, p. 1072, provide that any person performing the duties of paymaster by appointment of the senior officer shall be entitled to receive the pay of such grade while so acting. These sections must be construed with reference to other provisions of the statutes, and while they may operate literally if the appointee holds no office under the government, as may be the case, if he holds an office he cannot escape from the prohibitions of R. S. secs. 1763, 1765 (title Public Officers). Webster v. U. S., (1892) 28 Ct. Cl. 25.

R. S. sec. 1565. This section was as follows;

"Sec. 1565. The pay of chiefs of Bureau in the Navy Department shall be the highest pay of the grade to which they belong, but not below that of commodore." Act of March 3, 1871, ch. 117, 16 Stat. L. 537.

It is superseded by the provisions of the Act of March 3, 1899, ch. 413, § 7, supra, p. 1094, which omitted the grade of commodore from the active list of the line, and by the Act of March 13, 1908, ch. 166, infra, p. 1208, which fixed the pay of chiefs of bureaus.
R. S. sec. 1566. This section was as follows:

"Sec. 1566. An allowance of ten cents a mile may be made to officers in the naval service, and store-keepers on foreign stations for traveling expenses when under orders. And an allowance may be made to officers traveling in foreign countries under orders, for expenses of transportation of baggage necessarily incurred. And no officer shall be paid mileage, except for travel actually performed at his own expense and in obedience to orders." Act of March 3, 1836, ch. 27, 4 Stat. L. 737; Act of July 17, 1862, ch. 200, 12 Stat. L. 595; Act of July 15, 1870, ch. 282, 16 Stat. L. 322.

It was superseded by the Act of Aug. 5, 1882, ch. 391, § 1, infra, p. 1192, and the various Acts referred to in the note thereto.

Sec. 1567. [Officers serving as store-keepers on foreign stations.] Officers who are ordered to take charge of naval stores for foreign squadrons, in the place of naval store-keepers, shall be entitled to receive, while so employed, the shore-duty pay of their grades; and when the same is less than fifteen hundred dollars a year, they may be allowed compensation, including such shore-duty pay, at a rate not exceeding fifteen hundred dollars a year. [R. S.]


Sec. 1568. [Civilians, store-keepers on foreign stations.] Civilians appointed as store-keepers on foreign stations shall receive compensation for such services, at a rate not exceeding fifteen hundred dollars a year. [R. S.]


Sec. 1569. [Enlisted men.] The pay to be allowed to petty officers, excepting mates, and the pay and bounty upon enlistment of seamen, ordinary seamen, firemen, and coal-heavers, in the naval service, shall be fixed by the President: Provided, That the whole sum to be given for the whole pay aforesaid, and for the pay of officers, and for the said bounties upon enlistments shall not exceed, for any one year, the amount which may, in such year, be appropriated for such purposes. [R. S.]


By the Act of May 13, 1908, ch. 166, infra, p. 1208, the pay of enlisted men was increased and it was provided that the pay so fixed should remain in force until changed by Congress.

How pay regulated.—By the provisions of this statute it is the duty of the President to fix the pay of seamen, firemen, and coal heavers in the naval service, and such pay is to be regulated by the amount which may in each year be appropriated for such purposes. Stovel v. U. S., (1901) 36 Ct. Cl. 392.

Order granting additional pay.—The President issued an order allowing an additional sum of one dollar and a half to the pay of enlisted men. The secretary of the navy wrote to the fourth auditor of the treasury that the allowance was in lieu of the abolished spirit ration, and extended only to men who otherwise would be entitled to a spirit ration. It was held that the letter of the secretary must be deemed the act of the President, that the order and the letter were in pari materia, and that the latter operated as a proviso of the former. Button v. U. S., (1883) 20 Ct. Cl. 423.

Mates.—This statute indicates that mates are to be classed as "petty officers." U. S. v. Fuller, (1894) 160 U. S. 693, 16 S. Ct. 386, 40 U. S. (L. ed.) 849.

Sec. 1570. [Additional pay for serving as firemen and coal-heavers.] Every seaman, ordinary seaman, or landsman who performs the duty of a fireman or coal-heaver on board of any vessel of war shall be entitled to receive, in addition to his compensation as seaman, ordinary seaman, or
landsman, a compensation at the rate of thirty-three cents a day for the time he is employed as fireman or coal-heaver. [R. S.]

Act of March 1, 1869, ch. 48, 15 Stat. L. 280.

Sec. 1571. [Sea service.] No service shall be regarded as sea service except such as shall be performed at sea, under the orders of a Department and in vessels employed by authority of law. [R. S.]

Act of June 1, 1860, ch. 67, 12 Stat. L. 27.


What constitutes service "at sea."—Three things are necessary to constitute sea service. The service must be performed "at sea"; "under the orders of a department"; and "in vessels employed by authority of law." U. S. v. Barnette, (1897) 166 U. S. 174, 17 S. Ct. 286, 41 U. S. (L. ed.) 675.

To be entitled to sea pay an officer must be aboard and under orders to perform sea service. Schoonmaker v. U. S., (1894) 19 Ct. Cl. 170.

In order to come within the phrase "at sea," it is not necessary that the vessel upon which the service is performed should be upon the high seas. It is enough that she is waterborne, even if at anchor in a bay, or port, or harbor, and not in a condition presently to go to sea. U. S. v. Barnette, (1897) 165 U. S. 174, 17 S. Ct. 286, 41 U. S. (L. ed.) 675. See also U. S. v. Symonds, (1887) 120 U. S. 46, 7 S. Ct. 411, 30 U. S. (L. ed.) 537; U. S. v. Bishop, (1887) 120 U. S. 61, 7 S. Ct. 413, 30 U. S. (L. ed.) 558; Wyckoff v. U. S., (1899) 34 Ct. Cl. 288.

A ship at anchor is not a ship at sea; a ship sailing up a river is not a ship at sea; a ship in service on inland waters is not a ship at sea; a ship hauled up on a dry dock in a foreign port is not a ship at sea; a ship fighting her way up the Mississippi in 1862 was not a ship at sea; yet in all of these cases it has been held by the accounting officers or the courts that officers serving on such vessels were entitled to sea pay—that a ship at sea means nothing more than a ship afloat, she being at the same time so commissioned, authorized, and organized as to be able to render some kind or other of service. Engard v. U. S., (1903) 38 Ct. Cl. 712.

A naval vessel always afloat on tide-water frequently ordered to sea, at all times ready to obey such orders, the officers and crew messing and sleeping on board and maintaining the regulations and discipline of a man-of-war at sea, is in sea service. McRitchie v. U. S., (1887) 23 Ct. Cl. 23.

"The same person performing sea service and shore duty during the same period of time cannot claim both shore pay and sea service for such time; but where it is shown the officer charged with these dual duties lived upon the sea in command of a vessel employed by authority of law, there is a greater reason to regard the shore duty the incident of the sea service than to say that the shore duty is paramount to the other." Wyckoff v. U. S., (1899) 34 Ct. Cl. 288.

The commanding officer of a naval station was directed to assume command of a vessel at anchor in the bay, in addition to the duties then being performed by him as commander of the station. His quarters were continuously on board the vessel, and he messed there with a number of men employed by the bureau of yards and docks and steam engineering, and these men had regular duties during the day and a watch was kept during the night. The fire bell was posted and the men regularly exercised at fire drill. Steam was kept up for heating and pumping, and a large steam launch was attached to the ship for use in visiting the station and for other purposes. It was held that the officer performed sea service and was entitled to sea pay. Wyckoff v. U. S., (1899) 34 Ct. Cl. 288.

Training ship.—A sailing vessel owned and employed by the United States was furnished for educational purposes by the Secretary of the Navy upon the application of the governor of the state of New York, and a lieutenant of the navy was detailed as executive officer of the vessel while she was used for that purpose, pursuant to the powers expressly conferred upon the President and the Secretary of the Navy by the Act of Congress entitled "An Act to encourage the establishment of public marine schools," dated June 20, 1874, c. 339, 18 Stat. L. 191. It was held that she was a vessel employed by authority of law. U. S. v. Barnette, (1897) 165 U. S. 174, 17 S. Ct. 286, 41 U. S. (L. ed.) 675. See also U. S. v. Symonds, (1887) 120 U. S. 46, 7 S. Ct. 411, 30 U. S. (L. ed.) 537; U. S. v. Bishop, (1887) 120 U. S. 61, 7 S. Ct. 413, 30 U. S. (L. ed.) 558.

A lieutenant serving on a training ship while she was anchored at a wharf, living on board of her, wearing his uniform, and subject to the same regulations as while
she was upon the high seas. It was held that he was "at sea" within the meaning of the statute. U. S. v. Barnette, (1897) 165 U. S. 174, 17 S. Ct. 286, 41 U. S. (L. ed.) 675.


Assignment to duty on a receiving ship is assignment to sea service. Pierce v. U. S., (1898) 33 Ct. Cl. 294.

Trips made up and down a river, sometimes carrying ordnance, and sometimes towing vessels, are sea service. McKitchie v. U. S., (1897) 23 Ct. Cl. 23.

While in hospital.—An officer attached to a vessel at sea and not detached from it by competent authority is entitled to sea pay while temporarily in a naval hospital because of a gunshot wound incurred in the line of duty. Collins v. U. S., (1902) 37 Ct. Cl. 222.

Temporary additional duty on shore.—So long as an officer remains attached to a vessel with duties to discharge there and responsibilities to bear, he cannot be deprived of his sea pay by imposing upon him temporary additional duty to be discharged on shore. Engard v. U. S., (1903) 38 Ct. Cl. 712.

Vessel in navy yard.—Service performed on board a vessel of the United States by order of the Secretary of the Navy, in which the officer is obliged to occupy a room, pay mess bills, etc., as if actually at sea, is sea service within the meaning of the statute. The fact that an officer assigned to duty is to take charge of the machinery of another vessel and that the vessels are at a navy yard does not render the service shore duty. Hannon v. U. S., (1901) 36 Ct. Cl. 99.

What does not constitute service "at sea."—A naval officer, while on shore duty as hydrographic inspector of the coast and geodetic survey, was ordered by the superintendent of the survey to assume temporary command of the coast and geodetic survey schooner. He was not required to wear his uniform, nor subjected to the restrictions, requirements, or regulations of the Navy Department. He did not live aboard the vessel, nor was his paramount duty that on shipboard, but his duties as hydrographic inspector were of more importance than his duties as commander of the vessel. It was held that the service was not sea service. Taussig v. U. S., (1909) 39 Ct. Cl. 104.

A navy paymaster on shore duty at a navy yard is not entitled to pay for sea duty, though required by the Secretary of the Navy, in addition to his regular duties, to take charge of certain iron clads temporarily at anchor off the yard, and in commission for sea service. Carpenter's Case, (1879) 15 Ct. Cl. 247.

An officer of the navy assigned to duty as a light-house inspector under R. S. sec. 4671 (repealed as noted in Loure and Boudes, ante, p. 317), and ordered to inspect the light stations in his district, is not entitled to sea pay while making his tour of inspection, though it be by water and involve going to sea. Schoonmaker v. U. S., (1894) 19 Ct. Cl. 170.

Traveling at sea from one port to another.—When an officer is detached from duty on board a vessel in which he performed sea service, his sea pay ceases and his shore pay begins, though he may thereafter travel by sea on a merchant vessel from one port of duty at sea to another. Ryan v. U. S., (1903) 38 Ct. Cl. 143.

Suspension from duty.—A paymaster at sea, suspended from duty pending an investigation of his accounts, is not rendering sea service. Sullivan v. U. S., (1897) 32 Ct. Cl. 402.

A naval officer is not entitled to sea pay while occupied in traveling on duty partly on a merchant steamer and partly on land, and in reporting to the Navy Department, since this is not sea service within the meaning of this section. U. S. v. Thomas, (1904) 195 U. S. 418, 25 S. Ct. 102, 49 U. S. (L. ed.) 259.

Merchant vessel.—The term "vessels employed by authority of law" is restricted to vessels owned or otherwise engaged in the government service and travel under orders by naval officers upon a merchant vessel is not sea service within the meaning of this section. McGowan v. U. S., (1914) 49 Ct. Cl. 454.

"Under the orders of a department."—Where an order directs an officer to report to the superintendent of the naval academy "for duty on board the Santee and such other duty as he may assign you," his service on the vessel is "under the orders of a department." Pierce v. U. S., (1895) 33 Ct. Cl. 294.

Service by a lieutenant on a training ship, in obedience to an order of the department of the navy, is service performed "under the orders of a department." U. S. v. Barnette, (1897) 165 U. S. 174, 17 S. Ct. 286, 41 U. S. (L. ed.) 675.

Sec. 1572. [Detention beyond term of enlistment.] All petty officers and persons of inferior ratings who are detained beyond the terms of service, according to the provisions of section fourteen hundred and twenty-two, or who, after the termination of their service, voluntarily re-enter, to serve until the return to an Atlantic port of the vessel to which they belong, and
until their regular discharge therefrom, shall, for the time during which they are so detained or so serve beyond their original terms of service, receive an addition of one-fourth of their former pay. [R. S.]


Additional pay is the full compensation for detention and does not increase other allowances. Respective rates of pay refer to the regular rates of pay. Manila Bay, (1901) 36 Ct. Cl. 206. See also Santiago Bay, (1901) 36 Ct. Cl. 200; Stovel v. U. S., (1901) 36 Ct. Cl. 392.

Sec. 1573. [Bounty pay for re-enlistment.] If any enlisted man or apprentice, being honorably discharged, shall reenlist for four years within four months thereafter, he shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to a gratuity of four months' pay equal in amount to that which he would have received if he had been employed in actual service: Provided, That any enlisted man in the Navy whose term of enlistment has been extended for an aggregate of four years shall, after the expiration of the preceding four-year term of enlistment upon which the extension is made and if otherwise entitled to an honorable discharge, be paid the gratuity above provided: And provided, That any man who has received an honorable discharge from his last term of enlistment, or who has received a recommendation for reenlistment upon the expiration of his last term of enlistment, who reenlists for a term of four years within four months from the date of his discharge, shall receive an increase of one dollar and thirty-six cents per month to the pay prescribed for the rating in which he serves for each successive reenlistment: And provided further, That an extension of the period of enlistment as hereinbefore authorized, aggregating four years, shall be held and considered as equivalent to continuous service with respect to all rights, privileges, and benefits granted for such service pursuant to law. [R. S.]

As originally enacted this section was as follows:

"Sec. 1573. If any seaman, ordinary seaman, landsman, fireman, coal-heaver, or boy, being honorably discharged, shall reenlist for three years, within three months thereafter, he shall, on presenting his honorable discharge, or on accounting in a satisfactory manner for its loss, be entitled to pay, during the said three months, equal to that to which he would have been entitled if he had been employed in actual service; and that any man who has received an honorable discharge from his last term of enlistment, or who has received a recommendation for reenlistment upon the expiration of his last term of service of not less than three years, who reenlists for a term of four years within four months from the date of his discharge, shall receive an increase of one dollar and thirty-six cents per month to the pay prescribed for the rating in which he serves for each consecutive reenlistment."

It was amended to read as given in the text by an Act of Aug. 22, 1912, ch. 335, 37 Stat. L. 331. The benefits of this section were made applicable to all enlisted persons by a Res. of June 11, 1896, No. 62, infra, p. 1195.

The Act of June 16, 1880, ch. 240, 21 Stat. L. 290, entitled "An Act relating to machinists in the navy," which may be regarded as temporary only, was as follows:
"That all men now serving in the navy who may be discharged as machinists, with continuous-service certificates entitling them to honorable discharge, and those discharged in the said rating with such certificates since the twentieth day of November, eighteen hundred and seventy-nine, shall receive one-third of one year's pay as a machinist for each good-conduct badge they have received, or may receive, not exceeding three in number under the said certificates, the said gratuity to be received in lieu of re-enlistment as a machinist under such certificate, and to be in full and in lieu of all claims against the United States in connection therewith, for extra pay for re-enlisting, or for continuous service, or for enlistment as a petty officer; and the amount necessary to carry out the provisions of this Act is hereby appropriated, out of any money in the Treasury not otherwise appropriated: Provided, That nothing herein contained shall be so construed as to prevent the re-enlistment of machinists in the navy."

Sec. 1574. [Crews of wrecked or lost vessels.] When the crew of any vessel of the United States are separated from such vessel, by means of her wreck, loss, or destruction, the pay and emoluments of such of the officers and men as shall appear to the Secretary of the Navy, by the sentence of a court-martial or court of inquiry, or by other satisfactory evidence, to have done their utmost to preserve her, and, after said wreck, loss, or destruction, to have behaved themselves agreeably to the discipline of the Navy, shall go on and be paid them until their discharge or death. [R. S.]

Act of July 17, 1862, ch. 204, 12 Stat. L. 608, 609.
See further R. S. sec. 290, supra, p. 1164, and the Act of March 2, 1895, ch. 190, supra, p. 1165.

Sec. 1575. [Crews of vessels taken by an enemy.] The pay and emoluments of the officers and men of any vessel of the United States taken by an enemy who shall appear, by the sentence of a court-martial or otherwise, to have done their utmost to preserve and defend their vessel, and, after the taking thereof, to have behaved themselves agreeably to the discipline of the Navy, shall go on and be paid to them until their exchange, discharge, or death. [R. S.]

Act of July 17, 1862, ch. 204, 12 Stat. L. 609.

Sec. 1576. [Assignments of wages.] Every assignment of wages due to persons enlisted in the naval service, and all powers of attorney, or other authority to draw, receipt for, or transfer the same, shall be void, unless attested by the commanding officer and paymaster. The assignment of wages must specify the precise time when they commence. [R. S.]


Sec. 1577. [Rations of midshipmen.] Midshipmen and acting midshipmen in the Navy shall be entitled to one ration, or to commutation therefor. [R. S.]

By the Act of March 3, 1883, ch. 97, § 1, supra, p. 1087, the title of the grade of midshipman was changed to ensign.
By the Act of Aug. 5, 1882, ch. 391, § 1, cadet midshipmen were designated naval cadets, and by the Act of July 1, 1902, ch. 1368, the title was changed to midshipmen. See the notes to R. S. sec. 1512, given under NAVAL ACADEMY, ante, p. 1007.
See further the Act of Jan. 30, 1866, ch. 43, § 1, infra, p. 1193.

Repealed by implication.—This section was impliedly repealed by section 13 of the Act of March 3, 1899, ch. 413, infra, p. 1195. That section provides that officers of the navy "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank"
in the army." Had Congress intended that such allowances as theretofore given should be continued, or to reserve the right to commutation as to the sea ration, it would have been very easy to have inserted apt words which would have rendered effectual this purpose. Gibson v. U. S., (1904) 194 U. S. 182, 24 S. Ct. 613, 48 U. S. (L. ed.) 926.


Sec. 1578. [Rations of other officers.] All officers shall be entitled to one ration, or to commutation therefor, while at sea or attached to a sea-going vessel. [R. S.]


See the Act of March 3, 1899, ch. 413, § 13, infra, p. 1196, and the notes thereto.

Provisions relating to the limitation of claims for commutation of rations were made by the Act of July 28, 1892, ch. 311, infra, p. 1194.

The term "ordinary of a navy yard" refers to ships laid up in ordinary at a navy yard. Button v. U. S., (1885) 20 Ct. Cl. 423. See also Herbert v. U. S., (1886) 21 Ct. Cl. 53.

Mates are petty officers and as such come within the exceptions contained in this statute. U. S. v. Fuller, (1896) 160 U. S. 593, 18 S. Ct. 386, 40 U. S. (L. ed.) 549. See also Baxter v. U. S., (1897) 32 Ct. Cl. 75.

The judge-advocate-general, whose duty is in the department, is precluded by this section from the allowance of a sea-pay ration. Lemly v. U. S., (1893) 28 Ct. Cl. 488.

An apothecary in the navy detailed to and doing duty at the marine barracks, is not "attached to the ordinary of a navy yard" within the meaning of this section. Herbert v. U. S., (1886) 21 Ct. Cl. 53. See also Button v. U. S., (1886) 20 Ct. Cl. 423.

Sec. 1579. [When rations not allowed.] No person not actually attached to and doing duty on board a sea-going vessel, except the petty officers, seamen, and ordinary seamen attached to receiving-ships or to the ordinary of a navy-yard, and midshipmen, shall be allowed a ration. [R. S.]


This section was possibly affected by the Act of Jan. 30, 1885, ch. 43, § 1, infra, p. 1193.

Sec. 1580. [Navy ration, constituents of.] The navy ration shall consist of the following daily allowance of provisions to each person: One pound and a quarter of salt or smoked meat, with three ounces of dried or six ounces of canned or preserved fruit, and three gills of beans or peas, or twelve ounces of flour; or one pound of preserved meat, with three ounces of dried or six ounces of canned or preserved fruit and eight ounces of rice or twelve ounces of canned vegetables, or six ounces of desiccated vegetables; together with one pound of biscuit, two ounces of butter, four ounces of sugar, two ounces of coffee or cocoa, or one-half ounce of tea and one ounce of condensed milk or evaporated cream; and a weekly allowance of one-quarter pound of macaroni, four ounces of cheese, four ounces of tomatoes, one-half pint of vinegar or sauce, one-quarter pint of pickles, one-quarter pint of molasses, four ounces of salt, one-half ounce of pepper, one-eighth ounce of spices, and one-half ounce of dry mustard. Seven pounds of lard, or a suitable substitute, shall be allowed for every hundred pounds
of flour issued as bread, and such quantities of yeast and flavoring extracts as may be necessary. [R. S.]

As originally enacted this section was as follows:

"Sec. 1380. The navy ration shall consist of the following daily allowance of provisions to each person: One pound of salt pork, with half a pint of beans or peas; or one pound of salt beef, with half pound of flour and two ounces of dried apples, or other dried fruit; of three-quarters of a pound of preserved meat, with a half pound of rice, two ounces of butter, and one ounce of desiccated 'mixed vegetables'; or three-quarters of a pound of preserved meat, two ounces of butter, and two ounces of desiccated potatoes; together with fourteen ounces of biscuit, one-quarter of an ounce of tea, or one ounce of coffee or cocoa, and two ounces of sugar; and a weekly allowance of half a pint of pickles, half a pint of molasses, and half a pint of vinegar." Act of July 18, 1861, ch. 7, 12 Stat. L. 264; Act of July 14, 1862, ch. 164, 12 Stat. L. 565.

It was first amended by changing the constituents of the ration by an Act of July 1, 1902, ch. 1368, 32 Stat. L. 670, and was again amended to read as given in the text by an Act of June 29, 1906, ch. 3590, 34 Stat. L. 570.

Sec. 1581. [Substitutions in — extra allowance.] The following substitution for the components of the ration may be made when deemed necessary by the senior officer present in command: 'For one and one-quarter pounds of salt or smoked meat or one pound of preserved meat, one and three-quarter pounds of fresh meat or fresh fish, or eight eggs; in lieu of the articles usually issued with salt, smoked or preserved meat, one and three-quarter pounds of fresh vegetables; for one pound of biscuit, one and one-quarter pounds of soft bread or eighteen ounces of flour; for three gills of beans or pease, twelve ounces of flour or eight ounces of rice or other starch food, or twelve ounces of canned vegetables; for one pound of condensed milk or evaporated cream, one quart of fresh milk; for three ounces of dried or six ounces of canned or preserved fruit, nine ounces of fresh fruit; and for twelve ounces of flour or eight ounces of rice or other starch food, or twelve ounces of canned vegetables, three gills of beans or pease; in lieu of the weekly allowance of one-quarter pound of macaroni, four ounces of cheese, one-half pint of vinegar or sauce, one-quarter pint of pickles, one-quarter pint of molasses, and one-eighth ounce of spices, three pounds of sugar, or one and a half pounds of condensed milk, or one pound of coffee, or one and a half pounds of canned fruit, or four pounds of fresh vegetables, or four pounds of flour.

An extra allowance of one ounce of coffee or cocoa, two ounces of sugar, four ounces of hard bread or its equivalent, and four ounces of preserved meat or its equivalent shall be allowed to enlisted men of the engineer and dynamo force who stand night watches between eight o'clock post meridian and eight o'clock ante-meridian, under steam.

Any article comprised in the Navy ration may be issued in excess of the authorized quantity, provided there be an under issue of the same value in some other article or articles: And provided, further, That the unexpended balances under appropriations "Provisions, Navy," for the fiscal years ending June thirtieth, nineteen hundred and five and nineteen hundred and six, are hereby reappropriated for "Provisions, Navy," for the fiscal year ending June thirtieth, nineteen hundred and eight. [R. S.]

As originally enacted this section was as follows:

"Sec. 1581. The following substitution for the components of the ration may be made when it is deemed necessary by the senior officer present in command: 'For one pound of salt beef or pork, one pound and a quarter of fresh meat or three-quarters of a pound of preserved meat; for any or all of the articles usually issued with the salted meats, vegetables equal to the same in value; for fourteen ounces of biscuit, one
pound of soft bread, or one pound of flour, or half a pound of rice; for half a pint of beans or peas, half a pound of rice, and for half a pound of rice, half a pint of beans or peas. And the Secretary of the Navy may substitute for the ration of coffee and sugar the extract of coffee combined with milk and sugar, if he shall believe such substitution to be conducive to the health and comfort of the Navy and not to be more expensive to the Government than the present ration: Provided, That the same shall be acceptable to the men."


It was first amended, by changing the substitutions allowed, by an Act of July 1, 1902, ch. 1368, 32 Stat. L. 680.

It was again amended to read as given in the text, with the exception of the last paragraph thereof, by an Act of June 29, 1906, ch. 3590, 34 Stat. L. 571.

Said last paragraph of the text, beginning with the words "Any article " was added by the Act of March 2, 1907, ch. 3612, 34 Stat. L. 1193. That part of the paragraph beginning with the words "And provided further," is evidently temporary only and executed, but it was included within the quotation marks in the amending Act last cited.

The Act of May 3, 1880, ch. 73, 21 Stat. L. 86, contained the following provision:

"That the Secretary of the Navy may substitute for the ration of 'two ounces of desiccated potatoes,' six ounces of desiccated tomatoes if he shall believe such substitution to be conducive to the health and comfort of the Navy, and not to be more expensive to the Government than the present ration, provided the same shall be acceptable to the men."

It was repealed by the Act of July 1, 1902, ch. 1368, 32 Stat. L. 680.

Sec. 1582. [Short allowance.] In case of necessity the daily allowance of provisions may be diminished at the discretion of the senior officer present in command; but payment shall be made to the persons whose allowance is thus diminished, according to the scale of prices for the same established at the time of such diminution. And every commander who makes any diminution or variation shall give to the paymaster written orders therefor, specifying particularly the diminution or variation which is to be made, and shall report to his commanding officer, or to the Navy Department, the necessity for the same. [R. S.]


Sec. 1583. [Rations stopped for the sick.] Rations stopped for the sick on board vessels shall remain and be accounted for by the paymaster as a part of the provisions of the vessels. [R. S.]


R. S. sec. 1584. This section was as follows:

"Sec. 1584. An additional ration of tea or coffee and sugar shall be hereafter allowed to each seaman, to be provided at his first 'turning out.'" Act of May 23, 1872, ch. 195, 17 Stat. L. 151.

It was repealed by an Act of July 1, 1902, ch. 1368, 32 Stat. L. 680.

A subsequent provision relating to an extra allowance of coffee, etc., was made by an amendment of R. S. sec. 1581, supra, p. 1185.

Sec. 1585. [Commutation price of ration.] Thirty cents shall in all cases be deemed the commutation price of the Navy ration. [R. S.]


Repealed by implication.—This section was implicitly repealed by section 13 of the Act of March 3, 1899, ch. 413, infra, p. 1195. That section provides that officers of the navy "shall receive the same pay and allowances, except forage, as are or may be provided by or in pursuance of law for the officers of corresponding rank in the army." Had Congress intended that such allowances as theretofore given should be continued, or to reserve the right to commutation as to sea ration, it
would have been very easy to have inserted apt words which would have rendered effectual this purpose. Gibson v. U. S., (1864) 194 U. S. 192, 24 S. Ct. 613, 48 U. S. (L. ed.) 926. For cases which construed and referred to this section, see Lemly v. U. S., (1893) 28 Ct. Cl. 468; Baxter v. U. S., (1897) 32 Ct. Cl. 75; Collins v. U. S., (1902) 37 Ct. Cl. 222; Thomas v. U. S., (1903) 38 Ct. Cl. 70; Thomas v. U. S., (1903) 38 Ct. Cl. 113; Richardson v. U. S., (1903) 38 Ct. Cl. 182.

Sec. 1586. [Medicines and medical attendance.] Expenses incurred by any officer of the Navy for medicines and medical attendance shall not be allowed unless they were incurred when he was on duty, and the medicines could not have been obtained from naval supplies, or the attendance of a naval medical officer could not have been had. [R. S.]


Sec. 1587. [Funeral expenses.] No funeral expense of a naval officer who dies in the United States, nor expenses for travel to attend the funeral of an officer who dies there, shall be allowed. But when an officer on duty dies in a foreign country the expenses of his funeral, not exceeding his sea-pay for one month, shall be defrayed by the government, and paid by the paymaster upon whose books the name of such officer was borne for pay. [R. S.]

The Deficiency Appropriation Act of March 3, 1899, ch. 427, 30 Stat. L. 1225, contained a provision as follows:

"That in all cases where an officer or an enlisted man in either the army, navy, marine corps of the United States, or contract surgeon or trained nurse in the employ of the Government, has died while on duty away from home since the first day of January, eighteen hundred and ninety-eight, and the remains have been taken home and buried at the expense of the family or friends of the deceased, the parties who paid the cost of transportation and burying such remains shall be repaid at the expense of the United States by the Secretary of the Treasury, not to exceed what it would have cost the United States to have transported the remains to their homes."

Somewhat similar provisions have appeared in subsequent years, those for the fiscal year ending June 30, 1916, were contained in the Act of March 3, 1915, ch. 83, 38 Stat. L. 938.

Sec. 1588. [Pay of retired officers.] The pay of all officers of the Navy who have been retired after forty-five years' service after reaching the age of sixteen [sic] years, or who have been or may be retired after forty years' service, upon their own application to the President, or on attaining the age of sixty-two years, or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein, shall, when not on active duty, be equal to seventy-five per centum of the sea-pay provided by this chapter for the grade or rank which they held, respectively, at the time of their retirement. The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea-pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement. [R. S.]


These provisions and those of sections 1589 and 1590 are in part superseded by Act of March 3, 1899, ch. 413, § 8, supra, p. 1126, as to officers on the active list at the time of the passage of such Act, but not as to officers then on the retired list. See same Act, § 13, infra, p. 1195, and the note thereto.

R. S. sec. 1589, relating to retirement of officers, is given under subdivision VI of this title, supra, p. 1124.
Purport and application of section.— This section and R. S. secs. 1590 and 1583, in so far as they contain provisions of a general and special character, prescribing the compensation of retired naval officers, which together embrace within their scope all such officers, whether of the line or staff. They must, accordingly, be deemed to have repealed, upon the adoption of the Revised Statutes, all the provisions then in force by which that compensation was previously regulated, and to have constituted thereafter the only law upon the subject. Hence, in determining what is the retired pay of naval officers on the retired list since the date of the revision, we are governed entirely by the provisions of the sections cited. If the officer comes within the terms of R. S. sec. 1593, the pay to which he is entitled is the pay prescribed by that section. If he comes within the terms of R. S. sec. 1590, he is entitled to the pay thereby fixed. If he belongs to any of the classes of retired officers described in the first sentence of section 1588, he is entitled to the pay allowed thereby. But if he is not within section 1593, nor within section 1590, nor within the first sentence of section 1588, he is, in that case, to be regarded as within the second or last sentence of the latter section (which is general, and intended to include all retired officers not falling under either of the other provisions adverted to) and entitled to the pay thereby established. (1877) 15 Op. Atty.-Gen. 316.

