

THE FIXED LAW OF PATENTS

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AS ESTABLISHED BY THE SUPREME COURT OF
THE UNITED STATES AND THE NINE
CIRCUIT COURTS OF APPEALS

By
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SECOND EDITION
WITH ADDITIONS

BOSTON
LITTLE, BROWN, AND COMPANY
1913

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Copy Jan 27, 1914.

JAN 27 1914

Printers
S. J. PASKHILL & Co., BOSTON, U.S.A.

TO

ADELBERT MOOT, Esq.,

**REGENT OF THE UNIVERSITY OF THE STATE OF NEW YORK, MEMBER
OF THE NEW YORK BOARD OF STATUTORY CONSOLIDATION, ETC.**

**THIS BOOK IS DEDICATED BY HIS ERSTWHILE PUPIL AND
LIFELONG FRIEND.**

PREFACE TO THE SECOND EDITION

A SECOND edition of this work is made necessary by the large number of important decisions reported since the first publication. A considerable number of these — notably the Supreme Court decisions in the Expanded Metal Case, the Mimeograph Case and the Westinghouse Transformer Case — have worked changes of importance.

These many decisions have been excerpted and added in an Appendix Chapter, and include 225 U. S. and 194 Fed. Rep. The classification, section headings and numbers are identical with the body of the work. This chapter contains also excerpts from a number of other cases which were insufficiently covered in the first edition.

The Brief Survey Chapter has been revised throughout to meet these changes and additions.

The tables of cases have been entirely reset, and the Table of Cases Excerpted has been much amplified.

The Patent Statute Digested Chapter has been made to conform to changes in statute, especially those of the Federal Judicial Code.

Such general revision has made necessary an entirely new General Index.

This occasion gives opportunity to express my appreciation of the numerous and kindly commendations of this work by bench and bar alike.

W. M.

BUFFALO, September, 1912.

PREFACE

IN other days, an introduction was called an "advertisement." It advertised what the book contained — what it stood for. The writer reverts to this ancient custom, and here proceeds to indicate the character and scope of this work, the plan of construction, and how it may be used.

The first fact to be advertised is that this book is written primarily and chiefly for the general practitioner — for the lawyer looking for general principles. Questions of patent law, which are both simple and settled, arise from day to day in general practice. To put the answers to those questions between the thumb and finger of the busy lawyer is my prime object.

Nevertheless, since the book gathers up, in the language of the decisions, the appellate law, it should be of interest to the specialist who, unless he has digested the law for himself, will hardly have such a compilation.

It is an orderly statement of the fixed law of patents in the exact language of the court, except in minor instances where such course is not possible. It is, therefore, absolutely authoritative, because it is what the courts have said, and not what I, or anyone else, may think they have said.

The fixed law of patents comprises the decisions of the Supreme Court of the United States, the decisions of the nine Circuit Courts of Appeals, and the Patent Statute. Nothing else can be regarded as fixed law.

The book does not cover pleading, practice, or procedure, except as to matters peculiar to patent law; it does not cover patent soliciting; it does not cover trade-marks or copyrights.

The entire work is founded upon the principle that *a patent is a monopoly created in contravention of the common-law, and that every decision must, therefore, root back in a statute.* Every main proposition is accordingly worked out from the statute. No other plan can be in harmony with the facts.

No one of the two thousand appellate decisions relating strictly

to patents, stating or reiterating any principle or rule, has been intentionally omitted; and in many cases the principle or rule has been restated and reiterated with seeming prolixity. But it is not wise to omit any. Each case differs from every other; and what is seeming repetition is but a repeated application of a principle to varying facts and conditions. And yet, quite a number of appellate decisions yield no quotation in this work. This is so because those cases turned upon questions of fact or claim construction.

No rule is stated upon the authority of a court of original jurisdiction. No matter what the rule may be, or how long or how much respected, a rule of a circuit court is not fixed law. A remarkable example of this is seen in *Mayor v. American*, 60 Fed. 1016; 9 C. C. A. 336, where a rule established in *Brooks v. Jenkins*, 3 McLean, 432; Fed. Cas. 1953, was reversed in the Second Circuit after more than fifty years of general and unquestioning following. And while the consequent omission of many familiar rules renders the work incomplete, in a sense, it places it without the pale of flux and gives it the character of a code, rather than the detail of a digest. Here it is also to be remarked that I have declined to quote as fixed law a statement of a judge sitting in circuit even when such statement has been quoted verbatim and approved by the appellate court. I do not believe that law by adoption is fixed law, and it would seem that I am following high authority in taking this position. (*Westinghouse v. Stanley*, 138 Fed. 823; 71 C. C. A. 189).