Officers within section.— The seventy-five per cent rate applies to all officers of the navy (1) "who have been retired after forty-five years' service after reaching the age of sixty-two years;" (2) "or who have been or may be retired after forty years' service upon their own application to the President;" (3) "or on account of incapacity resulting from long and faithful service, from wounds or injuries received in the line of duty, or from sickness or exposure therein." Thomley's Case, (1881) 17 Op. Atty.-Gen. 173.

Cadet engineers are "officers" within the meaning of this section. (1882) 17 Op. Atty.-Gen. 329.

Mates.— This section applies to mates. Creighton v. U. S., (1902) 37 Ct. Cl. 327.

Retired pay is the equivalent of salary, and when an officer serves on a board as to which a statute prescribes for members who are "not salaried officers" a salary, and for members who are salaried officers "their actual necessary expenses," he is entitled to the latter and not to the former. Franklin v. U. S., (1893) 29 Ct. Cl. 6.

The word "grade" refers to the division of officers into five years' periods of service. An officer retired in the third five years' period of service is entitled to seventy-five per cent of the sea pay of that pay grade, and not to the highest pay of a chief engineer who has served over twenty years. Rutherford v. U. S., (1883) 18 Ct. Cl. 339. See also McClure v. U. S., (1883) 18 Ct. Cl. 347.

"The interchangeability of the words rank and grade throughout the statutes leads me to the conclusion that they are used synonymously—especially when we find them, as in section 1588, connected by a disjunctive, and with no indication that either shall control." (1881) 17 Op. Atty.-Gen. 184.

Longevity pay.— The first clause of this section does not give longevity pay to retired officers. The section means that the pay of a retired officer shall be three-fourths of the sea pay to which he was entitled when he was retired. Thornley v. U. S., (1886) 113 U. S. 316, 8 S. Ct. 491, 28 U. S. (L. ed.) 999. See also Rutherford v. U. S., (1883) 18 Ct. Cl. 339; McClure v. U. S., (1883), 18 Ct. Cl. 347.

Pay on promotion.— Provision is not made by this section for an allowance to an officer of an increase of pay upon his promotion to a higher grade. (1883) 17 Op. Atty.-Gen. 495.

Retirement while holding relative rank.— Where one holding a commission as captain in the navy was appointed to the office of chief of the bureau of navigation, with the relative rank of commodore, the Attorney-General advised that in case of his retirement by reason of a disability incident to the service, or on his application, during his incumbency of that office, and while he was borne on the navy register as a captain, he should be placed on the retired list with the rank of captain, and that, on being thus retired, he would be entitled to seventy-five per cent of the sea pay of officers of that rank. (1881) 17 Op. Atty.-Gen. 493.

An officer retired on the furlough list under R. S. sec. 1545, supra, div. VI, p. 1121, is not entitled to the pay of officers on the retired list under the second clause of this section. Brown v. U. S., (1885) 113 U. S. 585, 5 S. Ct. 645, 28 U. S. (L. ed.) 1079. See also Magaw v. U. S., (1880) 16 Ct. Cl. 11, as to an officer retired on furlough pay according to R. S. sec. 1593, infra, p. 1190.

An assistant engineer, being physically disabled, was examined by a naval retiring board, and reported that he was incapacitated from active service, and that in their judgment the incapacity did not originate in the line of duty. In this report the President concurred, and directed a retirement on furlough pay, under R. S. sec. 1545, supra, div. VI, p. 1121. Later he was nominated by the President and confirmed by the Senate for transfer from the furlough to the retired-pay list, under R. S. sec. 1594, supra, p. 1190. It was

An officer retired under Sec. 1454, supra, div. VI, p. 1121, cannot be transferred on the retired pay list under R. S. sec. 1594, infra, p. 1160, with increase of pay; such increase is forbidden by the Act of Aug. 5, 1882, ch. 391, which provides that "hereafter there shall be no promotion or increase of pay in the retired list of the navy, but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired." (1888) 18 Op. Atty.-Gen. 90.

In the case of an officer found by the retiring board to be incapacitated for active service, such incapacity not being the result of misconduct on his part nor of any incident of the service, and in view of the considerations which lead to the President's determination to retire instead of discharging the officer, and the same considerations being regarded as sufficient to warrant the transfer of such officer from the furlough to the retired-pay list, the President, by and with the consent of the Senate, cannot make the retirement and transfer simultaneous by placing such officer at once on the retired-pay list. (1885) 18 Op. Atty.-Gen. 96.

Special appointment and retirement.—When an acting master's mate was, under a private Act, duly appointed and commissioned a master on the retired list of the navy, he became a master by the appointment, although placed upon the retired list at the same instant. And when the cause of his retirement was on account of "incapacity resulting from • • • wounds or injuries received in the line of duty," he became entitled to receive seventy-five per centum of the sea pay of a master on the active list. Bradbury v. U. S., (1885) 20 Ct. Cl. 157.

A special Act for the relief of John N. Quackenbush, late a commander in the navy, provided that the President was authorized to appoint him to the same grade and rank of commander as of date of Aug. 1, 1883, and to place him on the retired list as of the date of June 1, 1885. He was nominated in May, 1887, and took the oath on May 26, 1897. He reached the age of sixty-two on May 31, 1898. The court said that if the claimant had been appointed without the reference to the prior date and had been immediately retired, he would have been entitled only to one-half the sea pay of a commander under this section, for he would not have reached the age of sixty-two years while in the service; but as he was appointed as of Aug. 1, 1883, he was put constructively in the service from that date and so, on being retired, became entitled to three-quarters of such sea pay. Quackenbush v. U. S., (1900) 177 U. S. 20, 20 S. Ct. 530.

Prior service.—A retired mate in the navy may be credited with his prior service in the navy at the date of his retirement in determining his classification for pay. (1908) 26 Op. Atty.-Gen. 599.

Effect of section 12, Act March 3, 1899. —Section 17 of the Act of March 3, 1899, supra, div. VI, p. 1128, providing that on the retirement of an officer after thirty years' service he shall thereafter receive seventy-five per centum of the pay and allowance of the rank or rating upon which he was retired, "is not in conflict with the language of this section providing for seventy-five per centum of the sea pay of the grade or rank held by him at the time of retirement." Creighton v. U. S., (1902) 37 Ct. Cl. 327.

Sec. 1590. [Third assistant engineers.] Officers who have been retired as third assistant engineers shall continue to receive pay at the rate of four hundred dollars a year. [R. S.]


See the note to the preceding R. S. sec. 1588.

The engineer corps was transferred to the line by the Navy Personnel Act of March 3, 1899, ch. 413, §§ 1-7, supra, p. 1091.

Sec. 1591. [Pay not increased by promotion.] No officer, heretofore or hereafter promoted upon the retired list, shall, in consequence of such promotion, be entitled to any increase of pay. [R. S.]

Sec. 1592. [Pay on active duty.] Officers on the retired list, when on active duty, shall receive the full pay of their respective grades. [R. S.]


Retired officers in active service shall receive, so long as they remain in such service, the same pay as officers of their respective grades on the active list are allowed by law. (1862) 10 Op. Atty.-Gen. 332. See (1861) 10 Op. Atty.-Gen. 107.

A paymaster in the navy, retired under the Act of Dec. 21, 1861, and subsequently employed in active sea service, is entitled to the proper “sea pay” of his grade during the time of such employment. Buchanan's Case, (1862) 10 Op. Atty.-Gen. 286.

Sec. 1593. [Officers retired on furlough pay.] Officers placed on the retired list, on furlough pay, shall receive only one-half of the pay to which they would have been entitled if on leave of absence on the active list. [R. S.]


The marine corps is not within the application of this section. Wells Case, (1878) 15 Op. Atty.-Gen. 442.

Longevity pay.—Officers retired under this section are not entitled to longevity pay. Brown v. U. S., (1883) 18 Ct. Cl. 557.

Relation to R. S. sec. 1592.—This section is an exception to the broad rule laid down in R. S. sec. 1592, supra, p. 1187, that the unenumerated retired officers shall receive half sea pay. Magaw v. U. S., (1880) 16 Ct. Cl. 3.

Sec. 1594. [Transfer from furlough to retired pay.] The President, by and with the advice and consent of the Senate, may transfer any officer on the retired list from the furlough to the retired-pay list. [R. S.]


Liberal construction.—This section was evidently intended to enable the President, with the advice and consent of the Senate, to relieve a deserving officer to a limited extent from the consequences of the findings of retiring boards, and under such circumstances it should be liberally construed. U. S. v. Burchard, (1888) 125 U. S. 176, 8 S. Ct. 832, 31 U. S. (L. ed.) 662.

Retroactive transfer.—The President, with the advice and consent of the Senate, may determine whether the transfer from furlough to retired pay shall operate only in the future, or relate back to a time when in his judgment it ought to have been granted. U. S. v. Burchard, (1888) 125 U. S. 176, 8 S. Ct. 832, 31 U. S. (L. ed.) 662.

An officer who has been found incapacitated for active service, and under R. S. sec. 1454, supra, div. VI, p. 1121, retired on furlough pay, cannot be transferred under this section to the retired pay list with the pay incident thereto, as such increase is forbidden by the Act of Aug. 5, 1882, 22 Stat. L. 236, ch. 391, supra, div. VI, p. 1123. (1888) 18 Op. Atty.-Gen. 96.

Relation to R. S. sec. 1588.—An officer transferred from the furlough list cannot receive the higher rate of pay provided for in R. S. sec. 1588, supra, p. 1187, irrespective of the conditions or circumstances of his retirement, as, when he is placed upon the retired list, the terms and conditions of his retirement determine the pay which he is to receive. An officer who had been retired on furlough pay from causes not incident to the service cannot be nominated for transfer to the seventy-fifth centurium retired-pay list under R. S. sec. 1588. (1878) 18 Op. Atty.-Gen. 92.
Sec. 1595. [Rations.] Rations shall not be allowed to officers on the 
retired list. [R. S.]


_An act for the better government of the Navy of the United States._

_[Act of June 22, 1874, ch. 392, 18 Stat. L. 191._]

_[Sec. 1.] [Commencement of pay of promoted officer.] That on and 
after the passage of this act, any officer of the Navy who may be promoted 
in course to fill a vacancy in the next higher grade shall be entitled to the 
pay of the grade to which promoted from the date he takes rank therein, if 
it be subsequent to the vacancy he is appointed to fill. [18 Stat. L. 191._]

This section superseded R. S. sec. 1661, noted _supra_, p. 1177.
Section 3 of this Act repealed R. S. sec. 1523, noted under _Naval Academy, ante_, 
p. 1013.

_Construction._—This statute supersedes R. S. sec. 1561, _supra_, p. 1177, as to offic-
ers promoted thereafter, and should be construed with that section and other pro-
visions relating to the pay of officers in the navy, R. S. _seca_ 1556, 1557, 1568, 
1562, _supra_, pp. 1171-1177, all of which are in _pari materia_. (1882) 17 Op. Atty.-
Gen. 329. See also (1883) 17 Op. Atty.-
Gen. 495.

_Increased pay dependent on promotion._—This section clearly cuts off by _implication_
any increase of pay until promotion. _Hunt v. U. S._, (1886) 116 U. S. 394, 6 S. 

This statute authorizes payment only from the time the promoted officer takes 
rank in the higher grade and subsequent to the date of the vacancy to which he is 
promoted. _Adanson v. U. S._, (1884) 19 Ct. Cl. 623.

_An officer entitled to be promoted before a battle, but not promoted until after-
wards, is entitled to have his prize money based on the pay which he would have been 
entitled to receive had he been promoted._ _Manila Bay_, (1901) 36 Ct. Cl. 206.

_When there are no vacancies at the time officers take rank, according to their com-
missions, this statute does not apply so as to entitle them to pay in the higher 
grades from the time they take rank._ (1900) 23 Op. Atty.-
Gen. 30.

_Age limit reached pending proceedings for promotion._—On Feb. 18, 1886, a rear-
admiral was, under R. S. sec. 1444, _supra_, div. VI, p. 1118, transferred from the ac-
tive to the retired list of the navy, and a commodore, first in line of promotion, was, 
after having successfully passed an exam-
ination, nominated by the President to be a rear-admiral to fill the vacancy caused 
by the retirement of the rear-admiral above noted. While this nomination was 
before the Senate awaiting action thereon, the commodore attained the age of sixty-

_two years, and under said section was transferred from the active to the retired 
list to rank as commodore. The attorney-
general advised that according to the law and usage of the service the commodore 
was entitled to be a rear-admiral from Feb. 18, 1886, by relation, and to receive the 
pay of a rear-admiral from that date, and 
if the Senate should confirm his nomination, might be commissioned as a rear-
admiral and placed on the retired list as of that grade. (1886) 18 Op. Atty.-
Gen. 393.

_Cadet engineers are within this section which fixes the commencement of their pay when promoted thereto._ (1882) 17 Op. Atty.-
Gen. 329.

_Rights of widow._—On Feb. 15, 1898, an officer of the U. S. steamship Maine, which 
was destroyed on that day by an explosion in the harbor of Havana, was injured by 
nervous shock and exposure, and died therefrom on June 16, 1898. At the time of 
the destruction of the vessel the officer held the office of lieutenant, junior grade, 
but a vacancy then existed in the grade of lieutenant, to which he was entitled to be 
promoted in due course, but by reason of absence from duty he was not available 
for examination, and without fault on his part had not been examined or actually 
 promoted at that time. After the destruction of the vessel he was promoted, and on 
April 21, 1898, commissioned a full lieu-
tenant to rank from Feb. 1, 1898. It was 
 held that the widow was entitled, under the Act of March 30, 1898, 30 Stat. L. 346, 
sec. 2 (An act for the relief of the suf-
ferrers by the destruction of the U. S. 
steamer Maine in the harbor of Havana, Cuba), to recover full sea pay from the 
time the decedent was appointed to take 
SEC. 2. [Officer dismissed and restored by finding of court-martial.] That the accounting officers of the Treasury be, and are hereby, prohibited from making any allowance to any officer of the Navy who has been, or may hereafter be, dismissed from the service and restored to the same under the provisions of the twelfth section of the act of March third, eighteen hundred and sixty-five, entitled "An act to amend the several acts heretofore passed to provide for the enrolling and calling out the national forces, and for other purposes," to exceed more than pay as on leave for six months from the date of dismissal, unless it shall appear that the officer demanded in writing, addressed to the Secretary of the Navy, and continued to demand as often as once in six months, a trial as provided for in said act. [18 Stat. L. 192.]


Failure to demand a trial "once in six months."—A retired naval officer was dismissed from the navy by order of the executive on the 30th of December, 1865. In May, 1876, upon his application for trial by court-martial, made under section 12 of the Act of March 3, 1865, ch. 79, a court was awarded, which, in June, 1876, pronounced him innocent of every charge and specification, and, the dismissal being thereby annulled, he was ordered, June 5, 1876, to be restored to the retired list. Between the date of his dismissal and the date of his restoration he had not demanded in writing from the Secretary of the Navy, as often as once in six months, a trial; and, pay being claimed by him for this period, it was advised that the right of the claimant to pay was governed by this section, under the provisions of which he was not entitled to more than "pay as on leave for six months" from the date of dismissal. (1876) 16 Op. Atty-Gen. 569.

[Allowance for traveling expenses.] * * * That no allowance shall be made in the settlement of any account for traveling expenses unless the same be incurred on the order of the Secretary of the Navy, or the allowance be approved by him. [18 Stat. L. 297.]

This is from the Naval Appropriation Act of Jan. 18, 1875, ch. 18. For other provisions relating to mileage, etc., see the Act of Aug. 5, 1882, ch. 391, § 1, infra, this page.

[SEC. 1.] [Expenses of officers traveling abroad — certified orders.] * * * And officers of the Navy traveling abroad under orders hereafter issued shall travel by the most direct route, the occasion and necessity for such order to be certified by the officer issuing the same; and shall receive, in lieu of the mileage now allowed by law, only their actual and reasonable expenses, certified under their own signatures and approved by the Secretary of the Navy. [23 Stat. L. 286.]

This is from the Naval Appropriation Act of Aug. 5, 1882, ch. 391. Other provisions relating to mileage, traveling expenses, etc., were made by R. S. sec. 1506, noted as superseded, supra, p. 1179; the Act of Jan. 18, 1875, ch. 18, supra, this page; the Act of July 7, 1868, ch. 571, infra, p. 1196; the Act of March 3, 1901, ch. 831, infra, p. 1197; the second paragraph of the Act of July 1, 1902, ch. 1366, infra, p. 1201; the Act of April 27, 1904, ch. 1630, infra, p. 1205; and the Act of June 30, 1914, ch. 130, infra, p. 1212.

Traveling abroad.—An officer is to be understood as traveling abroad when he goes to a foreign port or place under orders to proceed to that place, or from one foreign port to another, or from a foreign port to a home port. U. S. v. Hutchins

Route of travel.—An officer is ordi-
narily bound to travel by the shortest
usually traveled route; but not by an
extraordinary and unusual route because
it is the shortest. Hannum v. U. S.,
(1884) 19 Ct. Cl. 516.

When an officer does not travel by the
most direct route, or being ordered to
travel by one route is compelled to travel
by another, he must bring to the account-
ing officers the authority or ratification
of the Navy Department, and if he neglects
to do so will have no remedy save by es-
ablishing judicially the facts upon which
his right rests. Hannum v. U. S., (1884)
19 Ct. Cl. 516. See also Griffin v. U. S.,
(1886) 21 Ct. Cl. 13.

Under orders.—An officer in the navy
was authorized to appear before a board
of inquiry and ordered to wait at Yok-
ohama on the conclusion of the investiga-
tion, until he received further orders from
the department. It was held that he was
"traveling abroad under orders" within
the meaning of the statute. Salfridge v.

An officer on a vessel was ordered by
the department to return on another ves-
sel. Before the order reached him the
other vessel was ordered to a port 1,000
miles distant, and her return indefinitely
postponed. Nevertheless the admirals in
command formally ordered the officer to
report aboard the other vessel for passage
home, but informally gave him permission
to return on a merchantman if he defrayed
the expense thereof. It was held that he
could not receive mileage, though the ex-
ercise of his discretion in consequence of
the changed position of the ship of war
may have been a wise one. Pendleton v.
U. S., (1886) 21 Ct. Cl. 5.

Quarters were assigned to warrant offi-
cers on a flagship by the Navy Department.
Thus proved to be unreasoned. The
commander of the squadron at their re-
quest "detached" the officers from the
ship "with permission" to return home.
He also reported to the secretary that he
did not deem it proper to "order" them
home because their quarters were assigned
to them by the department, but that he
had no alternative to the course pursued.
The secretary approved his action and
ordered that the officers "be regarded as
having performed the journey under
orders." It was held that they had trav-
elled under orders and were entitled to
Cl. 388.

Private delinquency the cause of the
travel.—An officer who was absent from
his ship when she sailed, was ordered by
the commander of the fleet to take pas-
sage on a steamer at his own expense
and rejoin his ship. It was held that he
could not recover mileage; that under the Act
of 1876, ch. 159, 19 Stat. L. 65, "public
business" was the foundation on which
mileage rested. Perrimond v. U. S., (1884)
19 Ct. Cl. 509.

Resignation to take effect on arrival.—
An officer at a foreign station received an
order stating that his resignation was ac-
cepted to take effect on his "arrival in the
United States," and directing him to
proceed to New York, and report by let-
ter the date of his arrival. The officer
traveled by another route, entering the
United States at San Francisco. He re-
ported the reasons for so doing, and the
secretary approved his action and ordered
that his resignation take effect the day of
his arrival in New York. It has been the
policy of the government to restore an
officer to his residence before discharging
him from its service, and it was held that
a journey for that purpose by authority
of the secretary of the navy was a mat-
ter of public obligation "and on public
business" within the meaning of the Act
of June 30, 1876, ch. 159, 19 Stat. L. 65,

Statute changed while officer en route.
—At the time the Act of June 30, 1876,
ch. 159, 19 Stat. L. 65, was passed, an
officer was en route under orders from a
foreign port. It was held that he was
entitled to the actual expenses for the part
of the journey traveled before the Act
was passed, under the provisions of the
previous law, and to mileage for the part
traveled after the enactment of the statute.
U. S. v. McDonald, (1888) 128 U. S. 471,

[Sec. 1.] Rations of enlisted men and boys and naval cadets.]*

That all enlisted men and boys in the Navy, attached to any United States
vessel or station and doing duty thereon, and naval cadets, shall be allowed
a ration, or commutation thereof in money, under such limitations and regu-
lations as the Secretary of the Navy may prescribe. [33 Stat. L. 291.]

This is from the Naval Additional Appropriation Act of Jan. 30, 1885, ch. 43.

As to the change in the designation of naval cadets, see the notes to R. S. sec. 1577,
supra, p. 1183. This section would seem to supersede in part R. S. 1679, supra, p. 1184.
[Claims for sea pay or commutation of rations.] • • • That hereafter the accounting officers of the Treasury shall not receive, examine, consider, or allow any claim against the United States for sea pay or commutation of rations which has been or may be presented by officers of the Navy, their heirs or legal representatives, under the decisions of the Supreme Court, which have heretofore been adopted as a basis for the allowance of such claims, which accrued prior to July sixteenth, eighteen hundred and eighty. [27 Stat. L. 313.]

This is from the Deficiency Appropriation Act of July 28, 1892, ch. 311. The provisions of this section relating to commutation of rations was apparently superseded by the Act of March 3, 1899, ch. 413, § 13, infra, p. 1196, which has been itself partly superseded as indicated in the note thereto.

[Commencement of pay—graduates of Naval Academy.] • • • And every naval cadet or cadet engineer who has heretofore graduated or may hereafter graduate from the Naval Academy, and who has been or may hereafter be commissioned, within six months after such graduation, an officer in the Navy or Marine Corps of the United States, under the law appointing such graduate to the Navy or Marine Corps, shall be allowed the pay of the grade in which he may be so commissioned from the date he takes rank as stated in his commission to the date of qualification and acceptance of his commission. [27 Stat. L. 716.]

This is from the Naval Appropriation Act of March 3, 1893, ch. 212. A similar provision is contained in the Act of July 19, 1892, ch. 206, 27 Stat. L. 236. As to the change in the designation of naval cadets, see the note to R. S. sec. 1577, supra, p. 1193.

[Employment of naval officers by contractors furnishing supplies forbidden.] • • • That hereafter no payment shall be made from appropriations made by Congress to any officer in the Navy or Marine Corps on the active or retired list while such officer is employed, after June thirtieth, eighteen hundred and ninety-seven, by any person or company furnishing naval supplies or war material to the Government; and such employment is hereby made unlawful after said date. [29 Stat. L. 361.]

This and the following paragraph of the text are from the Naval Appropriation Act of June 10, 1896, ch. 399.

Effect of Act.—The employment of any officer in the Navy or Marine Corps or on the active or retired list by any person or company furnishing naval supplies or war material to the government is prohibited by this provision. If the Navy Department, in order to assist in the extension of United States trade and commerce and to carry out the general purposes indicated in the application by the Department of State, thinks fit to send an officer of the Navy, skilled in matters of ordnance, to a South American capital, it is entirely competent for the Secretary of the Navy to direct him to be sent, not as the representative of a private person or company, nor in its employment, but at the expense of the Government as a representative of the Navy Department and for the purpose of assisting all Americans whose interests are such as, in the opinion of the Secretary, to justify that proceeding. (1911-29 Op. Atty. Gen. 46.

[Allotment of pay.] • • • That the Secretary of the Navy be, and he is hereby, authorized to permit officers of the Navy and the Marine Corps
to make allotments from their pay, under such regulations as he may prescribe, for the support of their families or relatives, for their own savings, or for other proper purposes, during such time as they may be absent at sea, on distant duty, or under other circumstances warranting such action. [29 Stat. L. 361.]

See the note to the preceding paragraph of the text.

Increase of allotment.—The Secretary of the Navy has no power to increase a naval officer's allotment without his consent, and where an officer's allotment of pay in favor of his wife was increased and paid to her without his knowledge or consent during his absence on a long voyage he may recover the illegal excess. Melville v. U. S., (1888) 23 Ct. Cl. 74.

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Joint Resolution Extending the benefits of section fourteen hundred and twenty-six and fifteen hundred and seventy-three of the Revised Statutes to all enlisted persons in the Navy.


[Benefits of R. S. secs. 1426, 1573, extended to all enlisted men.] That the benefits of honorable discharge as conferred by section fourteen hundred and twenty-six of the Revised Statutes, and of three months' pay upon reenlistment after honorable discharge as conferred by section fifteen hundred and seventy-three upon seamen, ordinary seamen, landsmen, firemen, coal heavers and boys, be, and the same are hereby, extended and made applicable to all enlisted persons in the Navy. And all accounts of paymasters who have made payments to enlisted men, not of the classes named in sections fourteen hundred and twenty-six and fifteen hundred and seventy-three, Revised Statutes, as if they had been included in the provisions of said sections, shall be allowed and passed by the accounting officers of the Treasury as if they had been included in said sections. [29 Stat. L. 476.]

R. S. secs. 1426 and 1573 mentioned in the text are given supra, pp. 1085, 1182.

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[Difference between mileage and expenses—limitation to claims.]

That hereafter the accounting officers of the Treasury shall not receive, examine, consider, or allow any claim against the United States for difference between mileage and actual expenses which has been or may be presented by officers of the Navy, their heirs or legal representatives, under the decisions of the Supreme Court which have heretofore been adopted as a basis for the allowance of such claims, which accrued prior to July first, eighteen hundred and seventy-four. [30 Stat. L. 708.]

This is from the Deficiency Appropriation Act of July 7, 1898, ch. 571. For provisions relating to mileage, traveling expenses, etc., see the Act of Aug. 5, 1882, ch. 391, § 1, supra, p. 1192.

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Sec. 13. [Naval chaplains—prize and bounty abolished.] That, after June thirtieth, eighteen hundred and ninety-nine, commissioned officers of
the line of the Navy and of the Medical and Pay Corps shall receive the
same pay and allowances, except forage, as are or may be provided by or in
pursuance of law for the officers of corresponding rank in the Army:*
* * * Provided further, That when naval officers are detailed for shore duty
beyond seas they shall receive the same pay and allowances as are or may
be provided by or in pursuance of law for officers of the Army detailed for
duty in similar places: Provided further, That naval chaplains, who do
not possess relative rank, shall have the rank of lieutenant in the Navy;
and that all officers, including warrant officers, who have been or may be
appointed to the Navy from civil life shall, on the date of appointment, be
credited, for computing their pay, with five years' service. And all pro-
visions of law authorizing the distribution among captors of the whole or
any portion of the proceeds of vessels, or any property hereafter captured,
condemned as prize, or providing for the payment of bounty for the sinking
or destruction of vessels of the enemy hereafter occurring in time of war,
are hereby repealed: And provided further, That no provision of this Act
shall operate to reduce the present pay of any commissioned officer now in
the Navy; and in any case in which the pay of such an officer would other-
wise be reduced he shall continue to receive pay according to existing law:
And provided further, That nothing in this Act shall operate to increase or
reduce the pay of any officer now on the retired list of the Navy. [30 Stat.
L. 1006.]

This is from the Navy Personnel Act of March 3, 1899, ch. 413. For a reference
to the entire Act see the notes to section 1 thereof, supra, p. 1061.
The first provision of the text relating to pay of the officers of the line of the navy,
was superseded by the Act of May 13, 1908, ch. 186, infra, p. 1203.
The first proviso of this section, omitted in the text, was as follows:
"Provided, That such officers when on shore shall receive the allowances, but fifteen
per centum less pay than when on sea duty; but this provision shall not apply to
warrant officers commissioned under section twelve of this Act."
It was repealed by the Act of June 29, 1908, ch. 3580, 34 Stat. L. 554.
The second proviso of the text relating to the pay of officers detailed for shore duty
beyond seas, was likewise superseded by said Act of May 13, 1908, ch. 186, infra,
p. 1203.
The proviso of the text relating to naval chaplains was affected by the Act of March
3, 1899, ch. 413, § 7, supra, p. 1094, which provided that the words "the relative
rank of," wherever they appeared in the Revised Statutes, should be amended to read
"the rank of." Further provisions relating to the rank of chaplains were made by
R. S. sec. 1479, supra, p. 1137; the Act of June 29, 1908, ch. 3580, infra, p. 1202; and
the Act of June 30, 1914, ch. 130, supra, p. 1106.
That part of the text providing for a credit of five years' service to all officers
appointed to the navy from civil life was not to apply to persons entering the navy
after the passage of the Act of March 4, 1913, ch. 148 by virtue of a provision thereof
given infra, p. 1212.
A provision similar to that of the last proviso of the text was made by the Naval
Appropriation Act of June 7, 1900, ch. 859, 31 Stat. L. 697, as follows:
"Section 13 of the Act approved March 3, 1899, entitled 'An Act to reorganize and
increase the efficiency of the personnel of the navy and marine corps of the United
States,' is hereby so amended as to provide that nothing therein contained shall operate
to reduce the pay which, but for the passage of said Act, would have been received by
any commissioned officer at the time of its passage or thereafter."
A similar provision was made by the eleventh paragraph of the Act of May 13, 1908,
ch. 186, infra, p. 1210. See the notes to said paragraph.

[Admiral] * * * For the pay and allowances prescribed by law of
officers * * * including the admiral of the Navy, whose pay and
allowances shall be the same as those received by the last General of the United States Army. [30 Stat. L. 1024.]

This is from the Naval Appropriation Act of March 3, 1899, ch. 421. The pay of the admiral was fixed by the first paragraph of the Act of May 13, 1908, ch. 166, infra, p. 1203.

[Extra pay to temporary force.] * * * The officers and enlisted men comprising the temporary force of the Navy during the war with Spain who served creditably beyond the limits of the United States, and who have been or may hereafter be discharged, shall be paid two months' extra pay; and all such officers and enlisted men of the Navy who have so served within the limits of the United States, and who have been or may hereafter be discharged, shall be paid one month's extra pay. [30 Stat. L. 1228.]

This is from the Deficiency Appropriation Act of March 3, 1899, ch. 427. The Naval Appropriation Act of March 3, 1899, ch. 421, 30 Stat. L. 1024, contained the following provision:

"The Secretary of the Navy is hereby authorized to pay to such officers as were appointed for temporary service in the navy during the late war with Spain, and who entered upon the performance of duty prior to the date on which they accepted their commissions and executed oaths of office, the pay of their grades for the interval during which they were so employed, such payments to be made from the appropriation "Pay of the Navy.”"

Pay of particular officers.—See the notes under the Act of May 13, 1908, ch. 166, infra, p. 1203.
Temporary force.—"Comprising the temporary force" was intended to comprise all of the temporary force "of the navy during the war with Spain." The fact that a man enlisted for three years does not take his case out of the statute, but where he enlisted during the war with Spain, or when war was imminent, and was discharged at or about the termination of hostilities, and his discharge indicates that he was discharged as one of the temporary force of the navy, he is entitled to the two months' additional pay given by the Act. Cleary v. U. S., (1900) 55 Ct. Cl. 207.

To officers and men who serve until discharged the statute is restricted. An officer who resigns and whose resignation is accepted is thereby out of the service and cannot subsequently be discharged within the intent of the Act. Douw v. U. S., (1901) 36 Ct. Cl. 112.

Paymaster's clerks appointed to serve with paymasters in the navy were not a part of the temporary force of the navy. McBlair v. U. S., (1901) 36 Ct. Cl. 109.

[Mileage or actual expenses, when allowed.] * * * That in lieu of traveling expenses and all allowances whatsoever connected therewith, including transportation of baggage, officers of the Navy traveling from point to point within the United States under orders shall hereafter receive mileage at the rate of eight cents per mile, distance to be computed by the shortest usually traveled route; * * * Actual expenses only shall be paid for travel under orders outside the limits of the United States in North America. [31 Stat. L. 1029.]

This and the following paragraph are from the Deficiency Appropriation Act of March 3, 1901, ch. 831. The text is a repetition of a paragraph in the Naval Appropriation Act of June 7, 1900, ch. 889, 31 Stat. L. 685.

The part of the text here omitted was repeated with the addition of the word "hereafter" in the second paragraph of the Act of July 1, 1902, ch. 1368, infra, p. 1201.
For other provisions relating to mileage, traveling expenses, etc., see the Act of Aug. 5, 1882, ch. 391, § 1, supra, p. 1192, and the Acts cited in the note thereto.

The Naval Appropriation Act of June 30, 1876, ch. 150, § 1, 19 Stat. L. 65, contained the following provision:

"And so much of the Act of June sixteenth, one thousand eight hundred and seventy-four, making appropriations for the support of the army for the fiscal year ending June thirtieth, one thousand eight hundred and seventy-five, and for other purposes, as provides that only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States while engaged on public business, as is applicable to officers of the navy so engaged, is hereby repealed; and the sum of eight cents per mile shall be allowed such officers while so engaged, in lieu of their actual expenses."

The Act of June 16, 1874, ch. 280, 18 Stat. L. 72, mentioned in this provision was superseded by the Act of March 3, 1875, ch. 133, § 1, given in PUBLIC OFFICERS AND EMPLOYEES.

Construction.—A strict construction of the statute is required. Fulmer v. U. S., (1897) 32 Ct. Cl. 112.

Thus the government cannot, by buying for a naval officer traveling under orders a railroad or steamship ticket, deny to him the mileage allowed by law. Temple v. U. S., (1878) 14 Ct. Cl. 377, affirmed (1881) 106 U. S. 97, 26 U. S. (L. ed.) 947.

Nature of allowance.—The provision for eight cents per mile was intended to be in lieu of actual expenses when traveling on public business, and is in the nature of indemnity for actual expenses incurred and not an allowance for services rendered. Lemly v. U. S., (1893) 28 Ct. Cl. 468.

Officer within statute.—A mate in the navy is not an officer of the United States within the decision of U. S. v. Monat, (1888) 124 U. S. 303, 8 S. Ct. 505, 31 U. S. (L. ed.) 483, and is not entitled to mileage. Money paid him for mileage is in violation of law, and may be recovered by the United States on a counterclaim. Baxter v. U. S., (1897) 32 Ct. Cl. 75.

A paymaster's clerk is not an officer of the navy either by the naval regulations or by the statutes, or by any constitutional provision, and therefore he is not entitled to compensation for travel in excess of his actual traveling expenses. U. S. v. Monat, (1898) 124 U. S. 303, 8 S. Ct. 505, 31 U. S. (L. ed.) 483, reversing (1887) 22 Ct. Cl. 293. See also Johnson v. Sayre, (1895) 158 U. S. 109, 16 S. Ct. 773, 39 U. S. (L. ed.) 914.

Petty officers are not included as officers within the meaning of the statute. Baxter v. U. S., (1897) 32 Ct. Cl. 75.

Officers and enlisted men distinguished.—It is generally understood that the words "officers and enlisted men" include the whole personnel of the navy; those who sign the shipping articles being regarded as enlisted men, and those who take the oath of office prescribed by R. S. sec. 1757 (title PUBLIC OFFICERS), as officers. Monat v. U. S., (1887) 22 Ct. Cl. 293.

Under Act of June 30, 1876.—Under the provision of sec. 1 of the Act of June 30, 1876, set forth above, it was held that no person holding an employment or appointment under the United States, although in the navy, was relieved from the effect of the Act of 1874 except "officers of the navy." "As this is a special statute exempting for particular reasons a certain class of persons from the operation of the general law, which was left to include all other persons in the employment of or holding appointment under the government of the United States, it is obviously proper to confine that clause to those who are, properly speaking, officers of the navy. There is nothing in the context nor in the reason which may have been supposed to influence Congress in making this exception out of the general law justifying its application to any other person than those who are, strictly speaking, officers of the navy." U. S. v. Mount, (1888) 124 U. S. 303, 8 S. Ct. 505, 31 U. S. (L. ed.) 483, reversing (1887) 22 Ct. Cl. 293.

"Within the United States."—In U. S. v. Hutchins, (1894) 151 U. S. 542, 14 S. Ct. 421, 38 U. S. (L. ed.) 264, it was held that a naval officer traveling under orders from San Francisco to New York, by the way of the Isthmus of Panama, is to be considered as traveling in the United States, and not as traveling abroad. "The question whether travel is abroad or within the United States should be determined by the termini of the journey rather than by the route actually taken." See (1873) 14 Op. Atty.-Gen. 590.

An officer is to be understood as traveling abroad when he goes to a foreign port or place, under orders to proceed to that place, or from one foreign port to another, or from a foreign port to a home port. But where he is ordered to proceed from one place in the United States to another, and the government for its own purpose requires him to proceed by sea rather than by land, he ought not thereby to be disentitled to his mileage by the nearest traveled route. U. S. v. Hutchins, (1894) 151 U. S. 542, 14 S. Ct. 421, 38 U. S. (L. ed.) 264.

Where the point of departure and the point of destination are both within this country a naval officer is entitled to mileage though a portion of the route is on the high seas or through a foreign country. Where the route prescribed by su-
An officer ordered to a new station while at home on leave of absence, and ordered home again before his leave of absence has expired, is traveling "under orders." Fitzpatrick v. U. S., (1902) 37 Ct. Cl. 332.

Duties in two places.—An order of the Secretary of the Navy which does not relieve an officer from duty at a navy yard, but imposes upon him additional duties at another place and requires his personal attention at both places, entitles him to mileage for travel between the two places and invests him with discretion to determine when his presence is necessary at either place. Steele v. U. S., (1894) 30 Ct. Cl. 7.

Public business.—When a sick officer, while convalescent, is sent home for the purpose of allowing him to regain his health, it is sending him on public business within the meaning of the law. McCauley v. U. S., (1915) 50 Ct. Cl. 105.

The rule is well settled that the terms of an order given for any purpose cannot determine the character of the travel or the service performed, but that question must be determined from the particular facts in each case. McCauley v. U. S., (1915) 60 Ct. Cl. 105.

Thus if public business was an element in the circuitry of the route of an officer, he should recover mileage therefor; if it was not, the government should not be answerable for the needless distance. Du Bose v. U. S., (1884) 19 Ct. Cl. 514.

Permitted return home.—When the commander of a squadron on the high seas decides that there are no habitable quarters for certain warrant officers on their ship, and that he has no alternative save that of detaching them, "with permission" to return home, he not feeling at liberty "to order" them home because their quarters have been assigned by the department, the cause of travel was public business. Barker v. U. S., (1884) 19 Ct. Cl. 288.

Computation of mileage.—Mileage should not be computed by tracing a direct route upon a chart, but by ascertaining the distance of the shortest route of ordinary travel. Du Bose v. U. S., (1884) 19 Ct. Cl. 514.

When only the terminus of the journey is specified in the orders, leaving to the discretion of the officer the choice of route, his mileage should be calculated by the shortest usually traveled route, regardless of the distance actually traveled, unless some good reason is shown for the deviation. Crosby v. U. S., (1887) 22 Ct. Cl. 131.

Earlier departure to avoid extra travel.—An order requiring an officer to leave for his station before a designated day does not authorize him to travel by a circuitous route if other means offer prior to the appointed day. Crosby v. U. S., (1887) 22 Ct. Cl. 131.
[Charges for transporting discharged enlisted men of Navy.] • • • 
Bureau of Navigation. • • • That the transportation to their homes, if residents of the United States, of enlisted men and apprentices discharged on medical survey; and the transportation to the place of enlistment, if residents of the United States, of enlisted men and apprentices discharged on account of expiration of enlistment, shall hereafter be chargeable to the appropriation "Transportation, recruiting, and contingent." [31 Stat. L. 1030.]

See the note to the preceding paragraph of the text.

[Commutation of quarters.] • • • Commutation of quarters for officers on shore not occupying public quarters, including boatswains, gunners, carpenters, sailmakers, warrant machinists, pharmacists, and mates, who shall hereafter receive the same commutation for quarters as second lieutenants of the Marine Corps. [31 Stat. L. 1107.]

This and the following paragraph of the text are from the Naval Appropriation Act of March 3, 1901, ch. 852.

Commutation.—Commutation is a form of reimbursement, and is not a part of the compensation of an officer. Odell v. U. S., (1903) 38 Ct. Cl. 194.

Commutation allowance for quarters.—Where quarters are assigned to an officer, though less than the number of rooms to which he is entitled by regulations, commutation for quarters cannot be allowed. Irwin v. U. S., (1903) 38 Ct. Cl. 87, affirmed, (1905) 197 U. S. 223, 26 S. Ct. 434, 49 U. S. (L. ed.) 732.

Where there is no expense for quarters there can be no commutation for quarters. Odell v. U. S., (1903) 38 Ct. Cl. 194.

["Shore duty beyond seas," defined.] That officers of the Navy, and officers and enlisted men of the Marine Corps, who have been detailed, or may hereafter be detailed, for shore duty in Alaska, the Philippine Islands, Guam, or elsewhere beyond the continental limits of the United States, shall be considered as having been detailed for "shore duty beyond seas," and shall receive pay accordingly, with such additional pay as may be provided by law for service in island possessions of the United States. [31 Stat. L. 1108.]

See the note to the preceding paragraph of the text.

The provisions of law to which this paragraph referred were contained in the Act of March 3, 1899, ch. 413, § 13, supra, p. 1195, which allowed to naval officers detailed for shore duty beyond seas the same pay and allowances as provided for officers of the army detailed for duty in similar places. This was superseded by the Act of May 13, 1908, ch. 166, infra, p. 1203.

Construction.—This Act relates back to the original statute giving an increase of pay to officers and men serving beyond seas. The word "considered" refers not to payment, but to any or a final adjustment of an officer's account. Irwin v. U. S., (1903) 38 Ct. Cl. 87, affirmed (1905) 197 U. S. 223, 26 S. Ct. 434, 49 U. S. (L. ed.) 732.

"Beyond seas."—The decisions relating to the term reviewed in Irwin v. U. S., (1903) 38 Ct. Cl. 87.

Shore duty beyond the seas.—The primary question in the case of a naval officer "detailed for special duty on shore" is one of fact; and the court cannot determine the character of the duty on shore or the right of the officer to sea pay or shore duty pay without knowing what were the services rendered on shore and how far they detached him in fact from his vessel. It is well settled that where the naval officer detailed for shore duty is not called upon to perform services ashore incompatible with the performance of his duty on his ship, and the
shore services are temporary and not so different in character as to detach him in fact from his vessel, his paramount duty is sea service. Leach v. U. S., (1909) 44 Ct. Cl. 132.

In Furlong v. U. S., (1910) 46 Ct. Cl. 485, it was held that where an officer in the navy was assigned by proper authority to sea duty on a vessel he could not be considered as "detailed for shore duty beyond seas," within the intent of this section, because the naval governor of Guam by a verbal order directed him to do duty in the town of Agana in caring for the health and sanitary condition of the natives.

Where an officer of the navy was detailed to sea duty, which necessitated a journey by sea on a merchant vessel to reach the place appointed for such duty, he is not an officer "detailed for shore duty beyond the seas" within the meaning of this section. McGowan v. U. S., (1914) 49 Ct. Cl. 454.

Island possession.—The term "beyond seas" includes those who have been assigned to shore duty in the Philippine Islands. Irwin v. U. S., (1903) 38 Ct. Cl. 87, affirmed (1905) 197 U. S. 223, 25 S. Ct. 434, 49 U. S. (L. ed.) 732.

Time in hospital.—An officer on duty beyond seas is not entitled to the extra allowance to officers of the navy detached for shore duty beyond seas while in hospital and not rendering service. Farnsworth v. U. S., (1907) 42 Ct. Cl. 114, affirmed (1907) 206 U. S. 226, 27 S. Ct. 629, 51 U. S. (L. ed.) 1096.

Time of service.—The time of service beyond seas is to be counted from the date of departure to the date of return. McCully v. U. S., (1907) 42 Ct. Cl. 275.

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[Civilian employees — compensation.] • • • The Secretary of the Navy, in his discretion, is authorized to pay all civilian employees appointed for duty in the Philippine, Hawaiian, and Samoan islands, the island of Guam, and the island of Porto Rico, from the date of their sailing from the United States until they report for duty to the officer under whom they are to serve, and while returning to the United States by the most direct route and with due expedition, a per diem compensation corresponding to their pay while actually employed; and in cases where the appointee is not to fill an existing vacancy his pay while traveling may be charged to the annual appropriation of the bureau concerned. [32 Stat. L. 663.]

This and the two paragraphs of the text following are from the Naval Appropriation Act of July 1, 1902, ch. 1388.

[Actual expenses of travel.] • • • That hereafter in cases where orders are given to officers of the Navy or Marine Corps for travel to be performed repeatedly between two or more places in such vicinity as in the discretion of the Secretary of the Navy is appropriate, he may direct that actual and necessary expenses only be allowed. [32 Stat. L. 663.]

See the note to the preceding paragraph of the text.


For other provisions relating to mileage, traveling expenses, etc., see the Act of Aug. 5, 1882, ch. 391, § 1, supra, p. 1192.

Authority of Secretary of Navy.—The Secretary of the Navy is invested with discretion to determine what places are "in the same vicinity", but the Secretary can exercise this discretion only where the travel must be performed "repeatedly between two or more places."

Where the travel between two places was not repeated the officer is entitled to mileage. Willits v. U. S., (1903) 38 Ct. Cl. 534.

[Commutted funds, enlisted men.] • • • That money accruing from the rations of enlisted men commuted for the benefit of any mess may be...
paid on public bills to the commissary officer by the pay officer having their accounts. [32 Stat. L. 680.]

See the note to the second preceding paragraph of the text.

Application.—This provision does not extend to an officers' mess on shore. So where enlisted men on shipboard were detailed to serve an officers' mess on shore and were subsisted by the mess and their rations were commuted and paid to the mess the accounting officers could disallow the payment and compel the officers to refund the money. Williams v. U. S., (1809) 44 Ct. Cl. 173.

[Assistant civil engineers — pay.] • • • That assistant civil engineers, during the first five years after date of appointment, shall receive, per annum, when on duty, one thousand five hundred dollars, when on leave or waiting orders, one thousand dollars; during the second five years after such date, when on duty, one thousand eight hundred dollars, when on leave or waiting orders, one thousand two hundred dollars; and after ten years from such date, when on duty, two thousand one hundred dollars, and when on leave or waiting orders, one thousand four hundred dollars. [32 Stat. L. 1197.]

This is from the Naval Appropriation Act of March 3, 1903, ch. 1010.

[Mileage books, commutation tickets, etc.] • • • And the Secretary of the Navy is hereby authorized to continue to purchase such mileage books, commutation tickets, and other similar transportation tickets as may in his discretion seem necessary, and to furnish same to officers and others ordered to perform travel on official business; and payment for such transportation tickets upon their receipt, in accordance with commercial usage, or prior to the actual performance of the travel involved, shall not be regarded as an advance of public money within the meaning of section thirty-six hundred and forty-eight of the Revised Statutes. [33 Stat. L. 403.]

This is from the Deficiencies Appropriation Act of April 27, 1904, ch. 1630. For R. S. sec. 3648, mentioned in the text, see PUBLIC MONETS.

For other provisions relating to mileage, traveling expenses, etc., see the Act of Aug. 5, 1892, ch. 591, § 1, supra, p. 1192, and the Acts cited in the note thereto.

[Pay, etc., of chaplains — rank — restriction.] That all chaplains now in the Navy above the grade of lieutenant shall receive the pay and allowances of lieutenant-commander in the Navy according to length of service under the provisions of law for that rank, and all chaplains now in the Navy in the grade of lieutenant shall receive their present sea pay when on shore duty. [34 Stat. L. 854.]

This and the following two paragraphs of the text are from the Naval Appropriation Act of June 29, 1906, ch. 3590.

This provision superseded so much of R. S. sec. 1556, noted supra, p. 1174, as related to the pay of chaplains.

The pay and allowances of chaplains were restricted by the eighth paragraph of the Act of May 13, 1908, ch. 166, infra, p. 1209.

Further provisions relating to chaplains were made by the Act of June 30, 1914, ch. 130, supra, p. 1106.
[Travel allowance to enlisted men.] * * * That hereafter enlisted men, discharged on account of expiration of enlistment, shall receive in lieu of transportation and subsistence, travel allowance of four cents per mile from the place of discharge to the place of enlistment, for travel in the United States. [34 Stat. L. 555.]

See the note to the preceding paragraph of the text.

[Allowances to civil engineers and professors of mathematics.] That from and after the passage of this Act the allowances of civil engineers and professors of mathematics in the Navy shall be the same as are or may be provided by or in pursuance of law for naval constructors, and the allowances of assistant civil engineers the same as for assistant naval constructors. [34 Stat. L. 555.]

See the note to the second preceding paragraph of the text.

Status of civil engineer.—The Acts of July 15, 1870, 16 Stat. L. 321. § 3, and of March 3, 1871, 16 Stat. L. 526, do not seem to have been passed with the intention of changing the law; that is to say, of altering the legal status of civil engineers in the navy, but rather to define and make certain their position in the navy. In other words, the purpose of the statutes was not to transfer them from the civil service to the naval service, but to elevate and dignify the position in the naval service. These statutory provisions amount to the legislative recognition of civil engineers as officials who were and always had been in the navy. Brown v. U. S., (1897) 32 Ct. Cl. 379.

[Officers on active list — pay.] * * * Hereafter all commissioned officers of the active list of the Navy shall receive the same pay and allowances according to rank and length of service, and the annual pay of each grade shall be as follows: For Admiral, thirteen thousand five hundred dollars; rear-admiral, first nine, eight thousand dollars; rear-admiral, second nine, or commodore, six thousand dollars; captain, four thousand dollars; commander, three thousand five hundred dollars; lieutenant-commander, three thousand dollars; lieutenant, two thousand four hundred dollars; lieutenant, junior grade two thousand dollars; ensign one thousand seven hundred dollars. [35 Stat. L. 127.]

This and the following twelve paragraphs of the text are from the Naval Appropriation Act of May 13, 1908, ch. 166.

This paragraph superseded a part of R. S. sec. 1556, supra, p. 1172, and also parts of the Act of March 3, 1899, ch. 421, supra, p. 1196, and the Act of March 3, 1899, ch. 413, § 7, supra, p. 1094, and § 13, supra, p. 1195.

The grades of admiral and vice-admiral were re-established and their compensation fixed by the Act of March 3, 1916, ch. 83, supra, p. 1106.


This section deals comprehensively with the question of pay and allowances for officers in the navy and repeals the former statute, R. S. sec. 1556, supra, div. X, p. 1171. Jones v. U. S., (1915) 50 Ct. Cl. 344.

Construction.—This Act places all commissioned officers of the navy upon the same footing as to pay and allowances according to rank and length of service, whether on active duty or not, and gives to officers of the construction corps, professors of mathematics, and civil engineers, the same benefits of the law relating to the pay of army officers when on leave of absence or on waiting orders that are conferred upon officers of the line of the navy and of the medical and pay corps. (1909) 27 Op. Atty.-Gen. 261.

The pay of an officer when on leave
is just as much his pay as is his pay when on active duty, and a statute which provides that officers of the same rank and length of service shall receive the same pay necessarily means the same pay whether on leave or active duty. (1900) 27 Op. Atty.-Gen. 261.

Aid to admiral.—Congress in this Act in terms specifically provided for the pay of every officer in the navy, including the admiral and embracing extra compensation to aids to rear-admirals, but made no provision whatever for compensation for services which might be rendered by an officer acting as aid to the admiral. The incongruity, if any, which it is suggested must result from providing for extra compensation for an aid to a rear-admiral and none for aids to the higher officer, the admiral, if admitted, would be but the consequence of legislative omission, and would not justify the extinction of official power for the purpose of re-creating a provision of law, concerning aids to the general of the army which has long since ceased to exist, in order to afford a subject upon which the assimilating provision of the Naval Personnel Act of 1896 might operate. Wood v. U. S., (1912) 224 U. S. 132, 32 S. Ct. 461, 56 U. S. (L. ed.) 696.

Pay under prior Acts—Act of March 3, 1899, ch. 413—Rank and pay of rear-admirals.—Section 13 of the Act of March 3, 1899, is in general terms, and the language used does not indicate that it was the intention of Congress to abrogate the special provision made in section 7 of the Act, supra, div. IV, p. 1094, for the rear-admirals "embraced in the nine lower numbers of that grade;" and special provision having been made for them, it cannot be held that a subsequent general statute, much less in the same Act, was intended to alter or repeal the special provision so made. Rodgers v. U. S., (1901) 36 Ct. Cl. 266, affirmed (1902) 185 U. S. 83, 22 S. Ct. 582, 46 U. S. (L. ed.) 816.

Section 13 makes no distinction in the rank of rear-admirals, but does of pay; and the provision of section 11 of the Act, supra, div. VI, p. 1127, which authorizes the retirement of certain officers with the rank and retired pay "of the next higher grade" must be interpreted with reference to that distinction. Lowe v. U. S., (1903) 35 Ct. Cl. 170.

Under Act of June 7, 1900, ch. 895—The purpose of the Act of 1900 (noted supra, p. 1196) was to secure to officers who were in the navy when the Act of 1899 was passed, then and thereafter, so long as they should be in the navy, as high pay as they would have received if navy pay had not been assimilated to army pay. Richardson v. U. S., (1903) 38 Ct. Cl. 182; Terry v. U. S., (1904) 39 Ct. Cl. 353. See also Littell v. U. S., (1900) 36 Ct. Cl. 22; Colhoun v. U. S., (1903) 38 Ct. Cl. 198.

The amending Act of 1900 was clearly intended to apply only to commissioned officers in the navy when the Act of 1899 was passed and to the pay they might receive thereafter in case of promotion. Taylor v. U. S., (1903) 38 Ct. Cl. 155.

The pay of officers in the service at the time of the passage of the Navy Personnel Act and the amendatory Act of 1900 might be increased by the terms of those statutes but was not to be diminished. Cromwell v. U. S., (1907) 42 Ct. Cl. 432.

Fleet officers.—The Act of June 7, 1906, 31 Stat. L. 697, which provides that the Navy Personnel Act shall not operate so as to reduce the pay of officers, extends to pay which officers may subsequently become entitled to receive and to the pay of the chief engineer as prescribed by R. S. sec. 1556. Denig v. U. S., (1902) 37 Ct. Cl. 303, judgment also Littell v. U. S., (1900) 36 Ct. Cl. 22.

Under R. S. sec. 1556.—The following decisions respecting the pay of particular officers were rendered under R. S. sec. 1556, supra, p. 1171, superseded by the Act of May 13, 1906, ch. 196.

Rear-admiral.—A rear-admiral appointed to the office of chief of the bureau of yards and docks, under the Act of July 5, 1902, is not bound to accept the salary provided by that Act, but may demand the pay allowed to a rear-admiral performing shore duty. (1862) 10 Op. Atty.-Gen. 377.

Captain.—The theory of "leave or waiting orders pay" is that the officer, while at home on leave or waiting orders, is at less expense than when at sea or on shore service, and an order of the Navy Department will not be construed to place the officer at a foreign port on waiting orders pay where there is evidently no intention to punish nor to keep him there indefinitely. Selfridge v. U. S., (1903) 28 Ct. Cl. 440.

Lieutenant-commanders.—The sea pay given in this section may be earned by service performed under the orders of the Navy Department in a vessel employed with authority of law in active service in bays, inlets, roadsteads, or other arms of the sea, under the general restrictions, regulations, and requirements that are incident or peculiar to service on the high seas. U. S. v. Symonds, (1887) 120 U. S. 46, 7 S. Ct. 411, 30 U. S. (L. ed.) 557.

Service on vessel at anchor.—The claimant, while commanding officer of the United States naval station at Puget Sound, was directed to assume command of the U. S. Nipsic, then at anchor in the bay, in addition to the duties then being performed by him as commander of the station. His quarters were continuously on board the vessel, and he was not at the station. (1905) 36 Ct. Cl. 35.
and steam engineering, and these men had regular duties during the day and a watch was kept at night; the Claimant bill was posted and the men regularly exercised at fire drill; steam was kept up for heating and pumping, and a large steam launch was attached to the ship for use in visiting the station and for other purposes. To this extent the Claimant was entitled to sea pay. "The same person performing sea service and shore duty during the same period of time cannot claim both shore pay and sea service for such time; but where it is shown that the officer charged with these dual duties lived upon the sea in command of a vessel employed by authority of law, there is a greater reason to regard the shore duty the incident of the sea service than to say that the shore duty is paramount to the other." Wyckoff v. U. S., (1899) 54 Ct. Cl. 288.


**Service on receiving ship.**—A lieutenant-commander in the United States navy, by the order of the Secretary of the Navy was directed to report for duty as executive officer on board the United States receiving ship Wamash, at Boston, Mass. The order designated his employment as "shore duty." The duties of executive officer of the vessel performed by the appointee were similar to those of executive officers on cruising ships. During the time he was attached to the vessel he was required to have his quarters on board and was obliged to wear his uniform, to mess there, and was not permitted by the rules of the service to live with his family. The vessel, during the time of the officer's service thereon, was not in what is technically known as a commission for sea service. It was held that the officer was entitled by law to pay for sea service. U. S. v. Strong, (1889) 126 U. S. 656, 8 S. Ct. 1021, 31 U. S. (L. ed.) 823.

Officers of the navy may perform duty on a receiving ship, which will entitle them to sea pay, but only where they wear their uniform when on duty, live and mess on board the vessel, and are subject to all the restrictions and regulations applicable to vessels at sea. But an officer also having shore duty, living and messing on shore in quarters furnished to him by the government, and presumably receiving the allowances to which army officers are entitled, is entitled only to the shore duty pay prescribed by this section. Mahan v. U. S., (1904) 40 Ct. Cl. 36.

**Temporary command of vessel on coast survey.**—A naval officer assigned to shore duty as hydrographic inspector of the coast survey was ordered by the superintendent to assume temporary command of the vessel in his absence; his bill was continued and was of the higher character of the two. His duty as temporary commanding officer did not require his continued presence on board, and it does not appear that he lived on board, or was subject to the U. S. requirements or regulations of sea service. It was held that he was only entitled to shore-duty pay. Tausig v. U. S., (1903) 38 Ct. Cl. 104.

An officer attached to a vessel at sea and not detached from it by competent authority is entitled to see pay while temporarily in a naval hospital because of wounds incurred in the line of duty. Collins v. U. S., (1902) 37 Ct. Cl. 222.


**Service on school ship.**—The St. Mary's was a sailing vessel owned and employed by the United States, and had been furnished for educational purposes by the Secretary of the Navy upon the application of the governor of the state of New York, under an Act of Congress. The nautical school upon this vessel was established by the board of education of the city of New York under a state statute. A lieutenant in the navy of the United States, performing the duties of executive officer of such a vessel under the orders of the department of the navy, was held to be entitled, during the whole period of his service, whether the vessel was attached to a wharf or was sailing on a cruise, to the rate of pay which the statute allowed to him "when at sea," notwithstanding that during the same period he also received pay from the state of New York for the performance of the distinct but quite consistent duties of instructor in its nautical school upon this vessel, the performance of which by naval officers was manifestly contemplated and intended by the Act of Congress and by the orders of the secretary of the Navy. U. S. v. Barnette, (1897) 165 U. S. 174, 17 S. Ct. 286, 41 U. S. (L. ed.) 675.

A naval vessel always afloat on tide water, frequently ordered to sea, and at all times ready to obey such orders, the officers and crew messing and sleeping on board, and maintaining regulations and discipline of a man-of-war at sea, is in sea service within the intent of this section. McRitchie v. U. S., (1887) 23 Ct. Cl. 23.

**Masters.**—The words "date of commission" mean the date when the instrument was executed. Young v. U. S., (1884) 19 Ct. Cl. 145.

**Surgeons, paymasters and chief engineers.**—"When at sea" and "on shore
duty."—A paymaster in the navy was ordered to City Point "for duty on board the Ajax and the other monitors off that place. This employment on shore duty is required by public interests." It did not appear what were the officer's duties, nor whether he remained on board subject to the restrictions and condition of an officer at sea; the vessels were not in any designated service; they were lying at port held in reserve for sea service and reduced in complement. It was held that he was not entitled to sea pay. The terms "when at sea" and "on shore duty," as found in this section, were intended to classify duty with reference to services, not mere condition or location, and although "at sea" may pertain to such an officer so far as the ship is concerned, if he is lacking in the further qualification of being "subjected to such restrictions, regulations, and requirements as are incident to service at sea" he is deficient in one element which is required to entitle him to sea pay. Corwine v. U. S., (1889) 24 Ct. Cl. 104.

In charge of accounts of vessels temporarily at anchor.—A naval paymaster on shore duty at a navy yard is not entitled to pay for sea duty, though required by the Secretary of the Navy, in addition to his regular duties, to take charge of the accounts of certain ironclads temporarily at anchor off the yard and in commission for sea service. Carpenter v. U. S., (1878) 15 Ct. Cl. 247.

Burden of proof as to sea service or shore duty.—The burden of proof rests on the claimant to disclose by his evidence the character of the service rendered; this is especially true where the officer directing him to the designated service classifies the duty as "shore duty." Corwine v. U. S., (1889) 24 Ct. Cl. 104.

A paymaster at sea, but suspended from duty pending an investigation of his accounts, is not rendering sea service, and is entitled only to waiting-orders pay. While in attendance before a court-martial he is entitled to shore-duty pay. After the court-martial, and awaiting a review of the proceedings of the court by the President, he is entitled to waiting-orders pay. Sullivan v. U. S., (1897) 32 Ct. Cl. 402.

The place of passed assistant surgeon is an officer, and a notification by the Secretary of the Navy is a valid appointment to it. U. S. v. Moore, (1878) 95 U. S. 760. 24 U. S. (L. ed.) 538. See also Collins v. U. S., (1878) 14 Ct. Cl. 368.

The phrase "after date of appointment" and "from such date" refer not to the date of his original appointment when he entered the service as assistant surgeon, but to the time of the notification by the Secretary of the Navy that the appointee would thereafter be regarded as a passed assistant surgeon. U. S. v. Moore, (1878) 95 U. S. 760, 24 U. S. (L. ed.) 538.

Cadet engineers—Graduation before Act of Aug. 5, 1882.—Cadet engineers who had finished their four years' course at the Naval Academy, passed their final academic examination, and received their diplomas before the passage of the Act of Aug. 5, 1882, 22 Stat. L. 285, became "graduates" and were not made naval cadets by that Act. They are therefore entitled to the pay provided by that section. Leopold v. U. S., (1889) 15 Ct. Cl. 546.

[Longevity pay.] * * * There shall be allowed and paid to each commissioned officer below the rank of rear-admiral ten per centum of his current yearly pay for each term of five years' service in the Army, Navy and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law: Provided, That the annual pay of captain shall not exceed five thousand dollars per annum; of commander four thousand five hundred dollars per annum; and of lieutenant-commander, four thousand dollars per annum. [35 Stat. L. 128.]

See the note to the preceding paragraph of the text.

Earlier provisions relating to longevity pay were made by the Act of March 3, 1883, ch. 97, § 1, and the Act of June 10, 1896, ch. 399, § 1, given under subdivision V of this title, supra, pp. 1113, 1117.