In the preparation of the material for this work, I have personally read and excerpted from every appellate patent decision containing any point of law. No reliance whatever has been placed upon syllabus of court or reporter. This has been necessary for many reasons, but chiefly three: First, the syllabi of reported patent decisions, by reason of the abstruse and technical subject-matter, are often vague and unreliable, and in some cases absolutely misleading. Second, all of the questions passed upon in a given case are rarely included in the syllabus; and this is as true when the notes are made by the court as when they are made by the reporter, for the court views the opinion from the cause itself, and often regards unessential a holding of importance because the case itself did not hinge directly thereon. Third, most rules are founded upon authorities cited in direct connection with the statement of the rule; and as the authority for the rule is well-nigh as important as the rule itself, the collection of such authori-

ties to accompany the statement of the rule has made a detailed study and analysis of every opinion indispensable.

In addition to such a study of the entire text of every decision, this work has necessitated, — (1) Making a condensed statement of every point of law *in the exact language of the decision*, wherever possible. (2) Classifying these quotations under titles and section headings. (3) Appending to each quotation the authorities, if any, upon which the ruling was founded. (4) Repeating the ruling as necessary to bring it under all necessary titles to prevent overlooking a decision by going to a wrong title. (5) Making a corresponding analysis of the patent laws so that each title may read out from the statute. (6) Tabulating and cross-referencing the titles and section-headings so that the general practitioner, without detailed familiarity with patent law terminology, may at once find all the fixed law on any subject. (7) Appending a table of cases quoted from with section references; the name of the judge writing the opinion; whether affirming or reversing the court below, with reference to the opinion below if reported; names of dissenting judges, if any; and in C. C. A. decisions the circuit, and the names of the judges sitting; also, in many cases, memoranda of other cases bearing upon the patent under review. (8) Preparing a table of cases cited by the courts as authority for rulings made. (9) Giving with each case the volume and page of all standard reports containing the case.

At the solicitation of lawyers whose opinions I value I have preceded the main body of the work with a chapter entitled "A Brief Survey of the Fixed Law of Patents." This was not a part of the original conception; it is supplemental — written in the freedom of personal expression — and stands in contrast with the fixed, authoritative character of the body of the work.

I have not hesitated, in some instances, to express my opinion upon certain rulings; but these are always appended in such form as to be readily distinguishable from the law.

The method of citing cases is an innovation. Titles have been curtailed. Life is too short to give descriptive titles. It is sufficient to say "National *v.* Interchangeable," rather than "The National Hollow Brake Beam Company *v.* The Interchangeable Brake Beam Company." The time has gone by when learned judge or lawyer may give from memory the titles of the leading cases.

A labor of this character, growing out of the necessities of my practice, cannot be free from faults. Years teach consciousness of one's own frailty, and a deeper respect for the greatness of great

minds. Yet great minds are fallible, and from time to time I have not hesitated to dissent from a rule or holding, knowing that criticism founded on conviction born of experience, is never unwelcome to a broad mind.

In dedicating this book to my preceptor, counselor, and friend, Adelbert Moot, Esq., I am but recognizing the fact that it is not ourselves alone, but contact with lofty minds, that inspires us to our best work.

WILLIAM MACOMBER.

BUFFALO, August, 1909.

CONTENTS

| | PAGE |
|--|-------|
| PREFACE TO THE SECOND EDITION | vii |
| PREFACE | ix |
| TABLE OF CASES EXCERPTED | xv |
| TABLE OF CASES CITED | cxiii |
| A BRIEF SURVEY OF THE FIXED LAW OF PATENTS | 1 |
| THE FIXED LAW | 77 |
| CROSS-REFERENCE TABLE OF PATENT LAWS | 856* |
| THE PATENT STATUTE DIGESTED | 857 |
| APPENDIX OF CASES REPORTED SINCE FIRST EDITION | 915 |
| INDEX | 1027 |

TABLE OF CASES EXCERPTED

WITH ANNOTATIONS

The annotations give generally: (1) volume and page of each case in all standard reports; (2) affirmance, reversal or other disposition of the case below, with volume and page of opinion, if reported; (3) name of judge or justice writing the opinion, in SMALL CAPITALS; (4) name of judges or justices dissenting, and name of writer of dissenting opinion, in SMALL CAPITALS; (5) the circuit, and names of judges sitting in C. C. A. cases; (6) references to other cases related by subject-matter or patents involved.

[References are to sections. "App." refers to Appendix Chapter, pp. 00 covering cases reported since first printing down to and including 225 U. S. and 194 Fed.]