Longevity pay.—In Plummer v. U. S., (1912) 224 U. S. 137, 32 S. Ct. 467, 56 U. S. (L. ed.) 697, a controversy arose as to the sum of the longevity pay of certain commissioned officers, due to a part of the above section, reading as follows: "There shall be allowed and paid each commissioned officer below the rank of rear admiral ten per centum of his current yearly pay for each term of five years' service in the Army, Navy, and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law." The court said: "It is insisted that as the words 'current yearly pay,' as employed in Rev. Stat., sec. 1262, were construed in U. S. v. Tyler, (1881) 105 U. S. 244, (28 U. S. (L. ed.) 980), to require that
the calculation of the longevity pay should be made, not upon the sum of the base pay, but on the base pay and previous increases thereof. The pay must be applied to the words as used in the provision of the statute above quoted. But subsequent to the Tyler case, by the Act of June 30, 1883, 22 Stat. 118, c. 254, Congress expressly directed that the ten per cent which was provided for in sec. 1262, Rev. Stat., should be 'computed on the yearly pay of the grade.' That this Act was passed for the express purpose of commanding a method of computation which would render inapplicable the construction adopted in the Tyler case is not open to controversy. U. S. v. Miller, (1908) 208 U. S. 32, 38, 28 S. Ct. 199, 52 U. S. (L. ed.) 376. Indeed, that from the date of the Act of 1882 down to the present time the longevity pay of Army officers has been computed by the method directed by the Act of 1882 is not controverted. In view of the purpose of Congress to equalize as far as possible the pay of Army and Navy officers, manifested by the adoption of the Navy Personnel Act of 1899 and in all subsequent legislation as to such pay, we think it plainly results that the provisions relied upon must be held to have been adopted with reference to the settled rule prevailing for so many years, a rule consequent upon the Act of 1882. In other words, we think it may not be doubted that the intention of Congress in the provision relied upon was that the longevity pay therein prescribed should be computed according to the method then prevailing, and which had resulted from the enactment of the statute of 1882."

The basis of longevity pay is the officer's capacity for duty and his performance of it. Longevity pay is for longevity in actual service and offence only to officers on the active list. Faust v. U. S., (1907) 42 Ct. Cl. 94.

Longevity pay is founded upon the equivalent of increased judgment and capacity acquired by the experience of continued service. Young v. U. S., (1884) 19 Ct. Cl. 145.

Longevity pay is to be computed, except where the statute otherwise provides, from the day the officer's commission was signed by the President, and not from an antecedent date mentioned in the body of the commission. Young v. U. S., (1884) 19 Ct. Cl. 145.

An officer in the marine corps who served as a paymaster's steward is entitled to have the time of such service credited to him in the computation of his longevity pay. Muse v. U. S., (1884) 19 Ct. Cl. 441.

Under prior Acts.—The Act of March 3, 1883, ch. 97, U. S. v. Mullan, (1887) 122 U. S. 166, 9 S. Ct. 79, 31 U. S. (L. ed.) 140 (holding that it was not necessary that the officer should have entered the service more than once); U. S. v. Hendee, (1888) 124 U. S. 305, 8 S. Ct. 507, 31 U. S. (L. ed.) 486 (holding that a paymaster's check was within the statute); U. S. v. Baker, (1888) 125 U. S. 646, 8 S. Ct. 1022, 31 U. S. (L. ed.) 824; U. S. v. Cook, (1888) 128 U. S. 254, 9 S. Ct. 108, 32 U. S. (L. ed.) 464 (holding that service as a midshipman, at the Naval Academy, was service as an officer in the navy); U. S. v. Foster, (1888) 128 U. S. 435, 9 S. Ct. 116, 32 U. S. (L. ed.) 486 (holding that an officer was not entitled to credit in the grade held by him prior to the passage of the Act, for the time he served in the army or navy before reaching the grade; that Congress only intended to give him credit in the grade held by him after the Act took effect, for all prior services, whether as an enlisted man or officer, counting such services, however separated by distinct periods of time, as if they had been continuous and in the regular navy in the lowest grade having graduated pay held by him since last entering the service); U. S. v. Greene, (1890) 135 U. S. 283, 11 S. Ct. 299, 34 U. S. (L. ed.) 660 (holding that the Act referred to the lowest grade having graduated pay held by the officer after the Act providing for graduated pay took effect); Hawkins v. U. S., (1894) 19 Ct. Cl. 611 (wherein the longevity pay for a bosun's mate in the navy founded upon volunteer service was examined and stated); Jordan v. U. S., (1894) 19 Ct. Cl. 621 (setting forth the method of computing the longevity pay of an assistant paymaster in the navy); Dunn v. U. S., (1888) 21 Ct. Cl. 627, affirmed (1889) 129 U. S. 249, 7 S. Ct. 507, 30 U. S. (L. ed.) 667 (holding that service rendered by the marine corps through the army or navy was service rendered in the army or navy within the intent of the Act of 1883); Rockwell v. U. S., (1896) 21 Ct. Cl. 329, affirmed (1897) 120 U. S. 60 (holding that under the Act of 1883, a naval officer who served in the volunteer navy was entitled to credit for such service in the lowest grade in the regular navy having graduated pay at the time he held it); Barton v. U. S., (1889) 23 Ct. Cl. 376, affirmed (1890) 129 U. S. 249, 9 S. Ct. 285, 32 U. S. (L. ed.) 663 (holding that the effect of the Act of 1883 was to credit an officer with the actual time he previously served in the lowest grade having graduated pay, when held by him).

[Increase of pay for foreign service.] • • • All officers on sea duty and all officers on shore duty beyond the continental limits of the United States shall while so serving receive ten per centum additional of their
salaries and increase as above provided, and such increase shall commence from the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters. [35 Stat. L. 128.]

See the note to the second preceding paragraph of the text.

This paragraph superseded a proviso relating to the same subject contained in the Act of March 3, 1899, ch. 413, § 13, supra, p. 1105.

Commutation of quarters.—When an officer serving "beyond the continental limits of the United States" has all his actual and necessary expenses paid by the United States while so serving he is not entitled to commutation of quarters, heat, and light during the period of said service. Downey v. U. S., (1915) 50 Ct. Cl. 273.

Service in Alaska.—Service in Alaska is "shore duty beyond the continental limits of the United States," and an officer performing service there is entitled to the increased pay provided for such service. Downey v. U. S., (1915) 50 Ct. Cl. 273.

[Midshipmen — pay.] * * * The pay of midshipmen shall hereafter be six hundred dollars per annum while at the Naval Academy, and one thousand four hundred dollars per annum after graduation from the Naval Academy. [35 Stat. L. 128.]

See the note to the first paragraph of this Act, supra, p. 1203.


[Warrant officers and mates — pay.] * * * The pay of all warrant officers and mates is hereby increased twenty-five per centum. [35 Stat. L. 128.]

See the note to the first paragraph of this Act, supra, p. 1203.

The pay of warrant officers and mates increased by this paragraph was fixed by R. S. sec. 1556, supra, p. 1171.

See the notes to the paragraphs dealing with this subject.

Warrant officers — Service on receiving ship.—Assignment to duty on a vessel used for purposes of a receiving ship, either by the department or the superintendent, entitles the officer to pay according to his grade as if he were performing duty at sea. This decision was under section 13 of the Act of March 3, 1899. Pierce v. U. S., (1898) 33 Ct. Cl. 294.

[Enlisted men — increase of pay.] * * * The pay of all active and retired enlisted men of the Navy is hereby increased ten per centum. [35 Stat. L. 128.]

See the note to the first paragraph of this Act, supra, p. 1203.

By R. S. sec. 1569, supra, p. 1179, the pay of enlisted men was to be fixed by the President, but by a further provision of this Act given in the fifth paragraph of the text following, the pay provided for in this Act is to remain in force until changed by Congress.

[Chiefs of bureaus — pay.] * * * That the pay and allowances of chiefs of bureaus in the Navy Department shall be the highest pay of the grade to which they belong, and not below that of rear-admiral of the lower nine. [35 Stat. L. 128.]

See the note to the first paragraph of this Act, supra, p. 1203.

The Act of June 24, 1910, ch. 378, 36 Stat. L. 607, provided as follows:

"The pay and allowances of chiefs of bureaus of the navy department shall be the highest shore-duty pay and allowances of the rear-admiral of the lower nine; and all
officers of the navy who are now serving or shall hereafter serve as chief of bureau in the navy department and are eligible for retirement after thirty years' service, shall have, while on the active list, the rank, title and emoluments of a chief of bureau. in the same manner as is already provided by statute law for such officers upon retirement by reason of age or length of service, and such officers after thirty years' service, shall be entitled to and shall receive new commissions in accordance with the rank and title hereby conferred."

This provision was repealed by the Act of Aug. 22, 1912, ch. 335, 37 Stat. L. 329, with the proviso "That no officer who has received his commission under the provisions of said Act shall be deprived of said commission or the rank, title, and emoluments thereof by virtue of this repeal."

Act of June 24, 1910, ch. 378.— Congress did not intend by this Act to increase the number of officers in the navy. The sole purpose of the Act was to make permanent the rank, title and emoluments of an officer serving as chief of bureau who had become eligible for retirement by reason of age or length of service, but who preferred to remain upon the active list. (1910) 28 Op. Atty.-Gen. 526.

A naval officer who served as bureau chief in the Navy Department and was eligible to retirement after thirty years' service in the navy or Navy Department, was entitled to the rank, pay and emoluments of a bureau chief under the Act of June 24, 1910, during the time he remained on the active list, whether as bureau chief or otherwise. (1910) 28 Op. Atty.-Gen. 429.

A naval officer who had served as chief of bureau in the navy and returned to general duty before the expiration of thirty years' service, was not entitled, upon becoming eligible for retirement, to the same rank and emoluments to which he would have been entitled under the provisions of the Act of June 24, 1910, if he had become eligible for retirement while still acting as chief of bureau. (1910) 28 Op. Atty.-Gen. 531.


Paymasters' clerks were held to be "officers of the navy" within the meaning of the Act of June 24, 1910, which provided for the retirement of officers of the navy who had been in the service thirty years. (1909) 27 Op. Atty.-Gen. 157.

[Chaplains—pay.] • • • The pay and allowances of chaplains in the Navy shall in no case exceed that provided for lieutenant-commanders. [35 Stat. L. 128.]

See the note to the first paragraph of this Act, supra, p. 1203.

Provisions relating to the pay and allowance of chaplains were made by the Act of June 29, 1906, ch. 3590, supra, p. 1202, and by the Act referred to in the notes thereto.

[Aids to rear-admirals—pay.] • • • Aids to rear-admirals embraced in the nine lower numbers of that grade shall each receive one hundred and fifty dollars additional per annum, and aids to all other rear-admirals, two hundred dollars additional per annum each. [35 Stat. L. 128.]

See the note to the first paragraph of this Act, supra, p. 1203.

Rank of aids.—The navy regulations may designate the rank "of aids" when the statute has made appropriations for their pay. Jones v. U. S., (1913) 49 Ct. Cl. 16.

The provision of the Act of May 13, 1906, considered in connection with the provision of the navy regulations relating to the rank "of aids" is unambiguous and entitles a naval officer serving at sea as aid to a rear-admiral of the senior nine to the additional compensation provided by the said Act. Jones v. U. S., (1913) 49 Ct. Cl. 16; Holmes v. U. S., (1913) 49 Ct. Cl. 70.

Lieutenant as aid.—Where a lieutenant of the navy serves as aid to a rear-admiral on duty as commandant at a navy yard, such aid is entitled to the additional pay provided for by this Act. Fruchtl v. U. S., (1914) 49 Ct. Cl. 570.

Flag lieutenant.—Under section 13 of the Navy Personnel Act of March 3, 1899, supra, p. 1105, it was held that a naval officer assigned to duty on the personal staff of the commander-in-chief as flag lieutenant, and by no other designation, was an aid and entitled to the additional pay of $200 given to the aid of a major-general in the army. Miller v. U. S.,
Mounted pay.—Under section 13 of the
Navy Personnel Act of March 3, 1899, supra, p. 1195, mounted pay could not be
given to an aid to a rear-admiral. U. S. v. Creasy, (1905) 196 U. S. 327, 25 S.
Pt. 281, 49 U. S. (L. ed.) 497, modifying and affirming (1903) 38 Cl. Ct. 82.

[Basis of pay of retired commissioned, etc., officers.] • • • The pay of
all commissioned, warrant and appointed officers and enlisted men of the
Navy now on the retired list shall be based upon the pay, as herein provided
for, of commissioned, warrant and appointed officers and enlisted men of
corresponding rank and service on the active lists. [35 Stat. L. 128.]

See the note to the first paragraph of this Act, supra, p. 1203.

[Pay provided by Act to remain in force—effect on prior pay.] • • • All pay herein provided shall remain in force until changed by
Act of Congress. Nothing herein shall be construed so as to reduce the pay
or allowances now authorized by law for any commissioned, warrant or
appointed officer or any enlisted man of the active or retired lists of the
Navy, and all laws inconsistent with this provision are hereby repealed. [35
Stat. L. 128.]

See the note to the first paragraph of this Act, supra, p. 1203.

A provision similar to that of the text relating to reduction of pay, etc., was made by
the last proviso of section 13 of the Act of March 3, 1899, ch. 413, infra, p. 1195, and
the Acts cited in the note thereto.

Construction.—This Act provides that
nothing therein shall be construed so as to reduce the pay of naval officers, and
the intent of the statute was to place officers of the army, navy and marine corps

This section of the Act of May 13, 1908, saves to all officers coming within the
provisions of the Act any legislative discriminations theretofore existing and
preserves intact the full pay and allowances fixed by the statutes in force at

[Allowance for death.] • • • That hereafter immediately upon
official notification of the death, from wounds or disease not the result of
his own misconduct, of any officer or enlisted man on the active list of the
Navy and Marine Corps the Paymaster General of the Navy shall cause to
be paid to the widow, and, if no widow, to the children, and, if there be no
children, to any other dependent relative of such officer or enlisted man previously
designated by him, an amount equal to six months' pay at the rate
received by such officer or enlisted man at the date of his death, less seventy-
five dollars in the case of an officer and thirty-five dollars in the case of an
enlisted man, to defray expenses of interment, and the residue, if any, of
the amount reserved shall be paid subsequently to the designated person.
The Secretary of the Navy shall establish regulations requiring each officer
and enlisted man to designate the proper person to whom this amount shall
be paid in case of death, and said amount shall be paid to that person from
funds appropriated for the pay of the Navy and Marine Corps. [35 Stat.
L. 128, as amended by 37 Stat. L. 329.]

See the note to the first paragraph of this Act, supra, p. 1203.

As originally enacted, the provisions of this paragraph down to the words "The
Secretary of the Navy shall establish regulations," were as follows:
"That hereafter immediately upon official notification of the death from wounds or
disease contracted in line of duty of any officer or enlisted man on the active list
of the navy or marine corps the paymaster-general of the navy shall cause to be paid
to the widow of such officer or enlisted man, or any person previously designated by him, an amount equal to six months’ pay at the rate received by such officer or enlisted man at the date of his death, less seventy-five dollars in the case of an officer and thirty-five dollars in the case of an enlisted man, to defray expenses of interment, and the residue, if any, of the amount reserved shall be paid subsequently to the designated person."

Said quoted paragraph was amended to read as given in the text by the Naval Appropriation Act of Aug. 22, 1912, ch. 335, which provided that said paragraph “in so far as it relates to the payment of six months’ pay to the widow of an officer or enlisted man and so forth, be amended to read “as given in the text.”

See further the second paragraph of the Act of March 3, 1916, ch. 83, infra, p. 1213, which affected this paragraph.

[Navy bands not to compete with civilian.] * * * Navy bands or members thereof, other than the United States Naval Academy band at Annapolis, Maryland, shall not receive remuneration for furnishing music outside the limits of military posts, when the furnishing of such music places them in competition with local civilian musicians. [35 Stat. L. 153.]

See the note to the first paragraph of this Act, supra, p. 1203.

Marine bands.—The provisions of this Act which prohibit navy bands or members thereof from receiving remuneration for furnishing music outside the limits of military posts, when the furnishing of such music places them in competition with local musicians, do not apply to the Marine Band. (1908) 27 Op. Atty.-Gen. 90.

[Settlement of amounts due intestate deceased officers and enlisted men.] * * * Hereafter, in the settlement of the accounts of deceased officers or enlisted men of the Navy and Marine Corps, where the amount due the decedent’s estate is less than five hundred dollars and no demand is presented by a duly appointed legal representative of the estate, the accounting officers may allow the amount found due to the decedent’s widow or legal heirs in the following order of precedence: First, to the widow; second, if the decedent left no widow, or widow be dead at time of settlement, then to the children or their issue, per stirpes; third, if no widow or descendants, then to the father and mother in equal parts, provided father has not abandoned the support of his family, in which case to the mother alone; fourth, if either the father or mother be dead, then to the one surviving; fifth, if there be no widow, child, father, or mother at the date of settlement, then to the brothers and sisters and children of deceased brothers and sisters, per stirpes: Provided, That this Act shall not be so construed as to prevent payment from the amount due the decedent’s estate of funeral expenses, provided a claim therefor is presented by the person or persons who actually paid the same before settlement by the accounting officers. [35 Stat. L. 373.]

This is from the Sundry Civil Appropriation Act of May 27, 1908, ch. 200.

[Marine corps — settlement of traveling expense claims.] * * * That hereafter the settlement of all traveling expense claims, where the payment of such is authorized by existing law, and the determination of distances and of what constitutes the shortest usually traveled route in the meaning
of laws relating to traveling allowances, shall accord to such rules as the Secretary of the Navy may prescribe. [35 Stat. L. 774.]

This is from the Naval Appropriation Act of March 3, 1909, ch. 265.
This provision was placed under the heading "Marine Corps," but its terms would seem to indicate that it is not restricted to the marine corps alone.

[Credit for appointment from civil life repealed.] * * * That so much of an Act entitled "An Act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps," approved March third, eighteen hundred and ninety-nine, which reads as follows: " and that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited for computing their pay, with five years' service," shall not apply to any person entering the Navy from and after the passage of this Act. [37 Stat. L. 892.]

This and the following paragraph of the text are from the Naval Appropriation Act of March 4, 1913, ch. 148.
The provision of the Act of March 3, 1899, ch. 413, quoted in the text is contained in section 13 thereof, given supra, p. 1195.

Appointment from civil life.—Where at the time of retirement from the public service it was the intention and purpose of the party leaving the service to re-enter the service, and the same party, as soon as he could do so, thereafter entered the service, such last appointment was not "from civil life" as contemplated by section 13 of the Act of March 3, 1899, ch. 413. Barber v. U. S., (1915) 50 Ct. Cl. 260.

Credit with five years' service retrospective.—The provision of section 13 of the Act of March 3, 1899, that all officers who had been or might be appointed to the navy from civil life should, on the date of appointment, be credited with five years' service was retrospective. The object of the Act was not to readjust the pay of officers within the classes named, or to give them a gratuity for past services, but the credit was solely given for the purpose of "computing their pay," and this was to be read in the light of the purview of the statute wherein its operation was declared to be effective from the beginning of the coming fiscal year. White v. U. S., (1903) 191 U. S. 545, 24 S. Ct. 171, 48 U. S. (L. ed.) 295.
As to the computation of pay on credit of five years' service, see Bóyece v. U. S., (1901) 36 Ct. Cl. 336.

[Officers to receive pay from date of commission.] * * * That all officers of the Navy who, since the third day of March, eighteen hundred and ninety-nine, have been advanced or may hereafter be advanced in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions. [37 Stat. L. 892.]

See the note to the preceding paragraph of the text.
See the earlier provisions of the Act of June 22, 1874, ch. 392, § 1, supra, p. 1191.

[Sec. 1.] [Officers' mileage.] * * * That hereafter no mileage shall be paid to any officer where Government transportation is furnished such officer. [38 Stat. L. 399.]

This and the following paragraph of the text are from the Naval Appropriation Act of June 30, 1914, ch. 130.
For other provisions relating to mileage, traveling expenses, etc., see the Act of Aug. 5, 1892, ch. 391, § 1, supra, p. 1192, and the Acts cited in the notes thereto.
[Issue of flags used at funerals.] * * * That the Secretary of the Navy be authorized at his discretion to issue free of cost the national flag (United States national ensign No. 7) used for draping the coffin of any officer or enlisted man of the Navy or Marine Corps whose death occurs while in the service of the United States Navy or Marine Corps, upon request, to the relatives of the deceased officer or enlisted man or upon request, to a school, patriotic order, or society to which the deceased officer or man belonged. [38 Stat. L. 406.]

See the note to the preceding paragraph of the text.

Funeral expenses of naval officers.—By the Act of July 15, 1870, the allowance of funeral expenses of a naval officer who died in the United States was prohibited; but such expenses were allowable where the officer died in a foreign country, to an amount not exceeding his sea pay for a month. (1870) 18 Op. Atty.-Gen. 341.

[Issuance of clothing outfit — second enlistment men.] * * * That hereafter the Secretary of the Navy is authorized to issue a clothing outfit to all enlisted men serving in their second enlistment who failed to receive an outfit of the value authorized by law on their first enlistment, or who, having received such outfit, were required to refund its value on account of discharge prior to expiration of enlistment: Provided further, That the net cost to the Government of clothing outfits furnished any one enlisted man shall not exceed $60. [38 Stat. L. 932.]

This and the three paragraphs of the text following are from the Naval Appropriation Act of March 3, 1915, ch. 83.

Provisions similar to those of the text without the word hereafter, appeared in the Act of June 30, 1914, ch. 130, 38 Stat. L. 396.

[Gratuity pay — deductions.] * * * That no deduction shall hereafter be made from the six months' gratuity pay allowed under the naval Act of August twenty-second, nineteen hundred and twelve, on account of expenses for preparation and transportation of the remains. [38 Stat. L. 938.]

See the note to the preceding paragraph of the text.

The Act of Aug. 22, 1912, ch. 335, mentioned in the text amended the twelfth paragraph of the Act of May 13, 1908, ch. 106, supra, p. 1210.

[Naval aviators — pay and allowances.] * * * Hereafter officers of the Navy and Marine Corps appointed student naval aviators, while lawfully detailed for duty involving actual flying in air craft, including balloons, dirigibles, and aeroplanes, shall receive the pay and allowances of their rank and service plus thirty-five per centum increase thereof; and those officers who have heretofore qualified, or may hereafter qualify, as naval aviators, under such rules and regulations as have been or may be prescribed by the Secretary of the Navy, shall, while lawfully detailed for duty involving actual flying in air craft, receive the pay and allowances of their rank and service plus fifty per centum increase thereof. Hereafter enlisted men of the Navy or Marine Corps, while detailed for duty involving actual flying in air craft, shall receive the pay, and the permanent additions thereto, including allowances, of their rating and service,
or rank and service, as the case may be, plus fifty per centum increase thereof: Provided, That not more than a yearly average of forty-eight officers and ninety-six enlisted men of the Navy and twelve officers and twenty-four enlisted men of the Marine Corps, detailed for duty involving actual flying in air craft, shall receive any increase in pay while on duty involving actual flying in air craft, nor shall any officer in the Navy senior in rank to commander, nor any officer in the Marine Corps senior in rank to major, receive any increase in pay or allowances by reason of such detail or duty. [38 Stat. L. 939.]

See the note to the second preceding paragraph of the text.
This paragraph superseded the provisions of the Act of March 4, 1913, ch. 148, 37 Stat. L. 892, which were as follows:

"That from and after the passage and approval of this Act the pay and allowances that are now or may be hereafter fixed by law for officers of the navy and marine corps shall be increased thirty-five per centum for such officers as are now or may hereafter be detailed by the Secretary of the Navy on aviation duty: Provided, That this increase of pay and allowances shall be given to such officers only if are actual flyers of heavier-than-air craft, and while so detailed: Provided further, That no more than thirty officers of the navy and marine corps shall be detailed to aviation service: Provided further, That no officer above the rank of lieutenant commander in the navy or major in the marine corps shall be detailed for actual flying; Provided further, That nothing in this provision shall be construed to increase the total number of officers now in the navy or marine corps."

[Injuries to aviators — gratuities and pensions.] In the event of the death of an officer or enlisted man of the Navy or Marine Corps from wounds or disease, the result of an aviation accident, not the result of his own misconduct, received while engaged in actual flying in or in handling air craft, the gratuity to be paid under the provisions of the Act approved August twenty-second, nineteen hundred and twelve, entitled "An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes," shall be an amount equal to one year’s pay at the rate received by such officer or enlisted man at the time of the accident resulting in his death. In all cases where an officer or enlisted man of the Navy or Marine Corps dies, or where an enlisted man of the Navy or Marine Corps is disabled by reason of any injury received or disease contracted in line of duty, the result of an aviation accident, received while employed in actual flying in or in handling air craft, the amount of pension allowed shall be double that authorized to be paid should death or the disability have occurred by reason of an injury received or disease contracted in line of duty, not the result of an aviation accident. [38 Stat. L. 939.]

See the note to the first paragraph of this Act, supra, p. 1213.
The Act of Aug. 22, 1912, ch. 335, mentioned in the text, constituted an amendment to the twelfth paragraph of the Act of May 13, 1908, ch. 166, supra, p. 1210.

XI. THE MARINE CORPS

E. S. sec. 1596. This section was as follows:

"Sec. 1596. The marine corps of the United States shall consist of one commandant, with the rank of brigadier-general, one colonel, two lieutenant-colonels, four majors, one adjutant and inspector, one paymaster, one quartermaster, two assistant quartermasters, twenty captains, thirty first lieutenants, thirty second lieutenants, one

It was superseded by the provisions of the Navy Personnel Act of March 3, 1899, ch. 413, infra, p. 1224. See the notes to section 18 thereof.

Sections 1596–1623 constitute chapter 9 of title 15 of the Revised Statutes, entitled "The Marine Corps."

Said Act of March 3, 1899, ch. 413, also superseded the provisions of the Naval Appropriation Act of June 30, 1876, ch. 160, 10 Stat. L. 71, that "there shall be no appointments, except by promotion, to fill vacancies occurring in the list of commissioned officers of the Marine Corps until the number of such officers shall have been reduced, by casualties or otherwise, to seventy-five," and also the provisions of the Act of Jan. 30, 1886, ch. 43, 23 Stat. L. 293, repeating the above paragraph and continuing, "and after the number of officers shall be reduced as above provided, the whole number of commissioned officers on the active list in the Marine Corps shall not exceed seventy-five."

The following provisions of the Naval Appropriation Act of May 4, 1898, ch. 234, 30 Stat. L. 369, may be regarded as temporary only: "Pay of the Navy. . . . And whenever, within the next twelve months, an exigency may exist which, in the judgment of the President, renders their services necessary, he is hereby authorized to appoint from the civil life and commission such officers of the line and staff, not above the rank or relative rank of commander, and warrant officers including warrant machinists, and such officers of the Marine Corps not above the rank of captain, to be appointed from the noncommissioned officers of the Corps and from civil life, as may be requisite: Provided, That such officers shall serve only during the continuance of the exigency under which their services are required in the existing war: And provided further, That such officers so appointed shall be assigned to duty with rank and pay of the grades established by existing law; and warrant machinists shall be paid at the rate of one thousand two hundred dollars per annum."

By joint resolution of May 26, 1898, No. 39, 30 Stat. L. 745, all temporary appointments of officers in the navy made "on and after April twenty-first, eighteen hundred and ninety-eight," and up to the date of the passage of this joint resolution, of officers of the line and staff of the Navy, are hereby ratified and confirmed, to continue in force during the exigency under which their services are required in the existing war."

Power of President under Act May 4, 1898.—In (1898) 22 Op. Atty.-Gen. 82, the Attorney-General advised that the President could appoint the officers of the line and staff authorized by this Act, without the advice and consent of the Senate.

Sec. 1597. [What commissions and promotions not affected by number fixed.] The provisions of the preceding section shall not preclude the advancement of any officer to a higher grade for distinguished conduct in conflict with the enemy, or for extraordinary heroism in the line of his profession, as authorized by sections sixteen hundred and five and sixteen hundred and seven. [R.S.]


The "preceding section" to which the section refers is R.S. sec. 1606 heretofore noted as superseded by the provisions of the Navy Personnel Act of March 3, 1899, ch. 413, infra, p. 1224. However, this section would seem to apply to the provisions of the Act which superseded the section to which it refers.

R. S. secs. 1606–1607 mentioned in the text are given infra, p. 1217.

Sec. 1598. [Staff.] The staff of the Marine Corps shall be separate from the line. [R.S.]


The composition of the staff was prescribed by the Act of March 3, 1899, ch. 413, § 22, infra, p. 1226.

Sec. 1609. [Oath.] The officers and enlisted men of the Marine Corps shall take the same oaths, respectively, which are provided by law for the officers and enlisted men of the Army. [R. S.]

Act of July 11, 1798, ch. 72, 1 Stat. L. 595.

By the Act of March 3, 1869, ch. 413, § 25, supra, p. 1166, the oath of allegiance was required to be administered to the officers and men of the navy.

Sec. 1610. [Exemption from arrest.] Marines shall be exempt, while enlisted in said service, from all personal arrest for debt or contract. [R. S.]


Midshipmen are not exempt from arrest; the proper construction of the Act of July 11, 1798, for establishing and organizing the marine corps, failing to include them in the exemptions made. (1836) 3 Op. Atty.-Gen. 119.

Sec. 1611. [Companies and detachments.] The Marine Corps may be formed into as many companies or detachments as the President may direct, with a proper distribution of the commissioned and non-commissioned officers and musicians to each company or detachment. [R. S.]

Act of July 11, 1798, ch. 72, 1 Stat. L. 594.

Sec. 1612. [Pay of Marine Corps.] The officers of the Marine Corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for re-enlisting, as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the infantry of the Army. [R. S.]


For provisions relating to the pay of officers and enlisted men of the army, see War Department and Military Establishment.

Further provisions relating to the pay of members of the marine corps are given infra, within this subdivision.

Brevet officers of the marine corps are entitled to the same pay and emoluments that are allowed to officers of similar grades in the infantry of the army. (1852) 5 Op. Atty.-Gen. 513.

Ration to officer attached to a sea-going vessel—An officer in the marine corps, attached to a sea-going vessel, is not entitled to the ration allowed by R. S. sec. 1678, supra, div. X, p. 1184, to a naval officer so attached. Such an officer in the marine corps is, by the section, subject to the provisions of R. S. sec. 1269 (title War Department and Military Establishment). Reid v. U. S., (1883) 18 Ct. Cl. 625.

The “retained pay” and “transportation and subsistence” given to soldiers in the army by R. S. secs. 1281 and 1290, (title War Department and Military Establishment) are extended to the marine corps by this section. Kingsley v. U. S., (1889) 24 Ct. Cl. 219, reversed in (1891) 138 U. S. 87, 11 S. Ct. 286, 34 U. S. (L. ed.) 896, as to retained pay, on the ground that it can be forfeited in a collateral proceeding.

The additional pay given to soldiers by R. S. sec. 1284 (title War Department and Military Establishment), does not depend upon mere length of service, but upon an honorable discharge and a voluntary re-enlistment. One who was enlisted in the marine corps for eight years, eleven months, and twenty-six days, he being then under thirteen years of age, cannot recover the two dollars a month additional pay given by R. S. sec. 1284, for the period subsequent to his first five years of service. Webb v. U. S., (1888) 23 Ct. Cl. 53.

Right of discharged soldier to extra pay on re-enlistment in marine corps—This section extends and makes applicable to the enlisted men in the marine corps the additional pay provided by R. S. sec. 1284 (title War Department and Military Establishment), and a re-entry in the service by enlistment in the marine corps within one month from the date of
an honorable discharge from the army satisfies the requirements of the statute. Walton v. U. S., (1896) 31 Ct. Cl. 196.

Sergeant acting as schoolmaster.—A sergeant in the marine corps performed the duties of schoolmaster at the marine barracks, receiving in addition to his pay as sergeant one dollar per month from each apprentice in accordance with an agreement in their enlistment papers prescribed by the Navy Department. He cannot recover extra duty pay, either under R. S. sec. 1287 (title War Department and Military Establishment), providing that soldiers detailed for employment as artificers or laborers in the construction of permanent military works, public roads, or other constant labor shall receive additional pay, or under the Army Regulation 1889 (sec. 163), which provides that enlisted men on extra duty shall receive additional pay. Fugitt v. U. S., (1893) 22 Ct. Cl. 253.

Twenty per cent. additional pay in time of war.—By the Act of April 26, 1868, § 6, 30 Stat. L. 365 (title War Department and Military Establishment), it is provided "that in time of war the pay proper of enlisted men shall be increased twenty per centum over and above the rates of pay fixed by law," but that no additional increase for "performing what is known as extra or special duty" shall be allowed. This twenty per centum additional pay the auditor of the Navy Department has construed as part of the regular pay of the marines, and to get at the basis of their share in the distribution of prize money he has added that increase to their regular pay. This construction is correct, and must, therefore, form the basis for the distribution of bounty. Santiago Bay, (1901) 35 Ct. Cl. 200.

"The comptroller of the treasury has decided that the twenty per cent. does not apply to the additional pay which accrues to enlisted men for length of service (4 Dec. Comp. Treasury, 668), and accordingly it has been computed on the rates of pay prescribed for the respective ratings in the first year of the first enlistment. The auditor for the navy, treasury department, regards the twenty per cent. increase as a part of the regular pay of marines in time of war, and in preparation of prize lists of vessels captured during the war with Spain has included the increase, basing the shares of marines on their regular pay plus said twenty per cent. (of their minimum rates of pay, as per decision of the comptroller, supra). The men are entitled to share in the bounty on the basis of minimum pay plus twenty per cent." Manila Bay, (1901) 36 Ct. Cl. 206.

Extra compensation for disbursements. —In (1840) 3 Op. Atty-Gen. 516, the Attorney-General advised that since the Act of March 3, 1835, prohibiting extra allowances or compensation in any form to an officer of the army, on account of the disbursing any public money appropriated by law for the purchase of public supplies of any description, a quarter-master of the marine corps cannot be allowed any extra compensation on account of disbursements for public supplies. The object of the Act of June 30, 1834, from which this section was taken, was obviously to make the allowance to infantry of the army and to the marine corps exactly the same; any changes in the allowances to the latter being made to conform to those which might take place in the former, whether they increased or lessened the compensation the officer was thus to receive.

Sec. 1613. [Marine band.] The marines who compose the corps of musicians known as the "Marine band" shall be entitled to receive at the rate of four dollars a month, each, in addition to their pay as non-commissioned officers, musicians, or privates of the Marine Corps, so long as they shall perform, by order of the Secretary of the Navy, or other superior officer, on the Capitol grounds or the President's grounds. [R. S.]


Pay of members of marine band. See Act of March 3, 1899, ch. 413, § 24, infra, p. 1227.

Additional pay to private in marine band.—Claimant enlisted in the United States marine corps at the marine barracks, Washington, D. C., October 29, 1879, as a private, was assigned to duty with the marine band at the time of his enlistment, and remained and performed his duty with the band as a private from that time until May 1, 1881, when he was rated as a musician. Prior to the last mentioned date he was at no time rated as a musician although playing in the band. Between the date of enlistment and May 1, 1881, the organization known as the marine band performed, under proper order, on the Capitol grounds and on the President's grounds. Prior to May 1, 1881, claimant received no additional compensation for such service. It was held that the claimant was one of
the marines who composed the organization known as the "Marine Band." He performed on the Capitol grounds and on the President’s grounds, under proper order, and, thus falling within the phraseology of the statute, he should have received additional pay. U. S. v. Bond, (1888) 124 U. S. 301, 8 S. Ct. 501, 31 U. S. (L. ed.) 473.

Sec. 1614. [Deduction for hospitals.] The Secretary of the Navy shall deduct from the pay due each of the officers and enlisted men of the Marine Corps at the rate of twenty cents per month for every officer and marine, to be applied to the fund for Navy hospitals. [R. S.]


Sec. 1615. [Rations of enlisted men.] The non-commissioned officers, privates, and musicians of the Marine Corps shall, each, be entitled to receive one Navy ration daily. [R. S.]

Act of July 1, 1797, ch. 7, 1 Stat. L. 524; Act of July 11, 1798, ch. 72, 1 Stat. L. 595.

Provisions relating to navy rations were made by R. S. secs. 1680, 1581, supra, pp. 1184, 1185.


Sec. 1616. [Service on armed vessels.] Marines may be detached for service on board the armed vessels of the United States, and the President may detach and appoint, for service on said vessels, such of the officers of said corps as he may deem necessary. [R. S.]

Act of July 1, 1797, ch. 7, 1 Stat. L. 523; Act of July 11, 1798, ch. 72, 1 Stat. L. 596.

Sec. 1617. [Marine officers not to command navy-yards or vessels.] No officer of the Marine Corps shall exercise command over any navy-yard or vessel of the United States. [R. S.]

Act of June 30, 1834, ch. 132, 4 Stat. L. 713.

Sec. 1618. [Marines substituted for landsmen.] The President may substitute marines for landsmen in the Navy, as far as he may deem it for the good of the service. [R. S.]


Sec. 1619. [Duty on shore.] The Marine Corps shall be liable to do duty in the forts and garrisons of the United States, on the sea-coast, or any other duty on shore, as the President, at his discretion, may direct. [R. S.]

Act of July 11, 1798, ch. 72, 1 Stat. L. 596.

Pay when detailed for shore duty beyond seas, see Act of March 3, 1901, ch. 852, supra, p. 1209.

Sec. 1620. [Regulations.] The President is authorized to prescribe such military regulations for the discipline of the Marine Corps as he may deem expedient. [R. S.]

Act of June 30, 1834, ch. 132, 4 Stat. L. 713.
Sec. 1621. [Subject to laws governing the Navy, except when serving with the Army.] The Marine Corps shall, at all times, be subject to the laws and regulations established for the government of the Navy, except when detached for service with the Army by order of the President; and when so detached they shall be subject to the rules and articles of war prescribed for the government of the Army. [R. S.]

Act of July 11, 1796, ch. 72, 1 Stat. L. 595; Act of June 30, 1834, ch. 132, 4 Stat. L. 713.

Examination as to physical qualification for sea duty.—An officer of the marine corps is not, by the law applicable to this branch of the service, made subject to examination as to his physical qualification for duty at sea before promotion. The obvious purpose of the section just quoted is to provide rules for the discipline of the corps in the different spheres of duty (military and naval) in which it is liable to serve. When serving with the land forces, it is to be subject to the rules established for the government of the army; when serving with the naval forces, to the rules for the government of the navy. The language of the provision does not warrant the inference that it was intended thereby to subject that corps to any other laws and regulations of the navy than such as relate to discipline and its maintenance. Within this category section 1493 [supra, div. VII, p. 1140] does not fall.” (1881) 17 Op. Atty.-Gen. 117.

Guarding government property on exhibition.—The Secretary of the Navy has authority to detail men to guard and protect property of the government placed on exhibition at the World’s Columbian Exposition. The cost of transportation and sustenance of such detail must be paid from the fund provided for the marine corps and its subsistence, and is only limited by the consideration of the question whether there are sufficient funds available for that purpose, as to which the Secretary of the Navy is the sole judge. (1893) 20 Op. Atty.-Gen. 576.

Detention after term of enlistment.—In Wilkes v. Dinman, (1849) 7 How. 89, 12 U. S. (L. ed.) 618, it was held that under this statute and the Act of March 2, 1837, § 2, providing that “when the time of service of any person enlisted for the navy shall expire while he is on board any of the public vessels of the United States employed on foreign service, it shall be the duty of the commanding officer to send him to the United States in some public or other vessel, unless his detention shall be essential to the public interests, in which case the said officer may detain him until the vessel in which he may be serving shall return to the United States, etc.,” the commander of a vessel had the authority to detain a man on board a vessel after the expiration of his term of enlistment, if he deemed the detention on board “essential to the public interests.”

Naval or army court-martial.—Whether an officer of the corps of marines should be tried by a court-martial composed of officers of the navy or of officers of the army will depend upon whether the alleged misconduct in the accused took place while he was employed in the land service, according to the true spirit and object of the statute. “Under the first view, the marine corps is to be taken as an adjunct to the navy; nor can it be supposed that the mere fact of bodily presence upon the land would be sufficient to divest the service which may have been there performed of the substantial characteristics of naval service. How long sperer such bodily presence may have been continued, it may still well be conceived to have brought with it constructively, but essentially nothing but the fulfillment of naval duty.” (1817) 5 Op. Atty.-Gen. 706. See also (1830) 2 Op. Atty.-Gen. 311.

In (1816) 1 Op. Atty.-Gen. 187, the attorney-general advised that it was competent for a general court-martial of marine officers stationed on shore and convened under the articles of war, to try and sentence to suffer corporal punishment marines who had deserted from the public ships, where they were liable to such punishment under the regulations of the navy, but which had been forbidden by the Act of Congress of May 16, 1812, in regard to the army.

A private serving in the marine corps, while his brigade was detached for service with the army by order of the President was charged with having committed an act which was an offense both by “the rules and articles of war prescribed for the government of the army” and by “the laws and regulations established for the government of the navy.” For this he was placed under guard by military order. The next day the brigade to which he belonged was by executive order withdrawn from the detached service of the army. Subsequently he was brought before a naval court-martial for trial and was tried, convicted and sentenced for an offense against the laws and regulations of the navy. When arraigned for trial he entered a plea to the jurisdiction of the court, based upon the fact that at the time the offense was
charged to have been committed, he, a private in a brigade of the marine corps, was serving with the army on detached service and that as a matter of law the marine corps when on such service is not subject to the laws and regulations of the navy. The plea was overruled and the case came before the district court as in effect a case stated to have sec. 1021 construed. The court held that there was nothing to be added to the clear answer given by the language of the statute itself and that the relator was not subject to the laws and regulations of the navy, and that a court established by these laws was without authority of law to impose or enforce the sentence pronounced. U. S. v. Walker, (E. D. Pa., 1915) 225 Fed. 673. The Act of Feb. 9, 1889, ch. 119 (supra, div. IX, p. 1164), "to provide for the deposit of the savings of seamen of the United States navy," does not extend to enlisted men of the marine corps. (1890) 19 Op. Atty.-Gen. 616.

Sec. 1622. [Retirement.] The commissioned officers of the Marine Corps shall be retired in like cases, in the same manner, and with the same relative conditions, in all respects, as are provided for officers of the Army, except as is otherwise provided in the next section. [R. S.]


Provisions relating to the retirement of officers of the marine corps who served during the Civil War were made by the Act of April 27, 1904, ch. 1622, infra, p. 1229, and the Act of June 29, 1906, ch. 3690, infra, p. 1230.

For provisions relating to the pay of officers and enlisted men of the army, see Was DEPARTMENT AND MILITARY ESTABLISHMENT.

Effect of section.—This section simply provides for the conditions precedent to the retirement of an officer of the marine corps, but in no way changes the jurisdiction to which he is subject or the conditions under which he may be again placed on active duty. Jonas v. U. S., (1915) 50 Ct. Cl. 281.

Retirement for an incapacity not an incident of the service.—A board of officers, duly constituted, was convened by an order of the Secretary of the Navy, dated July 30, 1874, to inquire into and determine whether W., a lieutenant of marines, was incapacitated for active service. The board found him so incapacitated, and the cause of his incapacity was not an incident of the service. On submission of the proceeding and finding of the board to the President, he, under date of August 18, 1874, indorsed thereon: "I concur in opinion with the retiring board in the case of W. Let him be retired on furlough pay." It was held (1) that the action of the President amounted to an approval of the finding of the board, and to a retirement of W. from "active service," within R. S. sec. 1252, (title War DEPARTMENT AND MILITARY ESTABLISHMENT), and (2) that W. thereby became entitled to receive pay according to the rate established by law for retired officers of the marine corps (viz., seventy-five cents per cent of the pay of the actual rank held by him at date of retirement,) notwithstanding a different rate of pay (viz., furlough pay) was named by the President in retiring him. Welles' Case, (1878) 15 Op. Atty.-Gen. 442.

Rank of judge-advocate-general.—A captain of the marine corps, appointed a judge-advocate-general of the navy under the Act approved June 8, 1880 (21 Stat. L. 164), with the rank, pay, and allowance of a colonel, can be retired from that position as a colonel, and be entitled to the retired pay of an officer of that rank on the retired list. Remey v. U. S., (1898) 33 Ct. Cl. 218.

Civil war officers.—In the matter of retirement, officers of the marine corps with creditable records who served during the civil war are governed entirely by the Act of April 27, 1804, ch. 1622, infra, p. 1229, which provides that they shall be retired "in like manner and under the same conditions as provided for officers of the navy who served during the civil war." To this extent that Act alters and amends this section. (1904) 25 Op. Atty.-Gen. 282.

Sec. 1623. [Retiring-board, how composed.] In case of an officer of the Marine Corps, the retiring-board shall be selected by the Secretary of the Navy, under the direction of the President. Two-fifths of the board shall be selected from the Medical Corps of the Navy, and the remainder
shall be selected from officers of the Marine Corps, senior in rank, so far as may be, to the officer whose disability is to be inquired of. [R. S.]


Composition and authority of board.—A board of officers of the navy may be assembled by the Secretary of the Navy under this section, which shall have authority to determine facts and report a judgment in the cases of officers of the marine corps. That the section does not contemplate a board composed exclusively of marine officers is clear, because it provides that two-fifths of the board shall be of the medical staff; and there being no medical staff attached to the marine corps, this requirement of the statute could be only fulfilled by placing on the board naval surgeons. (1861) 10 Op. Atty.-Gen. 129.

Board constituted under R. S. sec. 1493. —The examination of the retiring board provided for by this section seems to be the only one to which an officer of the corps is by law subjected, in order to determine his fitness for active duty; and unless the officer is by this board found incapacitated for active service, and the finding is approved by the President (in which case he must be retired), he remains in the line of promotion on the active list as he was before, and is entitled to all the rights which belong to his position. A board of naval surgeons, constituted under R. S. sec. 1493, supra, div. VII, p. 1140, is not by law invested with authority to examine and pronounce upon any other cases than those of officers on the active list of the navy. (1881) 17 Op. Atty.-Gen. 117.

[No commutation of forage.] • • • Marine Corps. • • • That no commutation for forage shall be paid. [23 Stat. L. 294.]

This is from the Additional Naval Appropriation Act of Jan. 30, 1885, ch. 43. This paragraph is repeated in the Naval Appropriation Act of March 3, 1885, ch. 344, § 1, 23 Stat. L. 432.

An act to provide for the examination of certain officers of the Marine Corps, and to regulate promotion therein.


[Promotions — examining boards.] That hereafter promotions to every grade of commissioned officers in the Marine Corps below the grade of Commandant shall be made in the same manner and under the same conditions as now are or may hereafter be prescribed, in pursuance of law, for commissioned officers of the Army: Provided, That examining boards which may be organized under the provisions of this act to determine the fitness of officers of the Marine Corps for promotion shall in all cases consist of not less than five officers, three of whom shall, if practicable, be officers of the Marine Corps, senior to the officer to be examined, and two of whom shall be medical officers of the Navy: Provided further, That when not practicable to detail officers of the Marine Corps as members of such examining boards, officers of the line in the Navy shall be so detailed. [27 Stat. L. 321.]

Further provisions relating to this subject were made by the Act of March 3, 1899, ch. 413, § 20, infra, p. 1226, and the Act of March 3, 1905, ch. 1010, infra, p. 1228.

For provisions relating to promotions in the Army, see War Department and Military Establishment.

[Pay of drum-major.] • • • Marine Corps. • • • That the pay of the drum major shall be the same as that now established, or that may
be hereafter established, for first sergeants in the Marine Corps of the same length of service. [28 Stat. L. 138.]

This is from the Naval Appropriation Act of July 26, 1894, ch. 165.

[Mileage.] • • • And hereafter officers of the Marine Corps traveling under orders without troops shall be allowed the same mileage as is now allowed officers of the Navy traveling without troops. [29 Stat. L. 376.]

This is from the Naval Appropriation Act of June 10, 1896, ch. 399. Mileage of naval officers and officers of marine corps. See further supra, pp. 1197, 1201.

SEC. 18. [Composition of active list of the line — vacancies — promotions.] That from and after the date of the approval of this Act the active list of the line officers of the United States Marine Corps shall consist of one brigadier-general commandant, five colonels, five lieutenant colonels, ten majors, sixty captains, sixty first lieutenants and sixty second lieutenants: Provided, That vacancies in all grades in the line created by this section shall be filled as far as possible by promotion by seniority from the line officers on the active list of said Corps: And provided further, That the commissions of officers now in the Marine Corps shall not be vacated by this act: And provided further, That vacancies in the grade of brigadier-general shall be filled by selection from officers on the active list of the Marine Corps not below the grade of field officer. [30 Stat. L. 1008.]

This, and the following sections 19, 20, 22, 23, and 24 were from the Navy Personnel Act of March 3, 1899, ch. 413. See the notes to section 1 of this Act, supra, p. 1091. Section 21 of this Act, which may be regarded as temporary only, was as follows:

"Sec. 21. That upon the passage of this Act not more than forty-five of the captains, forty-five first lieutenants and forty-five second lieutenants herein provided for shall be appointed; fifteen captains, fifteen first lieutenants and fifteen second lieutenants to be appointed subsequently to January first, nineteen hundred."

These provisions superseded those of R. S. sec. 1596, noted supra, p. 1214. The last proviso of this section was superseded by the Acts of May 13, 1908, ch. 166, infra, p. 1230, and the Act of Dec. 19, 1913, ch. 3, infra, p. 1232.

Further provisions relating to the increase in the number of the officers of the corps, and the filling of vacancies, were made by the Act of March 3, 1903, ch. 1010, infra, p. 1223; the Act of May 13, 1908, ch. 166, infra, p. 1230; the Act of Aug. 22, 1912, ch. 335, infra, p. 1231, and the Act of March 3, 1918, ch. 83, infra, p. 1233.

Marine corps is part of the naval service.—Notwithstanding the intermediate character of the marine corps, and the several provisions of the statutes allaying it in several respects with the military service, it is properly classed with, and is part of, the naval service of the United States. In re Doyle, (S. D. N. Y. 1853) 18 Fed. 368.

The primary position of the marine corps in the military service is that of a part of the navy, and its chief control is placed under the Secretary of the Navy, there being exceptions, when it may, by order of the President, or some one having proper authority, be placed more immediately, for temporary duty, with the army, and under the command of the superior army officers. "It cannot be considered as a distinct military organization, independent of the departments of the army and navy, and under the supervision and control of neither of them, having no superior outside of its own officers, except the President. Such a position is at war with the whole policy of the distribution of power among the executive departments, as we have already shown; and while it may be true that it is not so exclusively a part of the navy as ships and navy yards are, yet its general supervision and control remain with the navy department." U. S. v. Dunn, (1887) 120 U. S. 249, 7 S. Ct. 607, 30 U. S.
The marine corps is an independent corps, officered like the army; ordinarily placed by law under the Secretary of the Navy and ordinarily subject to navy discipline; liable at the pleasure of the President to be put with the army and made subject to army discipline; when serving with the navy a part of the naval force; and wherever serving to be paid according to the laws governing the pay of the army, as those laws are or may become. Reid v. U. S., (1883) 18 Ct. Cl. 625. But see matter of Shugrue, (1883) 3 Mackey (D. C.) 324.

SEC. 19. [Original vacancies, now filled.] That the vacancies existing in said Corps after the promotions and appointments herein provided for shall be filled by the President from time to time, whenever the actual needs of the naval service require it, first, from the graduates of the Naval Academy in the manner now provided by law; or second, from those who are serving or who have served as second lieutenants in the Marine Corps during the war with Spain; or, third, from meritorious noncommissioned officers of the Marine Corps; or, fourth, from civil life: Provided, That after said vacancies are once filled there shall be no further appointments from civil life. [30 Stat. L. 1008.]

See the notes to the preceding section 18 of this Act.

Further provisions relating to filling vacancies were made by the Act of March 3, 1903, ch. 1010, infra, p. 1228, and the Act of May 13, 1908, ch. 166, infra, p. 1230.

SEC. 20. [Age limit for appointees — examinations for appointees and promotions.] That no person except such officers or former graduates of the Naval Academy as have served in the war with Spain, as hereinbefore provided for, shall be appointed a commissioned officer in the Marine Corps who is under twenty or over thirty years of age; and that no person shall be appointed a commissioned officer in said corps until he shall have passed such examination as may be prescribed by the President of the United States, except graduates of the Naval Academy, as above provided. That the officers of the Marine Corps above the grade of captain, except brigadier-general, shall, before being promoted, be subject to such physical, mental and moral examination as is now, and may hereafter be, prescribed by law for other officers of the Marine Corps. [30 Stat. L. 1008.]

See the notes to section 18 of this Act, supra, p. 1224.

Examination of officers for promotion. — Examinations for promotion of officers in the marine corps should be held anterior to the date upon which a vacancy is expected to occur. Where an officer entitled to promotion upon examination is required to be absent from any place where an examining board can be convened, as provided by section 32 of the Act of Feb. 2, 1901, 31 Stat. L. 756, (title War Department and Military Establishment), the President may promote the officer subject to future examination. Should such officer upon examination be found disqualified, he should be treated in the same manner as if he had been examined prior to promotion. An officer who fails to pass his examination should be suspended from promotion for one year from the date of the approval of the proceedings of the examining board by the Secretary of the Navy, during which period he is ineligible for re-examination. If, however, a vacancy occurs during such period of suspension for which, owing to death, resignation, or other cause, there should be no senior officer eligible, then the suspended officer must, of necessity, take the vacancy. The Secretary of the Navy may make the date of such suspension coincident with the date of the vacancy, by delaying the approval until the vacancy occurs. Where an examination is held before the vacancy occurs, and the officer fails in such examination for other than physical
cause, he cannot be re-examined until one year from the date of the approval of the proceedings of the examining board. Should the examination be held after the date of the vacancy, and the officer fail in such examination, he should be suspended from promotion for one year from the date of the vacancy to which he was promoted by the President subject to examination. The period of "loss of date" is not necessarily contemporaneous with the period of suspension, but it should correspond in length of time with the period of suspension. While the period of suspension from promotion begins to run from the date of the approval of the examining board, the period of "loss of date" begins to run from the date of the vacancy to which the suspended officer would have been promoted had he passed his examination. (1906) 25 Op. Atty.-Gen. 568.

Issue of commission after age limit passed.—R. 6, sec. 1599, superseded by this section, provided that no person under twenty or twenty-five years of age shall be appointed as a commissioned officer of the marine corps. In Stoddard's Case, (1862) 10 Op. Atty.-Gen. 308, the Attorney-General advised that the President might lawfully issue a commission to an applicant after he had passed the age of twenty-five, when he had applied for that office, was examined and found qualified, and was nominated to the Senate prior to that time, but the nomination was not confirmed by the Senate until after the time.

The exemption as to age limit with reference to the eligibility to appointment in the marine corps is not restricted to those who served in such corps, but extends to all graduates of the naval academy who served in the war with Spain. (1899) 22 Op. Atty.-Gen. 485.

Graduate of naval academy.—A person who took the regular four years' course at the naval academy, and received a certificate of graduation, is a graduate of the academy within the meaning of this section. (1899) 22 Op. Atty.-Gen. 485.

SEC. 22. [Staff — composition — filling vacancies.] That the staff of the Marine Corps shall consist of one adjutant and inspector, one quartermaster and one paymaster, each with the rank of colonel; one assistant adjutant and inspector, two assistant quartermasters and one assistant paymaster, each with the rank of major; and three assistant quartermasters with the rank of captain. That the vacancies created by this Act in the departments of the adjutant and inspector and paymaster shall be filled first by promotion according to seniority of the officers in each of these departments respectively, and then by selection from the line officers on the active list of the Marine Corps not below the grade of captain, and who shall have seen not less than ten years' service in the Marine Corps. That the vacancies created by this Act in the quartermaster's department of said corps shall be filled, first by promotion according to seniority of the officers in this department, and then by selection from the line officers on the active list of said corps not below the grade of first lieutenant: Provided, That all vacancies hereafter occurring in the staff of the Marine Corps shall be filled first by promotion according to seniority of the officers in their respective departments, and then by selection from officers of the line on the active list, as hereinbefore provided for. [30 Stat. L. 1009.]

See the notes to section 18 of this Act, supra, p. 1224.
See further the Act of March 3, 1903, ch. 1010, infra, p. 1228, and the Act of May 13, 1908, ch. 166, infra, p. 1230.

Merely directory.—This section is merely directory to the appointing power as to the course to be pursued in filling vacancies, and has nothing to do with the relative rank of officers after their appointment, and would have nothing to do with this, so long as the officers held their commissions, even if the rule prescribed were violated in the selection and a junior instead of a senior in the department were selected. (1900) 23 Op. Atty.-Gen. 156.

Computing time of service.—In making the promotions provided for by this statute in the marine corps, an applicant is entitled to have his time at the naval academy and at sea anterior to commission counted as time of service. (1899) 22 Op. Atty.-Gen. 377.

Seniority in the service or in one department.—Provision is made by this section for filling vacancies created by this Act in three different departments of the
marines — that of the adjutant and inspector, that of the quartermaster, and that of the paymaster — those in the first and last of which are to be filled in the same way, while those in the quartermaster's department are to be filled in a way somewhat different. But, in each case, when the question of seniority occurs, it is not seniority in the service, but seniority in the particular department. This seniority, while it might, perhaps, affect the relative rank of officers in the same department, cannot offset such relative rank as between officers of different departments. It may well happen that one officer may be senior in one department, while the other is much his senior in service. (1900) 23 Op. Atty.-Gen. 155.

SEC. 23. [Enlisted forces.] That the enlisted force of the Marine Corps shall consist of five sergeant majors, one drum major, twenty quartermaster sergeants, seventy-two gunnery sergeants with the rank and allowance of the first sergeant, and whose pay shall be thirty-five dollars per month; sixty first sergeants; two hundred and forty sergeants; four hundred and eighty corporals; eighty drummers; eighty trumpeters; and four thousand nine hundred and sixty-two privates. [30 Stat. L. 1009.]

See the note to section 18 of this Act, supra, p. 1224.

So much of this section as relates to the rank, pay, etc., of gunnery sergeants, was superseded by the provisions of the Act of Aug. 22, 1912, ch. 335, infra, p. 1223, and the Act of March 3, 1915, ch. 83, infra, p. 1233.

Subsequent provisions authorizing additions to the enlisted force were made by the Act of July 1, 1905, ch. 1366, infra, p. 1228; Act of March 3, 1905, ch. 1481, infra, p. 1229; the Act of May 13, 1908, ch. 166, infra, p. 1230; the Act of Aug. 22, 1912, ch. 335, infra, p. 1231; and the Act of March 3, 1915, ch. 83, infra, p. 1233.

The Naval Appropriation Act of March 3, 1915, ch. 83, 38 Stat. L. 948, provided, as did similar Acts for preceding years, as follows: "the number of enlisted men shall be exclusive of those undergoing imprisonment with sentence of dishonorable discharge from the service at expiration of such confinement."

SEC. 24. [Band.] That the band of the United States Marine Corps shall consist of one leader, with the pay and allowances of a first lieutenant; one second leader, whose pay shall be seventy-five dollars per month, and who shall have the allowances of a sergeant major; thirty first class musicians, whose pay shall be sixty dollars per month; and thirty second class musicians whose pay shall be fifty dollars per month and the allowances of a sergeant; such musicians of the band to have no increased pay for length of service. [30 Stat. L. 1009.]

See the note to section 18 of this Act, supra, p. 1224.

Retained pay.—In Patyscheke v. U. S., (1896) 31 Ct. Cl. 387, it was held that the members of the Marine Corps band were entitled to the same retained pay as was received by the members of the West Point band. See R. S. sec. 1281 (title War Department and Military Establishment). But see Kepper v. U. S., (1892) 27 Ct. Cl. 482.

[Period of enlistment.] • • • That hereafter the enlistments into the Marine Corps shall be for a period of not less than four years. [31 Stat. L. 1132.]

This is from the Naval Appropriation Act of March 3, 1901, ch. 852.

Age of enlistment.—R. S. secs. 1418 and 1419, supra, pp. 1051, 1052, do not apply to enlistments into the marine corps. In the absence of an express statute as to the age at which persons may enlist into the marine corps, a person under the age of twenty-one years cannot enlist without the consent of his parent, where such parent retained his right of control. These sections cannot be made to apply, by virtue of R. S. sec. 1621, supra, p. 1231, because, as a matter of construction, the
latter section was not intended to bear at all upon the subject of voluntary enlistments. Matter of Shugue, (1883) 3 Mackey (D. C.) 331. See Ex p. Brown, (1839) 5 Cranch C. C. 554, 4 Fed. Cas. No. 1,972.

Enlistment of minors.—The marine corps of the United States is not a part of the navy, and enlistments therein are not governed by the statutes relating to enlistments in the navy, but by regulations prescribed by the Secretary of the Navy, under whose government and control such corps is primarily placed; and such officer, having prescribed in the published regulations of his department that "the regulations for the recruiting service of the Army shall be applied to the recruiting service of the Marine Corps, as far as practicable," the enlistment of minors therein is governed by the statutory provisions relating to army enlistments, and no person under the age of twenty-one years can lawfully enlist without the consent of his parents or guardian, as required by R. S. sec. 1117 (title WAR DEPARTMENT AND MILITARY ESTABLISHMENT). McCalla v. Faso, (C. C. A. 9th Cir. 1906) 144 Fed. 61, 75 C. C. A. 219.

But see In re Doyle, (S. D. N. Y. 1883) 18 Fed. 369, wherein it was held that the limitations of R. S. secs. 1418 and 1419 undoubtedly apply to enlistments in the marine corps under this section, and that the provisions of R. S. sec. 1117 (title WAR DEPARTMENT AND MILITARY ESTABLISHMENT), pertaining to enlistments in the military service, do not apply to enlistments in the marine corps.

[Enlisted force.] * * * In addition to the enlisted force of the Marine Corps now authorized by law there may be enlisted ten gunnery-sergeants, forty sergeants, sixty corporals, ten drummers, ten trumpeters, and six hundred and twenty privates. [32 Stat. L. 687.]

This is from the Naval Appropriation Act of July 1, 1902, ch. 1365.
For other provisions relating to the number of enlisted men, see the Act of March 3, 1899, ch. 413, § 23, supra, p. 1227, and the notes thereto.

[Sec. 1.] [Increase of marine corps—vacancies in grade of field officers, staff departments.] * * * That from and after the passage of this Act, and in order to further increase the efficiency of the Marine Corps, the following additional officers, noncommissioned officers, drummers, trumpeters, and privates to those now provided by law for said corps, are hereby authorized and directed, namely: One colonel, one lieutenant-colonel, five majors, twelve captains, twenty-five first lieutenants, twelve second lieutenants, one assistant adjutant and inspector with the rank of lieutenant-colonel, two assistant adjutants and inspectors with the rank of major, one assistant quartermaster with the rank of lieutenant-colonel, five assistant quartermasters with the rank of captain, one assistant paymaster with the rank of lieutenant-colonel, one assistant paymaster with the rank of captain, one sergeant-major, forty quartermaster-sergeants, twelve first sergeants, sixty-five sergeants, fifty-five corporals, ten drummers, ten trumpeters, and five hundred and twenty-seven privates: Provided, That the vacancies now existing in the line and the staff departments of the Marine Corps and those created by this Act below the grade of brigadier-general shall be filled, respectively, first by promotion by seniority and then by selection and appointment as now provided by law, excepting that vacancies in the grade of second lieutenant shall be filled first, as far as practicable, from graduates of the Naval Academy each year on completing the prescribed course at the Naval Academy, exclusive of the probationary tour of sea service before final graduation, then from
meritorious noncommissioned officers and from civil life between the ages of twenty-one and twenty-seven years: Provided, That the commissions of officers now in the Marine Corps shall not be vacated by this Act: And provided further, That officers selected for appointment to fill vacancies in the grade of field officers in any of the staff departments shall be taken from officers on the active list not below the grade of captain and who have seen not less than seven years' service as commissioned officers in the Marine Corps. And that appointments to the grade of captain in any of the staff departments shall be made from officers on the active list of the Marine Corps not below the grade of first lieutenant. [32 Stat. L. 1198.]

This is from the Naval Appropriation Act of March 3, 1903, ch. 1010.
For other provisions relating to the number of enlisted men, see the Act of March 3, 1899, ch. 413, § 23, supra, p. 1227, and the notes thereto.

[Sec. 1.] [Retirement — credit for civil war service.] * * * That officers of the Marine Corps with creditable records who served during the civil war shall, when retired, be retired in like manner and under the same conditions as provided for officers of the Navy who served during the civil war. * * * [33 Stat. L. 349.]

This is from the Naval Appropriation Act of April 27, 1904, ch. 1622.
Subsequent provisions relating to this subject were made by the Act of June 29, 1906, ch. 3590, infra, p. 1230.

[Sec. 1.] [Fuel to enlisted men employed as clerks, etc.] * * * That the quartermaster of the Marine Corps be, and is hereby, authorized and directed to pay from appropriations fuel, Marine Corps, to enlisted men of the Marine Corps employed as clerks and messengers in the office of the commandant and in the offices of the staff officers of the Marine Corps commutation of fuel, at nine dollars each per month for clerks and eight dollars each per month for messengers, from and after January twenty-second, nineteen hundred and four, when, by a decision of the Comptroller of the Treasury, enlisted men so employed were denied the right to said commutation in said amounts. [33 Stat. L. 407.]

This is from the Deficiencies Appropriation Act of April 27, 1904, ch. 1630.

[Enlisted force increased.] Pay, marine corps: * * *
Pay of noncommissioned officers, musicians, and privates, as prescribed by law; and the following additional enlisted men namely, ten first sergeants, sixty-seven sergeants, one hundred and forty-two corporals, ten drummers, ten trumpeters, and one thousand privates, one million five hundred and fifty thousand six hundred and twenty-eight dollars. [33 Stat. L. 1113.]

This is from the Naval Appropriation Act of March 3, 1906, ch. 1481.
For other provisions relating to the number of enlisted men, see the Act of March 3, 1899, ch. 413, § 23, supra, p. 1227, and the notes thereto.
[Retirement—credit for Civil War service.] * * * That any officer of the Marine Corps below the grade of brigadier-general who served with credit as officer or as an enlisted man in the regular or volunteer forces during the civil war prior to April ninth, eighteen hundred and sixty-five, otherwise than as a cadet, and whose name is borne on the official register of the Marine Corps, and who has heretofore been, or may hereafter be, retired on account of wounds or disability incident to the service, or on account of age or after forty years' service, may, in the discretion of the President, by and with the advice and consent of the Senate, be placed on the retired list of the Marine Corps with the rank and retired pay of one grade above that actually held by him at the time of retirement: Provided, That this Act shall not apply to any officer who received an advance of grade since the date of his retirement or who has been restored to the Marine Corps and placed on the retired list by virtue of the provisions of a special Act of Congress. [34 Stat. L. 554.]

This and the following paragraph of the text are from the Naval Appropriation Act of June 29, 1906, ch. 3590.
Earlier provisions on this subject were made by the Act of April 27, 1904, ch. 1022, supra, p. 1229.

[Marine corps—deposit of savings—credit to appropriation for pay of marine corps.] * * * That hereafter enlisted men of the Marine Corps shall be entitled to deposit their savings with the United States, through any paymaster, in the same manner and under the same conditions as is now or may hereafter be provided for the enlisted men of the Navy: Provided, however, That the sums so deposited shall pass to the credit of the appropriation for pay of the Marine Corps. [34 Stat. L. 579.]

See the note to the preceding paragraph of the text.
The provisions referred to in the text, relating to deposits by the enlisted men of the navy, were made by the Act of Feb. 9, 1889, ch 119, supra, p. 1164.

[Marines detailed as cooks—pay.] * * * That hereafter privates [in Marine Corps] regularly detailed and serving as cooks, shall receive, in addition to the pay otherwise allowed by law, the following: First-class cooks, ten dollars per month; second-class cooks, eight dollars; third-class cooks, seven dollars; and fourth-class cooks, five dollars. [34 Stat. L. 1200.]

This is from the Naval Appropriation Act of March 2, 1907, ch. 2512.

[Marine corps—officers and enlisted men increased—vacancies.] * * * That from and after the passage of this Act, and in order to further increase the efficiency of the United States Marine Corps, the following additional officers, noncommissioned officers, drummers, trumpeters, and privates to those now provided by law for said corps are hereby authorized and directed, namely: One major-general commandant, in lieu of the present brigadier-general commandant; one colonel; one lieutenant-colonel; two majors; eighteen captains; seven first lieutenants; fourteen second lieutenants; one assistant adjutant and inspector, with rank of lieutenant-colonel;
one assistant quartermaster, with the rank of lieutenant-colonel; one assistant quartermaster, with the rank of major; and three assistant quartermasters, with the rank of captain; one assistant paymaster, with the rank of major; one assistant paymaster, with the rank of captain; two sergeant-majors; fifteen quartermaster-sergeants, five of whom are to serve in the pay department; twenty first sergeants; fifty sergeants; one hundred and twenty-five corporals; ten drummers; ten trumpeters; and five hundred and eighteen privates. Provided, That hereafter the number of enlisted men in the United States Marine Corps shall be such as the Congress may from time to time authorize. [35 Stat. L. 155.]

This and the following paragraph of the text are from the Naval Appropriation Act of May 13, 1908, ch. 166.

This paragraph superseded a provision of the Naval Appropriation Act of July 1, 1902, ch. 1368, 32 Stat. L. 686, which was as follows: "That from and after the date of the approval of this Act, the commandant of the Marine Corps shall have the rank, pay, and allowances of a major-general in the Army, and when a vacancy shall occur in the office of commandant of the corps, on the expiration of the service of the present incumbent, by retirement or otherwise, the commandant of the Marine Corps shall thereafter have the rank, pay, and allowance of a brigadier-general."

The provisions of the text relating to a major-general commandant were superseded by the Act of Dec. 19, 1913, ch. 3, infra, p. 1232. See the Act of March 3, 1899, ch. 413, § 23, supra, p. 1227, and the notes thereto.

[Method of filling vacancies.] * * * That the vacancies now existing in the line and staff departments of the United States Marine Corps and those created by this Act shall be filled in the manner provided by law. [35 Stat. L. 155.]

See the note to the preceding paragraph of the text.

[Restriction on extra-duty pay.] * * * That hereafter extra-duty pay will not be allowed to enlisted men of the Marine Corps except when they are regularly detailed thereon by a written order of the commandant of the corps. [35 Stat. L. 776.]

This is from the Naval Appropriation Act of March 3, 1909, ch. 255.

[Assistant paymasters' clerks.] * * * For each assistant paymaster, one clerk who shall hereafter be available where his services are required and who shall receive the same pay, allowances, and other benefits as are now or may hereafter be provided for paymasters' clerks of corresponding length of service in the United States Army (five clerks in all), seven thousand dollars. [36 Stat. L. 625.]

This is from the Naval Appropriation Act of June 24, 1910, ch. 378.

[Additional officers.] * * * Pay. Marine Corps: For pay and allowances prescribed by law of officers on the active list, including clerks for assistant paymasters, five in all, and for the following additional officers
hereby authorized: One major, four captains, four first lieutenants, and four second lieutenants. [37 Stat. L. 350.]

This and the two paragraphs of the text following are from the Naval Appropriation Act of Aug. 22, 1912, ch. 335.

[Increase of enlisted force.] * * * Pay of enlisted men, active list: Pay of noncommissioned officers, musicians, and privates, as prescribed by law, and for the following additional enlisted men hereby authorized: Four sergeants major, four quartermaster sergeants, twelve first sergeants, four gunnery sergeants, eighteen sergeants, thirty-five corporals, four drummers, four trumpeters and three hundred and fifteen privates; [37 Stat. L. 350.]

See the note to the preceding paragraph of the text.
See the Act of March 3, 1899, ch. 413, § 23, supra, p. 1227, and the notes thereto.

[Gunnery sergeants — pay, allowance, etc.] * * * That the gunnery sergeants of the Marine Corps shall hereafter receive the same pay, and be entitled to the allowances, rank, continuous-service pay, and retired pay of a first sergeant in said corps. [37 Stat. L. 351.]

See the note to the second preceding paragraph of the text.
Previous provisions relating to this subject were made by the Act of March 3, 1899, ch. 413, § 23, supra, p. 1227. See the notes to said section.

An Act To make the tenure of the office of the major general commandant of the Marine Corps for a term of four years.


[Marine Corps — tenure of office of major general commandant.] That hereafter when a vacancy shall exist in the position of commandant of the Marine Corps the President may appoint to such position, by and with the advice and consent of the Senate, an officer of the Marine Corps on the active list not below the grade of field officer, who shall hold office as such commandant for a term of four years, unless sooner relieved, and who, while so serving, shall have the rank, pay and allowances of a major general in the Army; and any officer appointed under the provisions of this Act who shall be retired from the position of commandant of the Marine Corps, in accordance with the provisions of sections twelve hundred and fifty-one, sixteen hundred and twenty-two, and sixteen hundred and twenty-three, Revised Statutes of the United States, or by reason of age or length of service, shall have the rank and retired pay of a major general; if retired for any other reason, he shall be placed on the retired list of officers of the grade to which he belonged at the time of his retirement: Provided, That an officer serving as commandant shall be carried as an additional number in his grade while so serving, and after his return to duty in his grade until said grade is reduced to the number authorized by law: Provided further, That nothing herein contained shall operate to increase or reduce the total
number of officers in the Marine Corps now provided by law. [38 Stat. L. 241.]

Previous provisions relating to major-general commandant were made by the Act of May 13, 1906, ch. 106, supra, p. 1230.
For R. S. sec. 1251, mentioned in the text, see WAR DEPARTMENT AND MILITARY ESTABLISHMENT.
R. S. secs. 1622, 1623, mentioned in the text, are given supra, p. 1222.

[Mileage.] • • • That hereafter no mileage shall be paid to any officer where Government transportation is furnished such officer. [38 Stat. L. 410.]

This is from the Naval Appropriation Act of June 30, 1914, ch. 130.
The provision of the text followed an appropriation for the Marine Corps. A like provision followed the Appropriation for Pay, Miscellaneous, and is given supra, p. 1219.

[Increased compensation while on sea duty.] • • • That the increased compensation as now fixed by law for the Marine Corps for foreign shore service shall hereafter be paid to the officers and enlisted men of that corps while on sea duty, in the same manner and under the same conditions as is provided by the Act approved May thirteenth, nineteen hundred and eight, for officers of the Navy. [38 Stat. L. 948.]

This and the two paragraphs of the text following are from the Naval Appropriation Act of March 3, 1915, ch. 83.
The Act of May 15, 1908, ch. 166, mentioned in the text, is given supra, p. 1230.

[Gunnery sergeants, corporals and privates—increase of numbers.] • • • That the number of gunnery sergeants heretofore authorized is increased by twenty; that the number of sergeants heretofore authorized is increased by twenty; that the number of corporals heretofore authorized is increased by seventy; that the number of privates heretofore authorized is decreased by one hundred and ten. [38 Stat. L. 948.]

See the note to the preceding paragraph of the text.
See also the Act of March 3, 1899, ch. 413, § 23, supra, p. 1227, and the notes thereto.

[Rations and commutations—enlisted men on shore duty—sales to officers, etc., of articles of subsistence stores.] • • • No law shall be construed to entitle enlisted men on shore duty to any rations or commutation therefor other than such as are now or may hereafter be allowed enlisted men in the Army: Provided, however, That when it is impracticable or the expense is found greater to supply marines serving on shore duty in the island possessions and on foreign stations with the Army ration, such marines may be allowed the Navy ration or commutation therefor: Provided, That hereafter so much of this appropriation as may be necessary may be applied for the purchase, for sale to officers, enlisted men, and civilian employees, of such articles of subsistence stores as may from time to time be designated and under such regulations as may be prescribed by the Secretary of the Navy. [38 Stat. L. 948.]

See the note to the second preceding paragraph of the text.
Provisions similar to those of this paragraph have appeared in like Appropriation Acts for many preceding years.
The payment to musicians in the marine corps of the cost price of their rations is not commutation, but is virtually a purchase of rations from them at the invoice price, and a musician who elects to take the price instead of subsistence in kind is not entitled to the commutation price of a navy ration prescribed by R. S. sec. 1555, supra, div. X. p. 1186. Jacque v. U. S., (1893) 28 Ct. Cl. 133.

Rations of marine held by civil authority.—Neither the pay, rations, nor clothing of enlisted marines taken by the civil authority for violations of the laws, can be withheld during their confinement and absence from their military stations. (1830) 2 Op. Atty.-Gen. 396.

XII. THE NAVAL RESERVE

[United States naval reserve—establishment.] * * * There is hereby established a United States naval reserve, which shall consist of citizens of the United States who have been or may be entitled to be honorably discharged from the Navy after not less than one four-year term of enlistment or after a term of enlistment during minority. The naval reserve shall be organized under the Bureau of Navigation and shall be governed by the Articles for the Government of the Navy and by the Naval Regulations and Instructions. Whenever actively employed with the Navy, or whenever employed in authorized travel to and from prescribed active duty with the Navy, its members shall be employed as members of the naval reserve and shall while so employed be held and considered to be in all respects in the same status as enlisted men of the Navy on active duty, except that they shall not be advanced in rating in time of peace. When not actively employed with the Navy, members of the naval reserve shall not be entitled to any pay, bounty, gratuity, or pension except the pay expressly provided for members of the naval reserve by the provisions of this Act, nor shall they be entitled to retirement by reason of such service in the naval reserve.

Enlistments in the naval reserve shall be made in the rating in which last honorably discharged from the Navy for a period of four years unless sooner discharged by competent authority. No man shall be first enlisted in the naval reserve after eight years from the date of his last discharge from the Navy nor unless he be found to be physically fit to perform the duties of the rating in which last discharged, nor shall any man whose last service in the Navy was terminated by any means other than by an honorable discharge be eligible for enlistment in the naval reserve. Reenlistments in the naval reserve shall be made under such regulations as may be prescribed by the Secretary of the Navy.

Enlistments in the naval reserve shall be made in two classes. Class one shall consist of those men who enlist in the naval reserve within four months from the date of their last honorable discharge from the Navy. Class two shall consist of those men who enlist in the naval reserve after four months and within eight years from the date of their last honorable discharge from the Navy.

In addition to the enlistments in the naval reserve above provided, the Secretary of the Navy is authorized to transfer to the naval reserve at the expiration of an enlistment any enlisted man of the Navy who may, after two years from the date of approval of this Act, complete service in the Navy of sixteen, or twenty or more years and be entitled at the expiration
of his enlistment to an honorable discharge. Such transfers shall only be made upon voluntary application and in the rating in which then serving, and the men so transferred shall be continued in the naval reserve until discharged by competent authority.

Members of the naval reserve of class one and men transferred to the naval reserve shall be required to keep on hand such part of the uniform clothing outfit as may be prescribed by the Secretary of the Navy, and all members of the naval reserve shall be issued a distinctive badge or button which may be worn with civilian dress.

Members of class one who have served less than eight years in the Navy shall be paid at the rate of $30 per annum, and those who have served eight or more years and less than twelve years in the Navy shall be paid at the rate of $60 per annum and those who have served twelve or more years in the Navy, $100 per annum. All members of the naval reserve of class two shall be paid at the rate of $12 per annum, and when first called into active service on board a vessel of the Navy shall receive an allowance for an outfit of clothing not exceeding $30 in value, to be expended under regulations prescribed by the Secretary of the Navy.

Members of the naval reserve who have, when transferred to the naval reserve, completed service in the Navy of sixteen, or twenty or more years shall be paid at the rate of one-third, and one-half, respectively, of the base pay, plus permanent additions thereto, which they were receiving at the close of their last service in the Navy.

Members of the naval reserve may, in time of peace, be required to perform not less than one month's active service on board a vessel of the Navy, during each year of service in the naval reserve, and such active service shall not exceed two months in any one year: Provided, That the aforesaid active service with the Navy may be required at any time after entrance in the naval reserve. In time of war they may be required to perform active service with the Navy throughout the war, not to exceed the term of enlistment in the case of those enlisted in the naval reserve. Any pay which may be due any member of the naval reserve shall be forfeited when so ordered by the Secretary of the Navy upon the failure, under such conditions as may be prescribed by the Secretary of the Navy, of such man to report for muster and inspection.

Those members of the naval reserve of class one, and those members who have been transferred to the naval reserve, who reenlist in the Navy within four months from the date of their discharge from the naval reserve, shall not be entitled to a gratuity of four months' pay, but their reenlistment in the Navy shall be held and considered to have been made within four months from the date of discharge from the Navy for the purpose of continuous service pay. The period of time during which members of the naval reserve were actively employed with the Navy while enlisted in the naval reserve shall, for the purpose of retirement, be counted as active service in the Navy in the case of those who reenlist in the Navy after service in the naval reserve. [38 Stat. L. 940.]

XIII. DESERTIONS

An act to relieve certain appointed or enlisted men of the Navy and Marine Corps from the charge of desertion.


[Sec. 1.] [Removal from record of charge of desertion — where term of service completed.] That the charge of desertion now standing on the rolls and records of the Navy or Marine Corps against any appointed or enlisted man of the Navy or Marine Corps who served in the late war may in the discretion of the Secretary of the Navy be removed in all cases where it shall be made to appear to the satisfaction of the Secretary of the Navy from such rolls and records or from other satisfactory evidence, that any such appointed or enlisted man served faithfully until the expiration of his term of enlistment, or until the first day of May anno Domini eighteen hundred and sixty-five, having previously served six months or more, or was prevented from completing his term of service by reason of wounds received or disease contracted in the line of duty, but who, by reason of absence from his command at the time he became entitled to his discharge, failed to be mustered out and to receive a discharge from the service: Provided, That no such appointed or enlisted man shall be relieved under this section who, not being sick or wounded, left his command, without proper authority, while the same was in the presence of the enemy. [25. Stat. L. 442.]

This Act is known as the "Desertion Act." This Act was revived and re-enacted by the Act of May 24, 1900, ch. 560, § 1, infra, p. 1238.

Liberal construction.—The statute was intended as a benefaction and should be construed liberally in the direction of effectuating the beneficent purpose of Congress. Cole v. U. S., (1899) 34 Ct. Cl. 448.

The phrase "by reason of absence from his command at the time he became entitled to his discharge," as used in this section, is to be regarded as equally applicable to the date when the term of enlistment of the applicant expired, and to the date when he would have received his discharge along with other enlisted men with whom he served, had he been present. (1889) 19 Op. Atty.-Gen. 221.

Right to bounty and prize money.—The purpose of the statute was to remove from many worthy soldiers the stigma of being deserters and give them all the rights and emoluments to which they would have been entitled had not the charge of desertion been made, and when the secretary under the law removes the charge from the record the soldier stands rehabilitated with all of his original rights. He is entitled to bounty and prize money withheld on account of the alleged desertion. Cole v. U. S., (1899) 34 Ct. Cl. 446.

Sec. 2. [Where man returned to duty after desertion, or died.] That the Secretary of the Navy is hereby authorized to remove the charge of desertion standing on the rolls or records of the Navy or Marine Corps against any appointed or enlisted man of the Navy or Marine Corps who served in the late war, in all cases where it shall be made to appear, to the satisfaction of the Secretary of the Navy, from such rolls or from other satisfactory evidence, that such appointed or enlisted man charged with desertion or with absence without leave, after such charge of desertion or absence without leave, and within a reasonable time thereafter, voluntarily returned to and served in the line of his duty until he was mustered out of the service, and received a certificate of discharge therefrom, or, while so absent, and before the expiration of his term of enlistment, died from
wounds, injury, or disease received or contracted in the service and in the line of duty. [25 Stat. L. 442.]

Sec. 3. [In case of re-enlistment without proper discharge.] That the charge of desertion now standing on the rolls or records of the Navy or Marine Corps against any appointed or enlisted man of the Navy or Marine Corps who served in the late war, by reason of his having enlisted at any station or on board of any vessel of the Navy without having first received a discharge from the station or vessel in which he had previously served, shall be removed in all cases wherein it shall be made to appear to the satisfaction of the Secretary of the Navy from such rolls and records, or from other satisfactory testimony, that such re-enlistment was not made for the purpose of securing bounty or other gratuity that he would not have been entitled to, had he remained under his original term of enlistment: Provided, That no appointed or enlisted man shall be relieved under this act who, not being sick or wounded, left his command without proper authority while the same was in the presence of the enemy, or who, at the time of leaving his command, was in arrest or under charges, or in whose case the period of absence from the service exceeded three months. [25 Stat. L. 442.]

See also the Act of March 2, 1889, ch. 390, § 3, infra, p. 1238.

Scope of proviso.—The proviso herein is applicable to this section alone. (1889) 19 Op. Atty.-Gen. 221.

Sec. 4. [Certificates of discharge in case of removal of charge of desertion.] That in all cases where the charge of desertion shall be removed under the provisions of this act from the record of any appointed or enlisted man of the Navy or Marine Corps who has not received a certificate of discharge it shall be the duty of the Secretary of the Navy to issue to such appointed or enlisted man, or in case of his death, to his heirs or legal representatives, a certificate of discharge. [25 Stat. L. 443.]

Sec. 5. [Pay and bounty when charge is removed.] That when the charge of desertion shall be removed under the provisions of this act from the record of any appointed or enlisted man of the Navy or Marine Corps, such man, or, in case of his death, the heirs or legal representatives of such man, shall receive all pay and bounty which may have been withheld on account of such charge of desertion or absence without leave: Provided, however, That this act shall not be so construed as to give to any such man as may be entitled to relief under the provisions of this act, or, in case of his death, to the heirs or legal representatives of any such man, the right to receive pay and bounty for any period of time during which such man was absent from his command without leave of absence: And provided further, That no appointed or enlisted man, nor the heirs or legal representatives of any such man, who served in the Navy or Marine Corps a period of less than six months shall be entitled to the benefit of the provisions of this act: And provided further, That all applications for relief under this act shall be made to and filed with the Secretary of the Navy within the period of five years from and after its passage, and all applications not so made and
filed within the said term of five years shall be forever barred, and shall not be received or considered. [25 Stat. L. 443.]

By the Act of May 24, 1900, ch. 550, § 2, infra, p. 1239, the limitation of time imposed by this section was removed.

SEC. 6. [Repeal.] That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed. [25 Stat. L. 443.]

SEC. 3. [Removal from record of charge of desertion—in case of re-enlistment.] That the charge of desertion now standing on the rolls and records in the office of the Adjutant-General of the Army against any regular or volunteer soldier who served in the late war of the rebellion by reason of his having enlisted in any regiment, troop, or company, or in the United States Navy or Marine Corps, without having first received a discharge from the regiment, troop, or company in which he had previously served, shall be removed in all cases wherein it shall be made to appear to the satisfaction of the Secretary of War, from such rolls and records, or from other satisfactory testimony, that such re-enlistment was not made for the purpose of securing bounty or other gratuity that he would not have been entitled to, had he remained under his original term of enlistment; that the absence from the service did not exceed four months, and that such soldier served faithfully under his re-enlistment. [25 Stat. L. 870.]

This is from the Act of March 2, 1889, ch. 390, entitled "An Act for the relief of certain volunteer and regular soldiers of the late war and the war with Mexico." See War Department and Military Establishment.


Desertion after arrest for prior desertion.—A soldier enlisted for three years Aug. 27, 1862, who deserts between Sept. 27 and Oct. 16, 1862, and enrolls Oct. 16, 1862, for nine months, and serves faithfully and is honorably discharged Aug. 16, 1863, is then arrested as a deserter, admitted to a United States hospital Jan. 5, 1864, and deserts Feb. 8, 1864, his second enrollment not having been for the purpose of bounty or gratuity other than what he would have received under the original term of his enlistment, is barred by his desertion after his arrest in January, 1864, from deriving advantage under this act. (1891) 20 Op. Atty.-Gen. 288.

An Act To amend section five of an act to relieve certain appointed or enlisted men of the Navy and Marine Corps from the charge of desertion, approved August fourteenth, eighteen hundred and eighty-eight. [Act of May 24, 1900, ch. 550, 31 Stat. L. 183.]

[SEC. 1.] [Removal from record of charge of desertion.] That chapter eight hundred and ninety, volume twenty-five, of the United States Statutes at Large, entitled "An Act to relieve certain appointed or enlisted men of the Navy and Marine Corps from the charge of desertion," approved August fourteenth, eighteen hundred and eighty-eight, be, and the same is hereby, revived and re-enacted. [31 Stat. L. 183.]

The Act of Aug. 14, 1888, ch. 890, revived by the text, is given supra, p. 1236.
SEC. 2. [Removal of limitation of time of application for relief.] That section five of the said Act be, and is hereby, so amended as to remove the limitation of time within which applications for relief may be received and acted upon under the provisions of said Act. [31 Stat. L. 183.]

Section 5 of the Act of Aug. 14, 1888, ch. 800, amended by the text, is given supra, p. 1237.

XIV. MEDALS

SEC. 7. [Medals of honor.] That the Secretary of the Navy be, and is hereby, authorized to cause two hundred "medals of honor" to be prepared, with suitable emblematic devices, which shall be bestowed upon such petty officers, seamen, landsmen, and marines as shall most distinguish themselves by their gallantry in action and other seamanlike qualities during the present war * * * . [12 Stat. L. 330.]

This is from an Act of Dec. 21, 1861, ch. 1, entitled "An Act to further promote the Efficiency of the Navy."

A further provision of this paragraph made an appropriation for carrying it into effect.

Subsequent provisions relating to this subject were made by the Act of July 16, 1862, ch. 193, § 10, 12 Stat. L. 584, which were superseded by R. S. sec. 1407, supra, p. 1073.

This section might be regarded as temporary only; but reference was subsequently made thereto by the Res. of May 4, 1898, No. 30, given in the following paragraph of the text.

A Res. of March 3, 1901, No. 18, 31 Stat. L. 1465, provided as follows: "That the Secretary of the Navy be, and he is hereby, authorized to cause to be struck bronze medals commemorative of the naval and other engagements in the waters of the West Indies and on the shores of Cuba during the war with Spain, and to distribute the same to the officers and men of the Navy and Marine Corps who participated in any of said engagements deemed by him of sufficient importance to deserve commemoration: Provided, That officers and men of the Navy or Marine Corps who rendered specially meritorious service, otherwise than in battle, may be rewarded in like manner: And provided further, That any person who may, under the provisions of this Act, be entitled to receive recognition in more than one instance shall, instead of a second medal, be presented with a bronze bar, appropriately inscribed, to be attached to the ribbon by which the medal is suspended."

Joint Resolution Relative to the medal of honor authorized by the Acts of December twenty-first, eighteen hundred and sixty-one, and July sixteenth, eighteen hundred and sixty-two.

[Res. of May 4, 1898, No. 30, 30 Stat. L. 741.]

[Rosettes to be furnished seamen holding medals of honor.] That the Secretary of the Navy be, and he is hereby, authorized to issue to any person to whom a medal of honor has been awarded, or may hereafter be awarded, under the provisions of the Acts approved December twenty-first, eighteen hundred and sixty-one, and July sixteenth, eighteen hundred and sixty-two, a rosette or knot to be worn in lieu of the medal, and a ribbon to be worn with the medal; said rosette or knot and ribbon to be each of a pattern to be prescribed and established by the President of the United States, and any appropriation that may hereafter be available for the contingent expenses of the Navy Department is hereby made available for the purposes of this Act: Provided, That whenever a ribbon issued under the
provisions of this Act shall have been lost, destroyed, or rendered unfit for use, without fault or neglect on the part of the person to whom it was issued, the Secretary of the Navy shall cause a new ribbon to be issued to such person without charge therefor. [30 Stat. L. 741.]

See the preceding paragraph of the text and the note thereto.

An Act For the reward of enlisted men of the Navy or Marine Corps.


[Medals of honor.] That any enlisted man of the Navy or Marine Corps who shall have distinguished himself in battle or displayed extraordinary heroism in the line of his profession shall, upon the recommendation of his commanding officer, approved by the flag-officer and the Secretary of the Navy, receive a gratuity and medal of honor as provided for seamen in section fourteen hundred and seven of the Revised Statutes. [31 Stat. L. 1099.]

R. S. sec. 1407 mentioned in the text is given supra, p. 1078.

[Medal of honor — President to prepare — to whom awarded.] * * *
The President of the United States is hereby empowered to prepare a suitable medal of honor to be awarded to any officer of the Navy, Marine Corps, or Coast Guard who shall have distinguished himself in battle or displayed extraordinary heroism in the line of his profession. [38 Stat. L. 931.]

This is from the Naval Appropriation Act of March 3, 1915, ch. 83.

NAVY DEPARTMENT

See Navy

NAVY PERSONNEL ACT

See Navy

NAVY REORGANIZATION ACT

See Navy
NAVY YARDS
See Navy

NE EXEAT
See Judiciary

NELSON ACTS
See Alaska; Bankruptcy; Judiciary

NELSON AMENDMENT
See Education
NEUTRALITY

Res. of March 4, 1915, No. 14, 1242.

Maintenance of Neutrality — Withholding Clearance of Vessels — Penalties, 1242.

Joint Resolution To empower the President to better enforce and maintain the neutrality of the United States.

[Res. of March 4, 1915, No. 14, 38 Stat. L. 1226.]

[Maintenance of neutrality — withholding clearance of vessels — penalties.] That, from and after the passage of this resolution, and during the existence of a war to which the United States is not a party, and in order to prevent the neutrality of the United States from being violated by the use of its territory, its ports, or its territorial waters as the base of operation for the armed forces of a belligerent, contrary to the obligations imposed by the law of nations, the treaties to which the United States is a party, or contrary to the statutes of the United States, the President be, and he is hereby, authorized and empowered to direct the collectors of the customs under the jurisdiction of the United States to withhold clearance from any vessel, American or foreign, which he has reasonable cause to believe to be about to carry fuel, arms, ammunition, men, or supplies to any warship, or tender, or supply ship of a belligerent nation, in violation of the obligations of the United States as a neutral nation.

In case any such vessel shall depart or attempt to depart from the jurisdiction of the United States without clearance for any of the purposes above set forth, the owner or master or person or persons having charge or command of such vessel shall severally be liable to a fine of not less than $2,000 nor more than $10,000, or to imprisonment not to exceed two years, or both, and, in addition, such vessel shall be forfeited to the United States.

That the President of the United States be, and he is hereby, authorized and empowered to employ such part of the land or naval forces of the United States as shall be necessary to carry out the purposes of this resolution.

That the provisions of this resolution shall be deemed to extend to all land and water, continental or insular, within the jurisdiction of the United States. [38 Stat. L. 1226.]

R. S. secs. 5281–5291 constituted title 67 of the Revised Statutes, "Neutrality." These sections were incorporated in the Penal Laws of 1909, chiefly in chapter 2, and were repealed by section 341 thereof. See Penal Laws.


NEWLANDS ACT

See Waters

[1242]
NEWLANDS RESOLUTION
See HAWAIIAN ISLANDS

NEW MEXICO ENABLING ACT
See STATES

NEW TRIALS
See JUDICIARY

NOBEL PRIZE
See INDUSTRIAL PEACE FOUNDATION
NOTARIES PUBLIC

R. S. Sec. 1778. Taking Oaths, Acknowledgments, etc., 1244.
Act of Aug. 15, 1876, ch. 304, 1245.
Taking Depositions, etc., 1245.

Act of March 22, 1902, ch. 273, 1246.
Acknowledgment of Deeds, etc., in Philippine Islands and Porto Rico, of Lands, etc., in Territories, 1246.

Acknowledgment of Deeds, etc., in Guam, Samoa, and Canal Zone — Certificates, 1246.

CROSS-REFERENCES

In Alaska, see ALASKA.
Authority of Consular Officers to Act as, see DIPLOMATIC AND CONSULAR OFFICERS.
Taking Depositions, see EVIDENCE.
Authority to Take Affidavit of Citizenship of Applicants for Mineral Patents, see MINERAL LANDS, MINES, AND MINING.
Protest of National Bank Notes, see NATIONAL BANKS.

Sec. 1778. [Taking oaths, acknowledgments, etc.] In all cases in which, under the laws of the United States, oaths or acknowledgments may now be taken or made before any justice of the peace of any State or Territory, or in the District of Columbia, they may hereafter be also taken or made by or before any notary public duly appointed in any State, district, or Territory, or any of the commissioners of the circuit courts, and, when certified under the hand and official seal of such notary or commissioner, shall have the same force and effect as if taken or made by or before such justice of the peace. [R. S.]


By Judicial Code, §§ 259–291, the circuit courts mentioned in the text were abolished and their powers and duties conferred on the district courts. See JUDICIARY, vol. 5, p. 1082.
The office of Commissioner of the Circuit Court ceased to exist on June 30, 1897, and the appointment of United States Commissioners, with the same powers and duties as were formerly imposed on the Commissioners of the Circuit Courts, was authorized by the Act of May 28, 1896, ch. 252, § 19, given in JUDICIAL OFFICERS, vol. 4, p. 631.

Oath in investigation as to loss of registered letter.—In U. S. v. Law, (W. D. Va. 1892) 50 Fed. 915, it was held that this section limited the authority of a notary public to administer an oath to cases in which a justice of the peace had the same authority and that a justice of the peace had no authority to administer an oath in an investigation by the post office department as to the alleged loss of a registered letter. U. S. v. Law, (W. D. Va. 1892) 50 Fed. 915.

Oath to return made by national bank to comptroller of currency.—A notary public commissioned by a state had no authority under this statute nor under the Act of 1876, ch. 304, nor at any time before the Act of Feb. 26, 1881, ch. 82, to administer the oath required by R. S. sec. 5211 (see note, p. 792) to be made

[1244]


Powers confined to district.—The office of notary public being a local one, and a taking of acknowledgments of deeds by him being as judicial act, when a notary public appointed for the District of Columbia goes to a foreign country outside of the limits for which he is appointed he loses, while absent, his official character, and in the absence of a statute to the contrary cannot take acknowledgments of deeds, while so absent, for property situated in the District of Columbia. Notary Public, (1887) 19 Op. Atty.-Gen. 81.

An act to provide for the appointment of commissioners for taking affidavits, &c., for the courts of the United States.

[Act of Aug. 15, 1876, ch. 304, 19 Stat. L. 206.]

[Taking depositions, etc.] That notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do. [19 Stat. L. 206.]

By Judicial Code, §§ 289-291, the circuit courts mentioned in the text were abolished and their powers and duties conferred on the district courts. See Judicary, vol. 5, p. 1082.

Introductory.—In section 1778 (see preceding section) the power which was formerly granted notaries by the provision of Laws of 1834, ch. 189, § 2, of administering oaths in the Circuit Courts of the United States was omitted. By the Act of Aug. 15, 1876, ch. 304, this power was again conferred upon notaries. Buerk v. Inhauser, (1876) 4 Fed. Cas. No. 2,107a.

Enlargement of powers.—The powers of notaries were greatly enlarged by this statute. From the terms of the statute it is manifest that Congress designed to confer upon them the same authority in regard to taking testimony and affidavits to be used in the courts of the United States as was then possessed by the commissioners of the circuit (now district) court. In re Donnelly, (D. C. N. J. 1881) 5 Fed. 783. See also U. S. v. Neale, (E. D. Va. 1883) 14 Fed. 767.

In criminal cases.—The provisions of this statute placing notaries on the footing of commissioners in respect to depositions and affidavits applies only to civil causes, as commissioners have no general powers in respect to depositions and affidavits in criminal proceedings. Therefore a notary public has no power to administer a certified oath to a summary complaint or an assault upon the high seas. U. S. v. Smith, (C. C. Mass. 1883) 17 Fed. 611.

Bankruptcy proceedings.—Under the Bankruptcy Act, section 20 (see vol. 1, p. 750), a notary public is authorized to administer the oath to a proof of claim, being an officer authorized to administer oaths in proceedings in the courts of the United States by Act Aug. 15, 1876, ch. 304, 19 Stat. L. 206, and such oath is sufficiently authenticated, prima facie, by what purports to be the notary's official signature and seal, although made in a different state from that in which the proceedings are pending, and without regard to the special requirements of the statutes of either state. In re Pancost, (E. D. Pa. 1904) 129 Fed. 643.

The provision of this statute authorizing notaries public to take depositions and do all other acts in relation to taking testimony to be used in the courts of the United States, and to take acknowledgments and affidavits in the same manner and with the same effect as commissioners

Seal.—This statute differs from some prior statutes relating to the powers of notaries to take testimony and to take acknowledgments and affidavits, in that it does not in terms require the signature and authority of the notary to be attested by his official seal. "Under this statute, while a court of the United States may doubtless make any reasonable rule to ascertain the authenticity of the notary's signature, as by requiring his seal to be affixed or a certificate of a state officer to his appointment and authority as such notary, yet it would seem that any such evidence in addition to his official signature would be required not to make the act of the notary valid, but simply to satisfy the court of the fact that the certifying officer was a notary; and if the court is satisfied with the official signature of the notary, I do not see how any other court can question the regularity of its action. The seal was not necessary under this statute to a due verification, and if the affixing of the seal were the proper and customary mode of proving to the court the notary's official character, the irregularity of the absence of such proof would not vitiate the process. At most it would be a mere irregularity which cannot be availed of after decree, even in case of a judgment by default." The tug E. W. Gorgas. (1879) 10 Ben. 460, 8 Fed. Cas. No. 4385.

This statute, unlike the Act of 1874, is silent as to such officers attesting their acts by their official seal. It is, therefore, doubtful whether in this district the courts of the United States would deem such an attestation indispensable, especially as the laws of the state expressly provide that no such certification is necessary to the validity or sufficiency of any oath, affirmation, or affidavit." In re Donnelly, (D. C. N. J. 1881) 5 Fed. 783.

Notary public and justice of the peace.

—In U. S. v. Harden, (S. D. Ga. 1903) 135 Fed. 419, it was held that since a United States commissioner was authorized by this Act to take the oath of a proposed surety on a liquor distiller's bond, on which perjury might be assigned, an indictment for perjury in the taking of such oath was not defective on the ground that the officer administering it styled himself as "notary public and ex officio justice of the peace."

An Act For the acknowledgment of deeds and other instruments in the Philippine Islands and Porto Rico affecting land situate in the District of Columbia or any Territory of the United States.


[Acknowledgment of deeds, etc., in Philippine Islands and Porto Rico of lands, etc., in Territories.] That deeds and other instruments affecting land situate in the District of Columbia or any Territory of the United States may be acknowledged in the Philippine Islands and Porto Rico before any notary public appointed therein by proper authority or any officer therein who has ex officio the powers of a notary public: Provided, That the certificate by such notary in the Philippine Islands or in Porto Rico, as the case may be, shall be accompanied by the certificate of the attorney-general of Porto Rico or the governor or attorney-general of the Philippine Islands to the effect that the notary taking said acknowledgment was in fact the officer he purported to be. [32 Stat. L. 88.]

An Act For the acknowledgment of deeds and other instruments in Guam, Samoa, and the Canal Zone to affect lands in the District of Columbia and other Territories.


[Acknowledgments of deeds, etc., in Guam, Samoa, and Canal Zone certificates.] That deeds and other instruments affecting land situate in
the District of Columbia or any Territory of the United States may be acknowledged in the islands of Guam and Samoa or in the Canal Zone before any notary public or judge, appointed therein by proper authority, or by any officer therein who has ex officio the powers of a notary public: Provided, That the certificate by such notary in Guam, Samoa, or the Canal Zone, as the case may be, shall be accompanied by the certificate of the governor or acting governor of such place to the effect that the notary taking said acknowledgment was in fact the officer he purported to be; and any deeds or other instruments affecting lands so situate, so acknowledged since the first day of January, nineteen hundred and five, and accompanied by such certificate shall have the same effect as such deeds or other instruments hereafter so acknowledged and certified. [34 Stat. L. 552.]

By an Act of June 7, 1878, ch. 162, § 6, entitled: “An Act regulating the appointment of justices of peace, commissioners of deeds, and constables within and for the District of Columbia and for other purposes” the following provisions were made:

Sec. 5. The President of the United States is hereby authorized to appoint as many commissioners of deeds throughout the United States as he may deem necessary, with powers to take the acknowledgment of deeds for the conveyance of property within the said District, administer oaths, and take depositions in cases pending in the courts of said District in the manner prescribed by law; to whose acts, properly attested by their hands and seals of office, full faith and credit shall be given. The President shall also have power to appoint such number of notaries public, residents of said District, as in his discretion the business of the District may require; said commissionors of deeds and notaries public to hold their offices for a period of five years, removable at discretion. [30 Stat. L 104.]

NURSERY STOCK QUARANTINE ACT
See AGRICULTURE

OATH OF OFFICE ACT
See PUBLIC OFFICERS

OBSCENITY
See PENAL LAWS

OBSTRUCTING JUSTICE
See PENAL LAWS
OBTAINING AND ISSUING CIRCULATING NOTES
See NATIONAL BANKS

OCEAN MAIL ACT
See POSTAL SERVICE

OFFICE AND COMPENSATION OF THE PRESIDENT
See PRESIDENT

OFFICERS AND PERSONS IN EMPLOY OF SENATE AND HOUSE OF REPRESENTATIVES
See CONGRESS

OFFICERS OF INDIAN AFFAIRS
See INDIANS

OFFICERS OF INTERNAL REVENUE
See INTERNAL REVENUE
OFFICERS OF MERCHANT VESSELS

R. S. 4131. What Are Vessels of the United States — All Officers to Be Citizens — Exception, 1249.
R. S. 4250. Removal of Captain by Owners of Vessels, 1251.
R. S. 4401. Vessels Navigating Coastwise and on the Great Lakes, 1252.
R. S. 4438. License of Officers by Inspectors, 1252.
R. S. 4439. License of Captain, 1254.
R. S. 4440. License of Mates, 1255.
R. S. 4441. License of Engineer, 1255.
R. S. 4442. License of Pilot, 1256.
R. S. 4443. License of Captain or Mate as Pilot, 1257.
R. S. 4445. Oath of Licensed Officers — Oath of Applicants for License — Penalty for Change of License, 1257.
R. S. 4446. License to Be Exhibited, 1258.
R. S. 4447. Renewal of Officer’s License, 1258.
R. S. 4448. Licensed Officers to Assist Inspectors in Examinations — Divulging Information, 1258.
R. S. 4449. Revocation, etc., of Officer’s License for Refusal to Serve, etc., 1259.
R. S. 4451. Payment of Marshal and Witnesses, 1260.
R. S. 4452. Appeal to Supervising Inspector — Appeal to Supervising Inspector-General, 1261.


Sec. 2. Terms of License — Renewal — Suspension — Naval Service — Pensions, 1262.
3. Effect, 1263.

Act of Aug. 18, 1914, ch. 256, 1263.

Sec. 2. Suspension of Requirements as to Citizenship of Watch Officers, 1263.

CROSS-REFERENCES

Duties under Customs Laws, see CUSTOMS DUTIES.
Duties under Immigration Laws, see CHINESE EXCLUSION; IMMIGRATION.
Duties as to Log Books, see LOG BOOKS.
Duties as to Seamen, see SEAMEN.
Duties as to Registry, Enrollment, and License, see SHIPPING AND NAVIGATION.
See also COAST GUARD; COLLISIONS; PILOTAGE; STEAM VESSELS.

Sec. 4131. [What are vessels of the United States — all officers to be citizens — exception.] Vessels registered pursuant to law and no others, except such as shall be duly qualified according to law for carrying on the coasting or fishing trade, shall be deemed vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels; but no such vessel shall enjoy such benefits and privileges longer than it shall continue to be wholly owned by a citizen or citizens of the United States or a
corporation created under the laws of any of the States thereof, and be commanded by a citizen of the United States. And all the officers of vessels of the United States who shall have charge of a watch, including pilots, shall in all cases be citizens of the United States. The word "officers" shall include the chief engineer and each assistant engineer in charge of a watch on vessels propelled wholly or in part by steam; and after the first day of January, eighteen hundred and ninety-seven, no person shall be qualified to hold a license as a commander or watch officer of a merchant vessel of the United States who is not a native-born citizen, or whose naturalization as a citizen shall not have been fully completed. In cases where, on a foreign voyage, or on a voyage from an Atlantic to a Pacific port of the United States, any such vessel is for any reason deprived of the services of an officer below the grade of master, his place, or a vacancy caused by the promotion of another officer to such place, may be supplied by a person not a citizen of the United States until the first return of such vessel to its home port; and such vessel shall not be liable to any penalty or penal tax for such employment of an alien officer. [R. S.]

The section originally read as follows:

"Sec. 4131. Vessels registered pursuant to law, and no others, except such as shall be duly qualified, according to law, for carrying on the coasting trade and fisheries, or one of them, shall be deemed vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels; but they shall not enjoy the same longer than they shall continue to be wholly owned by citizens and to be commanded by a citizen of the United States. And officers of vessels of the United States shall in all cases be citizens of the United States." Act of Dec. 31, 1792, ch. 1, 1 Stat. 287.

It was first amended by an Act of June 26, 1884, ch. 121, § 1, 23 Stat. L. 53 by changing the last clause thereof to read as follows:

"All the officers of vessels of the United States shall be citizens of the United States, except that in cases where, on a foreign voyage, or on a voyage from an Atlantic to a Pacific port of the United States, any such vessel is for any reason deprived of the services of an officer below the grade of master, his place, or a vacancy caused by the promotion of another officer to such place, may be supplied by a person not a citizen of the United States until the first return of such vessels to its home port; and such vessel shall not be liable to any penalty or penal tax for such employment of an alien officer."

It was again amended by an Act of May 28, 1896, ch. 255, § 1, 29 Stat. L. 188, to read as given in the text with the exception of the last sentence which was a part of the "last clause" of the original section as amended by the previously cited Act of June 26, 1884, ch. 121, § 1. Said last sentence was expressly saved from repeal by the amending Act of May 28, 1896, ch. 255, by virtue of sec. 3 thereof, infra, p. 1283.

As so amended this section superseded an Act of April 17, 1874, ch. 107, 18 Stat. L. 10, which was as follows:

"That any alien who, in the manner provided for by law, has declared his intention to become a citizen of the United States, and who shall have been a permanent resident of the United States for at least six months immediately prior to the granting of such license, may be licensed, as if already naturalized, to serve as an engineer or pilot upon any steam-vessel subject to inspection under the provisions of the Act entitled 'An Act to provide for the better security of life on board of vessels propelled, in whole or in part, by steam, and for other purposes,' approved February twenty-eighth, eighteen hundred and seventy-one." [18 Stat. L. 30.]

But the Act here quoted was not superseded by the prior amending Act of June 26, 1884, ch. 121, previously cited. See 21 Op. Atty.-Gen. (1890) 166.

The provisions of the Act of Feb. 28, 1871, ch. 100, 16 Stat. L. 440, referred to in this superseded Act were incorporated in the Revised Statutes as secs. 4599-4600. See SHIPPING AND NAVIGATION.

Provisions relating to the term of license, renewal, etc., were made by the Act of May 28, 1896, ch. 255, § 2, given as amended, infra, p. 1282.

By the Act of Aug. 18, 1914, ch. 296, § 2, infra, p. 1283, the President was authorized to suspend the requirements as to citizenship of watch officers.

"Vessels of the United States"—In general.—"A vessel of the United States" means more than a vessel whose nationality is American. It means such a vessel
ar is defined in this section and no other.
The Alta, (C. C. A. 9th Cir. 1905) 136
"Vessels registered pursuant to law."—
This section provides that vessels regis-
tered pursuant to law shall be deemed
vessels of the United States. As to what
vessels are entitled to register see R. S.
sec. 4132 and authorities there consid-
ered—
in the title Shipping and Navigation.
Foreign ownership.—No vessel in which
a foreigner is directly or indirectly in-
terested can lawfully be registered as a ves-
sel of the United States; nor can it be deemed
a vessel of the United States or entitled
to the benefits or privileges appertaining
to a vessel of that description. So where
a vessel has been registered, but the regis-
try was obtained by a false oath as to its
ownership, the vessel being at the time
owned in whole or in part by foreigners,
it cannot be deemed a vessel of the United
A canal boat is not a vessel of the
United States within the meaning of this
section. Witherbee v. Taft, (1900) 51
App. Div. 87, 64 N. Y. S. 347.
"Citizen of the United States."—Citiz-
ens of the United States who resigned
commissions in the navy of the United
States and entered the rebel service did
not lose their citizenship by becoming
traitors, and if otherwise qualified are
competent to be officers of vessels of the
United States. Citizenship of Rebel
An alien seaman, though he has de-
clared his intention to become a citizen of
the United States, and has served three
years on vessels of the United States, is
ineligible to the position of an officer of
an American vessel. For that full citi-
zenship is required. Navigation Laws,
(1883) 17 Op. Atty-Gen. 534, wherein the
Attorney-General said: "But by section
2174, Revised Statutes, a seaman, being a
foreigner, after declaring his intention to
become a citizen of the United States, and
after serving three years on board mer-
chant vessels of the United States (which
is this case), shall be deemed a citizen of
the United States for certain purposes,
to wit, for the purpose of manning and
serving on board any merchant vessel of
the United States and for all purposes of
protection as an American citizen. This,
however, is far from being full citizen-
ship. For all other rights and privileges
of United States citizenship, including
that of being eligible to the position of an
officer of a United States vessel, this alien
seaman must wait until he has complied
with the conditions prescribed by the laws
to make him a citizen generally and for
all purposes." This opinion is followed in
An alien cannot, under the laws of the
United States governing the registry of
vessels, be deemed master of a vessel, even
for the purpose of defeating his claim to
a lien for wages. The Dubuque, (1870) 2
Abb. 20, 7 Fed. Cas. No. 4,110.
Any Chinese person who was a citizen
of the Republic of Hawaii on August 12,
1898, and who has not since abandoned
or been legally deprived of his citizenship,
is a citizen of the United States. Such
naturalized Chinese citizen may take the
oath required by sections 4131 and 4142,
and have his vessel admitted to registry
as an American vessel, provided it carried
an Hawaiian register on the 12th of
August, 1898, and was at that time owned
bona fide by a citizen of Hawaii or of the
352.

Sec. 4250. [Removal of captain by owners of vessels.] Any person or
body-corporate having more than one-half ownership of any vessel shall have
the same power to remove a master, who is also part owner of such vessel,
as such majority owners have to remove a master not an owner. This
section shall not apply where there is a valid written agreement subsisting,
by virtue of which such master would be entitled to possession, nor in any case
where a master has possession as part owner, obtained before the ninth day
of April, eighteen hundred and seventy-two. [R. S.]

Act of April 9, 1872, ch. 90, 17 Stat. L. 51.
This section was amended by the Act of Feb. 18, 1875, ch. 80, 18 Stat. L. 320, by
substituting after the words "obtained before the" the word "ninth," in place of
the word "nineteenth" appearing in the section as originally enacted.

Extent of power of removal.—This sec-
ton not only confers upon a majority of
owners the absolute power to remove a
part owner from the command and posses-
sion of a vessel, but by clearest implica-
tion it means that nothing but a written
agreement entitling a part owner to pos-
session shall be available against this
right of the majority. Clayton v. The
Schooner Eliza B. Emory, (C. C. N. J.
1880) 4 Fed. 342, reversing (D. C. N. J.
1880) 3 Fed. 241.

The absolute right of the owners of a
vessel to displace the master may be exer-
cised without cause and even in violation
of the contract engaging him. Clayton v.

Upon a general retainer for no particular voyage a captain may be dismissed at any time without cause assigned, but where there is a charter-party, bills of lading, and a particular voyage agreed upon, though the owners may dismiss the captain, yet they would be liable in a common-law court. Montgomery v. Henry, (1780) 1 Dall. 49, 1 U. S. (L. ed.) 32, affirming (1750) Bee Adm. 388, 17 Fed. Cas. No. 9,737.

A master who has been employed for a particular voyage, whose cargo is on board, for which he has signed bills of lading, and who is all ready and just about to sail, may be dismissed at the pleasure of the owner. Montgomery v. Wharton, (1780) Bee Adm. 388, 17 Fed. Cas. No. 9,737.

Foreign vessel.—The majority owner of a foreign vessel may take possession as against an alien master although a part owner, and although the vessel has merely stopped in an American port on her way home and the accounts of the voyage are still unsettled. Diedman v. The Joseph Hume, (1862) 7 Fed. Cas. No. 3,901.

Title by mortgage.—A Court of Admiralty has no jurisdiction to decree possession of a vessel to the owners of the majority when the title to such vessel is set up in the mortgage. The Martha Washing-

ton, (1880) 3 Ware 245, 16 Fed. Cas. No. 9,140, affirmed (1886) 1 Cliff. 453, 3 Fed. Cas. No. 1,513.

Restraint violation of contract.—Where a part owner of a vessel has by contract a right to command her a preliminary injunction will be granted restraining the owners from appointing any other person to the command. Higgin v. Jenks, (1853) 3 Ware 17, 12 Fed. Cas. No. 6,468.

What constitutes agreement.—It is not a "written agreement" within the meaning of this section where a certain instrument under seal was signed by the holders of twenty-one thirty-thirds of the brig, providing that each signer thereof should consult the ship's husband therein named before assigning or transferring his share. Rogers v. Brig Osseo, (D. C. R. I. 1880) 3 Fed. 668.

Rights of master.—A part owner who is appointed master of a ship is not endowed with any new or additional right as a part owner. Childs v. Gladding, (1872) 11 Am. L. Reg. N. S. 386, 5 Fed. Cas. No. 2,878.

Transfer of right to command.—The right to sail a vessel as master is not by its nature transferable, nor does the transfer by the master of his interest as a part owner entitle his purchaser to claim possession of the vessel under a "written agreement" theretofore existing between the master and the majority owners. The Barkentine Lizzie Merry, (1878) 10 Ben. 140, 15 Fed. Cas. No. 8,423.

SEC. 4401. [Vessels navigating coastwise and on the great lakes.] All coastwise sea-going vessels, and vessels navigating the great lakes, shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof; and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam-vessels in passing, as provided by this Title; and every coastwise sea-going steam-vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats. [E. S.]


This section was from title 52 of the Revised Statutes, "Regulation of Steam Vessels." See STEAM VESSELS.


License presumed.—In the absence of any allegation to the contrary it will be presumed that the officers required by law to be licensed were so licensed. Butler v. Boston, etc., Steamship Co., (1889) 150 U. S. 327, 9 S. Ct. 612, 32 U. S. (L. ed.) 1017; In re Meyer, (N. D. Cal. 1896) 74 Fed. 881.

SEC. 4438. [License of officers by inspectors.] The boards of local inspectors shall license and classify the masters, chief mates, and second and
third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the masters of sail vessels of over seven hundred gross tons, and all other vessels of over one hundred gross tons carrying passengers for hire. It shall be unlawful to employ any person or for any person to serve as a master, chief mate, engineer, or pilot of any steamer or as master of any sail vessel of over seven hundred gross tons or of any other vessel of over one hundred gross tons carrying passengers for hire who is not licensed by the inspectors; and anyone violating this section shall be liable to a penalty of one hundred dollars for each offense. [R. S.]

As originally enacted this section was as follows:

"SEC. 4438. The boards of local inspectors shall license and classify the masters, chief mates, engineers, and pilots of all steam vessels. It shall be unlawful to employ any person, or for any person to serve as a master, chief mate, engineer, or pilot on any steamer, who is not licensed by the inspectors; and any one violating this section shall be liable to a penalty of one hundred dollars for each offense." Act of Feb. 28, 1871, ch. 100, 16 Stat. L. 446.

It was first amended by an Act of Dec. 21, 1898, ch. 29, § 1, 30 Stat. L. 764, to read as follows:

"SEC. 4438. The boards of local inspectors shall license and classify the masters, chief mates, and second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the masters and chief mates of sail vessels of over seven hundred tons and all other vessels and barges of over one hundred tons burden carrying passengers for hire. It shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer, or pilot of any steamer, or as master or chief mate of any sail vessel of over seven hundred tons who is not licensed by the inspectors; and anyone violating this section shall be liable to a penalty of one hundred dollars for each offense."

"The purpose of this amendment is to place the masters and chief mates of sail vessels of over 700 tons and all other vessels or barges of over 100 tons burden carrying passengers for hire, on the same basis with reference to inspection, etc., as steam vessels, in addition to which second and third mates of steam vessels are added to the list." [Compiler's note, vol. 2, Supp. R. S., p. 905.]

It was again amended by an Act of Jan. 25, 1907, ch. 398, 34 Stat. L. 884, to read as follows:

"SEC. 4438. The boards of local inspectors shall license and classify the masters, chief mates, and second and third mates, if in charge of a watch, engineers, and pilots of all steam vessels, and the masters of sail vessels of over seven hundred gross tons, and all other vessels of over one hundred gross tons carrying passengers for hire. It shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer in charge of a watch, or pilot of any steamer or as master of any sail vessel of over seven hundred gross tons, or of any other vessel of over one hundred gross tons carrying passengers for hire, who is not licensed by the inspectors; and anyone violating this section shall be liable to a penalty of one hundred dollars for each offense."

It was again amended to read as given in the text by an Act of May 28, 1898 ch. 212. 35 Stat. L. 425, § 2.

Purpose of section.—These regulations are for the protection of the lives of those engaged in navigation as well as the traveling public and the property that may be carried on those vessels. U. S. v. Sims, (N. D. Ohio 1881) 9 Fed. 443.

Scope of section.—The words of the statute cannot be limited to coating vessels. The Steamship United States, (C. C. Mass. 1880) 1 Fed. 133.

This section and similar provisions do not create any new or other officers on shipboard than existed before the passage of the Acts containing them, and a master or mate of a vessel has no further, other, or different authority by virtue of his license and the compliance with the regulations of such statutes than he would otherwise have when in fact acting in such capacity on board. U. S. v. Huff, (W. D. Tenn. 1892) 13 Fed. 630.

Necessity of license.—There is no law requiring a vessel to have a master or a mate, but when these officers are employed they must be licensed. The Steamship United States, (C. C. Mass. 1880) 1 Fed. 133.

But a mate of a schooner of less than 700 tons burden is not required by the express terms of this section to be licensed. The Sadie C. Sumner, (D. C. Mass. 1905) 142 Fed. 611.

Effect of license.—In Dryden v. Com., (1855) 16 B. Mon. (Ky.) 598, it was held that the Act of Congress of Aug. 30, 1832, providing for the appointment of inspectors in certain districts, and authorizing them to license engineers and
pilots, superseded any state law upon the subject, and that a license from such inspectors was a protection to the holder against any penalty denounced by a state law for neglecting to obtain a license under its authority. It was further held that a license to pilot boats on the Ohio river, between two points embracing the falls Ohio, authorized the holder to pilot boats over the falls.

Sufficient certificate.—What constitutes a sufficient certificate to authorize a master to act as a pilot, construed in The Steamship United States, (C. C. Mass. 1858) 1 Fed. 133.

Naval officer.—A naval officer cannot lawfully serve as master of a private steam vessel in the merchant service without having previously obtained the license required by the above section, although he may be eligible by virtue of his commission to take command of a steam vessel of the United States in the naval service. Naval Officers, (1875) 15 Op. Atty.-Gen. 61.

Knowledge of employer.—This section does not require that the acts therein forbidden shall be intentionally done to incur the penalty. Knowledge that an engineer is not licensed is not an element of the offense, and it is not necessary to aver it in an indictment to make the employer liable to the penalty of the statute. U. S. v. Sims, (N. D. Ohio 1881) 9 Fed. 443.

Presumption from violation of statute.—Where the navigation of one of two vessels in collision was at the time in charge of an unlicensed mate, in violation of the positive provisions of this section, it was held that there was a presumption that such fact caused or contributed to the collision, and that the vessel had the burden of showing that it could not have done so. The Eagle Wing, (E. D. Va. 1905) 135 Fed. 826.

Sec. 4439. [License of captain.] Whenever any person applies to be licensed as master of any steam vessel, or of a sail vessel of over seven hundred tons, the inspectors shall make diligent inquiry as to his character, and shall carefully examine the applicant as well as the proofs which he presents in support of his claim, and if they are satisfied that his capacity, experience, habits of life, and character are such as warrant the belief that he can safely be intrusted with the duties and responsibilities of the station for which he makes application, they shall grant him a license authorizing him to discharge such duties on any such vessel for the term of five years; but such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, incapacity, inattention to his duties, or the willful violation of any provision of this title applicable to him. [R. S.]

This section was amended to read as above by the Act of Dec. 21, 1898, ch. 29, § 2, 30 Stat. L. 764.

The section originally read as follows:

"Sec. 4439. Whenever any person applies to be licensed as master of a steam vessel, the inspector shall make diligent inquiry as to his character, and shall carefully examine the applicant, as well as the proofs which he presents in support of his claim, and if they are satisfied that his capacity, experience, habits of life, and character are such as to warrant the belief that he can be safely intrusted with the duties and responsibilities of the station for which he makes application, they shall grant him a license authorizing him to discharge such duties on any such vessel for the term of one year; but such license shall be suspended or revoked, upon satisfactory proof of bad conduct, intemperate habits, incapacity, inattention to his duties, or the willful violation of any provisions of this Title." Act of Feb. 28, 1871, ch. 100, 16 Stat. L. 446.

Section 14 of Rule 5 of General Rules and Regulations adopted by the Board of Supervising Engineers, and approved by the Secretary of the Treasury, was held by the Attorney-General of the United States, in July, 1891, to be within the authority conferred by R. S. sec. 4405 (see the title STEAM VESSELS) and to have the force of law. It was further held that a refusal of an application to be licensed as master of steam vessels running on western rivers, on the ground that the applicant had "not been licensed and served at least one year as a first class pilot or chief mate on lake, bay, or river steamer as provided by said section," was not in derogation of the rights of the applicant to be licensed under the above section, but was carrying out the requirements that the applicant should have such capacity, experience, and habits of life that he could be safely intrusted with the duties and responsibilities of the position for which he had applied. Master's License, (1891) 20 Op. Atty.-Gen. 212.
Sec. 4440. [License of mates.] Whenever any person applies for authority to be employed as chief mate of ocean or coastwise steam vessels or of sail vessels of over seven hundred tons, or as second or third mate of ocean or coastwise steam vessels, who shall have charge of a watch, or whenever any person applies for authority to be employed as mate of river steamers, the inspectors shall require satisfactory evidence of the knowledge, experience, and skill of the applicant in lading cargo and in handling and stowage of freight, and if for license as chief mate on ocean or coastwise steamers, or of sail vessels of over seven hundred tons, or as second or third mate of ocean or coastwise steamers, who shall have charge of a watch, shall also examine him as to his knowledge and ability in navigation and managing such vessels and all other duties pertaining to his station, and if satisfied of his qualifications and good character they shall grant him a license authorizing him to perform such duties for the term of five years upon the waters upon which he is found qualified to act; but such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, unskillfulness, or want of knowledge of the duties of his station or the willful violation of any provision of this title. [R. S.]

The section was originally as follows:

"Sec. 4440. Whenever any person applies for authority to be employed as chief mate of steam-vessels, the inspector shall require satisfactory evidence of the knowledge, experience, and skill of the applicant in lading cargo, and in handling and stowage of freight, and shall examine him as to his knowledge and ability in navigation and managing such vessels, and all other duties pertaining to his station; and if satisfied of his qualifications and good character, they shall grant him a license, authorizing him to perform such duties for the term of one year; but such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, unskillfulness, or want of knowledge of the duties of his station, or the willful violation of any provisions of this title." Act of Feb. 28, 1871, ch. 100, 16 Stat. L. 446.

The word "inspector," where it first appears in the section as originally enacted, was changed to "inspectors" by Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 251.

The section was again amended by Act of March 25, 1898, ch. 86, 30 Stat. L. 340, to read as follows:

"Sec. 4440. Whenever any person applies for authority to be employed as chief mate of ocean or coastwise steam vessels, or as second or third mate of ocean or coastwise steam vessels, who shall have charge of a watch, or whenever any person applies for authority to be employed as mate of river steamers, the inspectors shall require satisfactory evidence of the knowledge, experience and skill of the applicant in lading cargo and in handling and stowage of freight, and if for license as chief mate on ocean or coastwise steamers, or as second or third mate of ocean or coastwise steamers, who shall have charge of a watch, shall also examine him as to his knowledge and ability in navigation and managing such vessels and all other duties pertaining to his station, and if satisfied of his qualifications and good character they shall grant him a license authorizing him to perform such duties for the term of five years upon the waters upon which he is found qualified to act; but such license shall be suspended or revoked upon satisfactory proof of bad conduct, intemperate habits, unskillfulness, or want of knowledge of the duties of his station or the willful violation of any provision of this title."

It was again amended by an Act of Dec. 21, 1908, ch. 29, sec. 3, 30 Stat. L. 766, to read as given in the text.

Sec. 4441. [License of engineer.] Whenever any person applies for authority to perform the duties of engineer of any steam-vessel, the inspectors shall examine the applicant as to his knowledge of steam machinery, and his experience as an engineer, and also the proofs which he produces in support of his claim; and if, upon full consideration, they are satisfied that his character, habits of life, knowledge, and experience in the duties of an engineer are all such as to authorize the belief that he is a suitable and safe
person to be intrusted with the powers and duties of such a station, they
shall grant him a license, authorizing him to be employed in such duties
for the term of one year, in which they shall assign him to the appropriate
class of engineers; but such license shall be suspended or revoked upon
satisfactory proof of negligence, unskillfulness, intemperance, or the willful
violation of any provisions of this Title. Whenever complaint is made
against any engineer holding a license authorizing him to take charge of the
boilers and machinery of any steamer, that he has, through negligence or
want of skill, permitted the boilers in his charge to burn or otherwise become
in bad condition, or that he has not kept his engine and machinery in good
working order, it shall be the duty of the inspectors, upon satisfactory
proof of such negligence or want of skill, to revoke the license of such
engineer and assign him to a lower grade or class of engineers, if they find
him fitted therefor. [R. S.]

This section was amended by the Act of Feb. 27, 1877, ch. 69, 19 Stat. L. 252, by
substituting the word "inspectors" where it first appears in the section above for the
word "inspector" appearing in the section as originally enacted.

The alteration of a license under this section can only be punished by a revoca-

Sec. 4442. [License of pilot.] Whenever any person claiming to be a
skilful pilot of steam-vessels offers himself for a license, the inspectors shall
make diligent inquiry as to his character and merits, and if satisfied, from
personal examination of the applicant, with the proof that he offers that he possesses the requisite knowledge and skill, and is trustworthy and faithful,
they shall grant him a license for the term of one year to pilot any such
vessel within the limits prescribed in the license; but such license shall be
suspended or revoked upon satisfactory evidence of negligence, unskillful-
ness, inattention to the duties of his station, or intemperance, or the willful
violation of any provision of this Title. [R. S.]


Effect of state laws.—The penalties imposed by state laws for piloting vessels
without due license from the state have no application to persons employed as
pilots on board of the public vessels of the United States, the latter vessels being
within the exclusive jurisdiction of the United States. Pilots on United States

Whenever Congress exercises the power of passing laws on the subject of pilotage,
so far the power becomes exclusive, and all prior laws of the states within the
purview of such enactments are at once abrogated and cease to have effect. The

Unreasonable rule relating to examination.—In Williams v. Molther, (C. C. A.
2d Cir. 1912) 198 Fed. 460, 117 C. C. A. 220 (reversing (N. D. N. Y. 1911) 189
Fed. 700) a rule of the board of supervising inspectors of steam vessels was
held unreasonable and in conflict with the section, which required an applicant
for examination for a pilot's license to show that he had three years' service in
the deck department of a steam vessel, motor vessel, sail vessel or barge consort.
The court said: "Congress unquestionably has power to regulate commerce upon
the waters involved, and in so doing to restrict the right to act as pilot upon
steamers navigating them, to persons who shall have obtained a license. It can also
make the very regulations complained of. But the question is whether these regu-
lations are necessary to carry out the provisions of title 52, Rev. Stat. U. S., which
the board of supervising inspectors has the power to make. To exclude from the
right of examination for a license persons
who have not had the prescribed experience seems to us to be a direct contradiction of section 4442, which entitles any person claiming to be a skillful pilot of steam vessels to be examined by the local inspectors. While no citizen has the inherent right to a pilot's license, every citizen has a right to be examined for it. The local inspectors are to determine the applicant's qualifications. They may hold in any case that he has not had sufficient deck experience. That, however, is quite different from refusing him an examination for this reason. The period of such experience necessary to qualify an applicant would seem in the nature of things to be different in different cases. One applicant might be qualified after one year's experience when another would not be qualified after five years. It seems to us purely arbitrary to say that no one is qualified to act as a pilot because he has not had any fixed period of deck experience."

Review of findings of steamboat inspectors.—The courts have no authority to review the findings of the steamboat inspectors by appeal or writ of error. The most they can do is to see that the inspectors act within their jurisdiction, and that the constitutional and statutory rights of citizens are not impaired. Williams v. Potter, (C. C. A. 2d Cir. 1915) 223 Fed. 423, 139 C. C. A. 17, affirming (N. D. N. Y. 1913) 210 Fed. 318.

Sec. 4443. [License of captain or mate as pilot.] Where the master or mate is also pilot of the vessel, he shall not be required to hold two licenses to perform such duties, but the license issued shall state on its face that he is authorized to act in such double capacity. [R. S.]

R. S. sec. 4444 relating to state regulation of pilots is given under PILOTAGE.

The effect of this section and R. S. secs. 4235 (title PILOTAGE), 4401 (supra, p. 1252), and 4444 (title PILOTAGE), is to exempt all steam vessels sailing under a license and employed in a coastwise trade from the pilotage laws of the state. Bigley v. New York, etc., Steamship Co., (S. D. N. Y. 1900) 105 Fed. 74.

License presumed.—In the absence of any allegations to the contrary, it will be presumed in a limited liability case in admiralty that the captain and first mate of a seagoing coastwise steamer are licensed pilots. Butler v. Boston, etc., Steamship Co., (1889) 130 U. S. 527, 9 S. Ct. 612, 52 U. S. (L. ed.) 1017; In re Meyer, (N. D. Cal. 1896) 74 Fed. 881.

License between Boston and Havana.—In The Steamship United States, (C. C. Maas. 1880) 1 Fed. 133, it was held that the inspectors of the United States had authority to grant a pilot's license to a master under this section who was on a vessel plying between Boston and Havana.

Sec. 4445. [Oath of licensed officers — oath of applicants for license — penalty for change of license.] Every master, chief mate, engineer, and pilot, who receives a license, shall, before entering upon his duties, make oath before one of the inspectors herein provided for, to be recorded with the certificate, that he will faithfully and honestly, according to his best skill and judgment, without concealment or reservation, perform all the duties required of him by law.

Every applicant for license as either master, mate, pilot, or engineer under the provisions of this title shall make and subscribe to an oath or affirmation, before one of the inspectors referred to in this title, to the truth of all the statements set forth in his application for such license.

Any person who shall make or subscribe to any oath or affirmation authorized in this title and knowing the same to be false shall be deemed guilty of perjury.

Every licensed master, mate, pilot, or engineer who shall change, by addition, interpolation, or erasure of any kind, any certificate or license issued by any inspector or inspectors referred to in this title shall, for every such offense, upon conviction, be punished by a fine of not more than five hundred
dollars or by imprisonment at hard labor for a term not exceeding three years. [R. S.]

This section was amended by the Act of March 23, 1900, ch. 90, sec. 1, 31 Stat. L. 50, by adding to the end of the section as originally enacted the provisions beginning with the words "Every applicant for license," etc., as above set out.

**Power of inspector.** This section and an owner's liberty of contract for re-
R. S. secs. 4448 (infra, p. 1258), 4453, pairs nor make or unmake contracts
and 4454 (title PILOTAGE) do not give an inspector the right to interfere with him. The Sappho, (D. C. S. C. 1898) 89 Fed. 366.

**Sec. 4446. [License to be exhibited.]** Every master, mate, engineer, and pilot who shall receive a license shall, when employed upon any vessel, within forty-eight hours after going on duty, place his certificate of license, which shall be framed under glass, in some conspicuous place in such vessel, where it can be seen by passengers and others at all times: Provided, That in case of emergency such officer may be transferred to another vessel of the same owners for a period not exceeding forty-eight hours without the transfer of his license to such other vessel; and for every neglect to comply with this provision by any such master, mate, engineer, or pilot, he shall be subject to a fine of one hundred dollars, or to the revocation of his license. [R. S.]

As originally enacted this section was as follows:

"Sec. 4446. Every master, mate, engineer, and pilot who shall receive a license shall, when employed upon any vessel, place his certificate of license, which shall be framed under glass, in some conspicuous place in such vessel, where it can be seen by passengers and others at all times; and for every neglect to comply with this provision by any such master, mate, engineer, or pilot, he shall be subject to a fine of one hundred dollars, or to the revocation of his license."


It was amended to read as given in the text by the Act of Feb. 10, 1907, ch. 991, 34 Stat. L. 897, entitled:

"An Act to amend sections forty-four and forty-six of the Revised Statutes, relating to licensed masters, mates, engineers, and pilots."

**Sec. 4447. [Renewal of officer's license.]** When any licensed officer is employed on a steamer in a district distant from any local board of inspectors, such inspectors, or the supervising inspector of the district, may grant a renewal of his license, without such licensed officer being personally present, under such regulations as the board of supervising inspectors shall prescribe. [R. S. ]


**Sec. 4448. [Licensed officers to assist inspectors in examinations— divulging information.]** That all officers licensed under the provisions of this title shall assist the inspectors in their examination of any vessel to which such licensed officers belong and shall point out all defects and imperfections known to them in the hull, equipments, boilers, or machinery of such vessel, and shall also make known to the inspectors at the earliest opportunity all accidents or occurrences producing serious injury to the vessel, her equipments, boilers, or machinery, and in default thereof the license of any such officer so neglecting or refusing shall be suspended or revoked.

No inspector or supervising inspector receiving information from a licensed officer who is employed on any vessel as to defects in such vessel,
or her equipments, boilers, or machinery, or that any provision of this title is being violated, shall impart the name of such licensed officer, or the source of his information, to any person other than his superiors in the Steamboat-Inspection Service. Any inspector or supervising inspector violating this provision shall be subject to dismissal from the service. [B. S.]

As originally enacted this section was as follows:

"Sec. 4448. All officers licensed under the provisions of this Title shall assist the inspectors in their examination of any vessel to which such licensed officers belong, and shall point out all defects and imperfections known to them in the hull, equipments, boilers, or machinery of such vessel, and also shall make known to the inspectors, at the earliest opportunity, all accidents or occurrences producing serious injury to the vessel, her boilers, or machinery and in default thereof the license of any such officer so neglecting or refusing shall be revoked."


It was amended to read as given in the text by an Act of March 3, 1915, ch. 79, sec. 1, 38 Stat. L. 893, sec. 2 of said amendatory Act provided for the repeal of all conflicting laws.

Duty of master.—Unless the duty as to furnishing equipments and fittings be imposed expressly upon the master of a ship, it is not primarily his duty to provide them; but it is his duty, before navigating, to exercise care to know whether the ship has any equipment, whether it is apparently sufficient and in accordance with law, and, after the introduction of appliances and equipment, it is his duty to have some care respecting its maintenance, the extent of such care being dependent upon the master's opportunity to examine the appliance and perceive its condition. U. S. v. Van Schaick, (S. D. N. Y. 1904) 134 Fed. 592.

Sec. 4449. [Revocation, etc., of officer's license for refusal to serve, etc.] That if any licensed officer shall, to the hindrance of commerce, wrongfully or unreasonably refuse to perform his official duties after having signed articles or while employed on any vessel as authorized by the terms of his certificate of license, or if any pilot or engineer shall refuse to admit into the pilot house or engine room any person whom the master or owner of the vessel may desire to place there for the purpose of learning the profession, his license shall be revoked or suspended upon the same proceedings as are provided in other cases of revocation or suspension of such license. [B. S.]

As originally enacted this section was as follows:

"Sec. 4449. If any licensed officer shall, to the hindrance of commerce, wrongfully or unreasonably refuse to serve in his official capacity on any steamer, as authorized by the terms of his certificate of license, or shall fail to deliver to the applicant for such service at the time of such refusal, if the same shall be demanded, a statement in writing assigning good and sufficient reasons therefor, or if any pilot or engineer shall refuse to admit into the pilot-house or engine-room any person whom the master or owner of the vessel may desire to place there for the purpose of learning the profession, his license shall be revoked, upon the same proceedings as are provided in other cases of revocation of such licenses."


It was first amended by an Act of March 3, 1905, ch. 1457, sec. 5, 33 Stat. L. 1030, to read as follows:

"Sec. 4449. If any licensed officer shall, to the hindrance of commerce, wrongfully or unreasonably refuse to serve in his official capacity on any vessel as authorized by the terms of his certificate of license, or shall fail to deliver to the applicant for such service at the time of such refusal, if the same shall be demanded, a statement in writing assigning good and sufficient reasons therefor, or if any pilot or engineer shall refuse to admit into the pilot house or engine room any person whom the master or owner of the vessel may desire to place there for the purpose of learning the profession, his license shall be revoked or suspended upon the same proceedings as are provided in other cases of revocation or suspension of such licenses."
It was again amended, to read as given in the text, by an Act of March 3, 1915, ch. 79, § 128, Stat. L. 694. Section 2 of said amendatory Act provided for the repeal of all laws in conflict therewith.

Nature of penalty of section.—"Section 4449 is a remedial, not a penal, statute, and the revocation of a license therein provided for may be viewed, not in the light of a punishment for an offense committed, but rather as a remedy placed in the hands of the board of inspectors, to insure greater efficiency in the steamboat-inspection service, and to guard against obstructions of or injury to commerce, etc." Licensed Officers of Steam Vessels, (1902) 24 Op. Atty.-Gen. 136.

Refusal to testify.—A licensed officer of a steam vessel duly summoned to give testimony in a hearing before a board of United States local inspectors of steam vessels, who refuses to answer questions which are in the opinion of the board material and proper, may be compelled to answer under the penalty of suspension or revocation of his license, or otherwise. Licensed Officers of Steam Vessels, (1902) 24 Op. Atty.-Gen. 136.

Such licensed officer when charged with violation of R. S. sec. 4449, and on trial before the above-named board on such charge, has no right to refuse to answer a question material to the inquiry upon the ground that his answer may subject him to the penalty provided in that section. Licensed Officers of Steam Vessels, (1902) 24 Op. Atty.-Gen. 136.

Sec. 4450. [Investigation of conduct of officers.] The local boards of inspectors shall investigate all acts of incompetency or misconduct committed by any licensed officer while acting under the authority of his license, and shall have power to summon before them any witnesses within their respective districts, and compel their attendance by a similar process as in the United States circuit or district courts; and they may administer all necessary oaths to any witnesses thus summoned before them; and after reasonable notice in writing, given to the alleged delinquent, of the time and place of such investigation, such witnesses shall be examined, under oath, touching the performance of his duties by any such licensed officer; and if the board shall be satisfied that such licensed officer is incompetent, or has been guilty of misbehavior, negligence, or unskillfulness, or has endangered life, or willfully violated any provision of this Title, they shall immediately suspend or revoke his license. [R. S.]


The alteration of a license to an engineer so as to give the licensee the appearance of a higher class than that for which the license was actually issued is not, it has been held by the Attorney-General, a forgery of a public record punishable under statutes relating to forgery, but it may be punished by the revocation of the license under the above section. Alteration of Engineer's License, (1890) 19 Op. Atty.-Gen. 649.

Findings of board of local inspectors as evidence in suit in admiralty for collision. —Findings of a board of local inspectors made under this section are not admissible in a suit in admiralty for a collision of vessels for the purpose of showing that the offending vessel was in her proper position in the river, and had proper watches and lights set at the time of the collision. The Charles Morgan, (1885) 115 U. S. 69, 5 S. Ct. 1172, 29 U. S. (L. ed.) 316.

Sec. 4451. [Payment of marshal and witnesses.] The chief officer of the customs for the district shall pay out of the revenues received under the provisions of this Title such fees to the United States marshal for his services, and to any witness, so summoned, for his actual travel and attendance, as shall be officially certified to by any inspector hearing the case, upon the back of such summons, not exceeding the rate allowed for fees and to
witnesses for travel and attendance in any circuit or district courts of the United States. [R. S.]

By the Judicial Code of March 3, 1911 ch. 13, secs. 289-291, the Circuit Courts were abolished and their powers and duties conferred on the District Courts. See JUDICIARY, vol. 5, p. 1082.
As to fees, see Costs, vol. 2, p. 642.

Sec. 4452. [Appeal to supervising inspector — appeal to Supervising Inspector-General.] Whenever any board of local inspectors refuses to grant a license to any person applying for the same, or suspends or revokes the license of any master, mate, engineer, or pilot, any person deeming himself wronged by such refusal, suspension, or revocation, may, within thirty days thereof, on application to the supervising inspector of the district, have his case examined anew by such supervising inspector; and the local board shall furnish to the supervising inspector, in writing, the reasons for its doings in the premises; and such supervising inspector shall examine the case anew, and he shall have the same powers to summon witnesses and compel their attendance and to administer oaths that are conferred on local inspectors; and such witnesses and the marshal shall be paid in the same manner as provided for by the preceding section; and such supervising inspector may revoke, change, or modify the decision of such local board; and like proceedings may be had by any master or owner of any steam vessel in relation to the inspection of such vessel, or her boilers or machinery, by any such local board; and in case of repairs, and in any investigation or inspection, where there shall be a disagreement between the local inspectors, the supervising inspector, when so requested, shall investigate and decide the case. In cases of trials for the revocation or suspension of an officer’s license, where either the license has been revoked or suspension for more than six months has been made, and such action has been affirmed by the supervising inspector, the officer whose license is in question may have the case examined anew by the Supervising Inspector-General, who shall have the same powers to summon witnesses, to compel their attendance, and to administer oaths as are conferred on local inspectors, and the Supervising Inspector-General may revoke, change, or modify said decisions. Application for such reexamination of the case shall be made to the Supervising Inspector-General within thirty days after final decision by the supervising inspector. [R. S.]

This section, originally drawn from an Act of Feb. 28, 1871, ch. 100, 16 Stat. L. 447, was amended to read as given in the text by an Act of March 3, 1905, ch. 1457, sec. 6, 33 Stat. L. 1030. The amendment consisted in the addition of all of that part of the text beginning with the words “In cases of trials for the revocation,” etc., to the end of the section as here given.

Appeal from decision of supervising inspector.—Where a supervising inspector inspects a steam vessel under the authority given him by R. S. sec. 4409 (title Steam Vessels), in cases where the local board cannot be resorted to without inconvenience on account of distance, there is no appeal or review provided for, as the provisions of the above section do not apply in such instances. Inspection of Steam-Vessels, 1884) 17 Op. Atty.-Gen. 628.

Who may appeal.—The right of appeal is given only to an interested party, and a stranger to the proceeding has no standing. Joyce v. Bulger, (W. D. Wash. 1918) 240 Fed. 817.
An Act To amend section forty-one hundred and thirty-one of the Revised Statutes of the United States, to improve the merchant-marine engineer service and thereby also to increase the efficiency of the Naval Reserve, and for other purposes.


SEC. 2. [Terms of license—renewal—suspension—naval service—pensions.] That all licenses issued to such officers shall be for a term of five years, but the holder of a license may have the same renewed for another five years in the manner prescribed in the rules and regulations of the Board of Supervising Inspectors: Provided, however, That any officer holding a license, and who is engaged in a service which necessitates his continuous absence from the United States, may make application in writing for renewal and transmit the same to the board of local inspectors, with his certificate of citizenship, if naturalized, and a statement of the applicant, verified before a consul or other officer of the United States authorized to administer an oath, setting forth the reasons for not appearing in person; and upon receiving the same the board of local inspectors that originally issued such license shall renew the same and shall notify the applicant of such renewal: Provided further, That no license as master, mate, or pilot of any class of vessel shall be renewed without furnishing a satisfactory certificate of examination as to color blindness. And in all cases where the issue is the suspension or revocation of such licenses, whether before the local boards of inspectors (of steam vessels), as provided for in section forty-four hundred and fifty of the Revised Statutes, or before the supervising inspector, as provided for in section forty-four hundred and fifty-two of the Revised Statutes, the accused shall be allowed to appear by counsel and to testify in his own behalf. No master, mate, pilot, or engineer of steam vessels licensed under title fifty-two of the Revised Statutes, pages forty-three hundred and ninety-nine to forty-five hundred, shall be liable to draft in time of war, except for the performance of duties such as required by his license; and while performing such duties in the service of the United States every such master, mate, pilot, or engineer shall be entitled to the highest rate of wages paid in the merchant marine of the United States for similar services; and if killed or wounded while performing such duties under the United States, they, or their heirs, or their legal representatives, shall be entitled to all the privileges accorded to soldiers and sailors serving in the Army or Navy, under the pension laws of the United States. [29 Stat. L. 188, as amended by 38 Stat. L. 765.]

This section was amended to read as given in the text by an Act of Oct. 22, 1914, ch. 334, 38 Stat. L. 765, entitled:

"An Act To amend section forty-one hundred and thirty-one of the Revised Statutes of the United States of America as amended by the Act of Congress approved May twenty-eighth, eighteen hundred and ninety-six, relating to the renewal of licenses."

As originally enacted it was as follows:

"Sec. 2. That all licenses issued to such officers shall be for a term of five years, but the holder of a license may have the same renewed for another five years at any time before its expiration: Provided, however, That any officer holding a license, and who is engaged in a service which necessitates his continuous absence from the United States, may make application in writing for one renewal and transmit the same to the board of local inspectors with a statement of the applicant verified before a consul, or other officer of the United States authorized to administer an oath, setting forth the reasons for not appearing in person; and upon receiving the same the board of local inspectors that originally issued such license shall renew the same for one
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additional term of such license, and shall notify the applicant of such renewal. And in all cases where the issue is the suspension or revocation of such licenses, whether before the local boards of inspectors as provided for in section forty-four hundred and fifty of the Revised Statutes, or before the supervising inspector as provided for in section forty-four hundred and fifty-two of the Revised Statutes, the accused shall be allowed to appear by counsel and to testify in his own behalf. No master, mate, pilot, or engineer of steam vessels licensed under title fifty-two of the Revised Statutes shall be liable to draft in time of War, except for the performance of duties such as required by his license; and, while performing such duties in the service of the United States, every such master, mate, pilot, or engineer shall be entitled to the highest rate of wages paid in the merchant marine of the United States for similar services; and, if killed or wounded while performing such duties under the United States, they, or their heirs, or their legal representatives shall be entitled to all the privileges accorded to soldiers and sailors serving in the Army and Navy, under the pension laws of the United States." [29 Stat. L. 188.]

Section 1 of this Act amended R. S. sec. 4131, supra, p. 1249.

Sec. 3. [Effect.] That all laws or parts of laws in conflict with this Act are hereby repealed. But this shall not be construed to modify or repeal that provision of the Act of June twenty-sixth, eighteen hundred and eighty-four, which reads as follows: "In cases where on a foreign voyage, or on a voyage from an Atlantic to a Pacific port of the United States, any such vessel is for any reason deprived of the services of an officer below the grade of master, his place, or a vacancy caused by the promotion of another officer to such place, may be supplied by a person not a citizen of the United States until the first return of such vessel to its home port; and such vessel shall not be liable to any penalty or penal tax for such employment of an alien officer." [29 Stat. L. 189.]

The Act of June 26, 1884, ch. 121, sec. 1, mentioned in the text constituted an amendment to R. S. sec. 4131, supra, p. 1249. See the notes to said section.

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Sec. 2. [Suspension of requirements as to citizenship of watch officers.] That the President of the United States is hereby authorized, whenever in his discretion the needs of foreign commerce may require, to suspend by order, so far and for such length of time as he may deem desirable, the provisions of law prescribing that all the watch officers of vessels of the United States registered for foreign trade shall be citizens of the United States.

* * *

[38 Stat. L. 699.]

This was a part of sec. 2 of an Act of Aug. 18, 1914, ch. 256, providing for the admission of foreign built ships to American registry. For a reference to the entire Act see SHIPPING AND NAVIGATION.

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See Public Lands

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R. S. 212. Passports—Receiving and Attesting Oaths and Affidavits, 1266.
R. S. 4076. To Be Issued Only to Persons Owing Allegiance to United States, 1267.
R. S. 4077. Returns of Passports Issued, 1267.
R. S. 4078. False Passports, 1267.

Act of June 20, 1874, ch. 328, 1268.
Sec. 1. Disposition of Fees, 1268.

Act of March 23, 1888, ch. 34, 1268.
Fee for Issuing Passport, 1268.

CROSS-REFERENCES

To Persons Having Made Declaration of Intention to Become Citizens, see CITIZENSHIP.
Penalty for Violating, see DIPLOMATIC AND CONSULAR OFFICERS.
Refusal to Permit Entry of Holder of Passport, see IMMIGRATION.
To Enter Indian Country, seeINDIANS.
Forging or Altering, see PENAL LAWS.
To Vessels, see SHIPPING AND NAVIGATION.

Sec. 212. [Passports — receiving and attesting oaths or affidavits.] The clerk in the Department of State who may from time to time be assigned to the duty of examining applications for passports is authorized to receive and attest, but without charge to the affiant, all oaths or affidavits required by law or by the rules of the Department of State to be made before granting passports. [R. S.]


Sec. 4075. [Passports, how granted.] The Secretary of State may grant and issue passports, and cause passports to be granted, issued and verified in foreign countries by such diplomatic or consular officers of the United States, and by such chief or other executive officer of the insular possessions of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States; and no other person shall grant, issue, or verify any such passport. Where a legation of the United States is established in any country, no person other than the diplomatic representative of the United States at such place shall be permitted to grant or issue any passport, except in the absence therefrom of such representative. [R. S.]

Act of May 30, 1866, ch. 102, 14 Stat. L. 54.
This section was amended by the Act of June 14, 1902, ch. 1088, sec. 1, 32 Stat. L. 386, by inserting after the phrase “consular officers of the United States” the words [1266]
"and by such chief or other executive officer of the insular possessions of the United States," so as to make it read as above given.

**Issuance discretionary.**—The provisions of the statute are not in terms mandatory, but the secretary of state may, in his discretion, either grant or withhold a passport as the public interests may require. Chinese Citizens of Hawaii, (1901) 23 Op. Atty.-Gen. 509. See also Citizenship, (1899) 13 Op. Atty.-Gen. 89.

**Legal effect of passport.**—This statute does not alter the legal effect which the passport possessed before the enactment, and does not render it legal and competent evidence of the fact of citizenship. In re Gee Hop, (N. D. Cal. 1895) 71 Fed. 274; Eadsell v. Mark, (C. C. A. 9th Cir. 1910) 179 Fed. 292, 103 C. C. A. 121.

**Issuance by state officers.**—There is no form of certificate in the nature of a passport which can be issued lawfully by a state officer.

**Sec. 4076. [To be issued only to persons owning allegiance to United States.]** No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States. [R. S.]

This section was amended "so as to read as" above by the Act of June 14, 1902, ch. 1088, § 2, 32 Stat. L. 386. The section was originally as follows:

"Sec. 4076. No passport shall be granted or issued to or verified for any other persons than citizens of the United States." Act of May 30, 1866, ch. 102, 14 Stat. L. 54.

By an Act of March 2, 1907, ch. 2534, sec. 1, given under CITIZENSHIP, vol. —, p. —, provisions were made for the issue of passports to persons who have made a declaration of intention to become citizens.

**To whom issued.**—"A passport, such as he has applied for, is merely a certificate of citizenship and of identity; its purpose being to enable the bearer to be admitted within the territory of a foreign government in the quality of, and with the privileges thereby allowed to, a foreign citizen. Our laws prohibit the issue of passports of this sort to any other persons than citizens of the United States; but they authorize their issue to all citizens, without distinction, whether native born or naturalized; and where a naturalized citizen applies for a passport with a view to traveling or residing abroad, though his intended destination may be in the country of his former nationality, his right to have the passport issued to him is just as obligatory upon the department of the government charged with this matter as if he were a native-born citizen intending to go to the same country." Citizenship, (1876) 15 Op. Atty.-Gen. 114.

Permanent allegiance is necessary under this section. (1907) 26 Op. Atty.-Gen. 376.

**Sec. 4077. [Returns of passports issued.]** All persons who shall be authorized to grant, issue, or verify passports, shall make return of the same to the Secretary of State, in such manner and as often as he shall require; and such returns shall specify the names and all other particulars of the persons to whom the same shall be granted, issued, or verified, as embraced in such passport. [R. S.]

Act of May 30, 1866, ch. 102, 14 Stat. L. 54.

**Sec. 4078. [False passports.]** If any person acting or claiming to act in any office or capacity under the United States, its possessions, or any of the States of the United States, who shall not be lawfully authorized so to do, shall grant, issue, or verify any passport or other instrument in the nature of a passport to or for any person whomsoever, or if any consular officer who shall be authorized to grant, issue, or verify passports shall knowingly and willfully grant, issue, or verify any such passport to or for any person not owing allegiance, whether a citizen or not, to the United States, he shall be imprisoned for not more than one year or fined not more than five hundred dollars, or both; and may be charged, proceeded against,
tried, convicted, and dealt with therefor in the district where he may be arrested or in custody. [R. S.]

This section was amended "so as to read" as above by the Act of June 14, 1902, ch. 1088, § 3, 32 Stat. L. 386. The section originally read as follows:

"Sec. 4078. If any person acting, or claiming to act, in any office or capacity, under the United States, or any of the States of the United States, who shall not be lawfully authorized so to do, shall grant, issue, or verify any passport or other instrument in the nature of a passport, to or for any citizen of the United States, or to or for any person claiming to be or designated as such in such passport or verification, or if any consular officer who shall be authorized to grant, issue, or verify passports shall knowingly and willfully grant to or for any person not a citizen of the United States, he shall be imprisoned for not more than one year, or fined not more than five hundred dollars, or both; and may be charged, proceeded against, tried, convicted, and dealt with therefor in the district where he may be arrested or in custody.“ Act of May 30, 1866, ch. 102, 14 Stat. L. 54.

Certain papers issued by a mayor, and also by a notary public, containing the essentials of a passport and intended to be used in traveling in a foreign country, were held to be a violation of this section. (1884) 17 Op. Atty.-Gen. 674.

[Sec. 1.] [Disposition of fees.] * * * An account of these fees shall be kept, and the amount collected shall be paid into the Treasury of the United States at least quarterly. [28 Stat. L. 90.]

This is from the Legislative, Executive, and Judicial Appropriation Act of June 20, 1874, ch. 328.

A preceding part of this section, fixing the fee for issuing passports at five dollars, was repealed by virtue of the last sentence of the Act of March 23, 1888, ch. 34, given in the following paragraph of the text.

An Act to fix the charge for passports at one dollar.


[Fee for issuing passport.] That from and after the passage of this act a fee of one dollar shall be collected for each citizen's passport issued from the Department of State. That all acts or parts of acts inconsistent with this are hereby repealed. [25 Stat. L. 45.]

See the preceding paragraph of the text and the notes thereto.
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