- Acme *v.* Cary, 101 Fed. 269; 41 C. C. A. 338.....74, 79, 620
 Affg. 99 Fed. 500; 96 Fed. 344.
 Second; Wallace, LACOMBE, Shipman.
- Acme *v.* Meredith, 183 Fed. 124; 105 C. C. A. 414.....App. 188, 456
 Eighth; Hook, Adams, REED.
- Acme Acetylene *v.* Commercial, 192 Fed. 321; 112 C. C. A. 573....App.
 9, 420, 421, 476, 543, 544, 561
 Affg. 188 Fed. 89; see 166 Fed. 907; 181 Fed. 387.
 Sixth; WARRINGTON, Knappen, Sanford.
- Acme-Keystone *v.* Dearborn, 185 Fed. 503; 107 C. C. A. 603....App. 506
 Affg. 180 Fed. 766.
 Second; LACOMBE, Cox, Ward.
- Adam *v.* Folger, 120 Fed. 260; 56 C. C. A. 540. .438, 459, 473, 554, 794, 929
 Seventh; Jenkins, Grosscup, BAKER.
- Adams *v.* Bellaire, 141 U. S. 539; 35 L. Ed. 849; 12 S. Ct. 66..90, 596, 635
 FIELD.
- Adams *v.* Burks, 84 U. S. 453; 21 L. Ed. 700.....763, 769, 927
 MILLER; dissenting: BRADLEY, Swayne, Strong.
- Adams *v.* Lindell, 77 Fed. 432; 23 C. C. A. 223...204, 223, 441, 473, 507, 674
 Affg. 63 Fed. 986.
 Eighth; Caldwell, SANBORN, Thayer.
- Adams *v.* Tannage, 81 Fed. 178; 26 C. C. A. 326.....561, 796
 Affg. 77 Fed. 191.
 Third; DALLAS, Butler, Buffington.
- Adée *v.* Mott, 55 Fed. 876; 5 C. C. A. 288.....903
 Affg. 46 Fed. 77.
 Second; Per Curiam; Lacombe, Wheeler.
- Adriance *v.* National, 121 Fed. 827; 58 C. C. A. 163516, 924
 Revg. 111 Fed. 637.
 Second; WALLACE, Lacombe.
- Adriance *v.* National, 101 Fed. 1005; 41 C. C. A. 675.....App. 133
 See 98 Fed. 118.
 Second; Wallace, Lacombe, Shipman, Per Curiam.

[References are to sections. "App." refers to Appendix]

- Acolian v. Juelg*, 155 Fed. 119; 86 C. C. A. 205.....478, 579
 Affg. 149 Fed. 939.
 Second; Per Curiam; Wallace, Lacombe, Coxe.
- Agawam v. Jordan*, 74 U. S. 583; 19 L. Ed. 177:....6, 144, 267, 318, 319,
 CLIFFORD. 321, 368, 369, 487, 503, 795, 850, 861
- Ager v. Murray*, 105 U. S. 126; 26 L. Ed. 942.....151, 157
 GRAY.
- Ajax v. Pettibone*, 125 Fed. 748; 60 C. C. A. 516.....207
 Seventh; Jenkins, BAKER, Bunn.
- Albany v. Worthington*, 79 Fed. 966; 25 C. C. A. 258.....187, 200, 341
 Affg. 73 Fed. 325.
 Second; LACOMBE, Shipman.
- Albright v. Teas*, 106 U. S. 613; 27 L. Ed. 295; 1 S. Ct. 550....714, 724
 WOODS.
- Allen v. Culp*, 166 U. S. 501; 41 L. Ed. 1093; 17 S. Ct. 644.....887
 Affg. 166 Pa. St. 286.
 BROWN.
- Allen v. Riley*, 203 U. S. 347; 51 L. Ed. 216; 27 S. Ct. 95.....920
 Affg. 71 Kan. 378.
 PECKHAM; dissenting, WHITE, Day.
- Allington v. Booth*, 78 Fed. 878; 24 C. C. A. 378.....551, 556, 562
 Affg. 72 Fed. 772; see 61 Fed. 297.
 Second; WALLACE, Lacombe, Shipman.
- Allis-Chalmers v. Westinghouse*, 184 Fed. 722; 107 C. C. A. 541..App. 604
 Affg. 180 Fed. 751.
 Third; GRAY, Buffington, Lanning.
- Am. Bell Tel. Co. v. U. S.* 68 Fed. 542; 15 C. C. A. 569.....26, 57, 361,
 727, 789
 Revg. 65 Fed. 86.
 First; Colt, PUTNAM, Nelson.
- Am. Bell Tel. Co. v. National*, 119 Fed. 893; 56 C. C. A. 423.....690
 Affg. 109 Fed. 976.
 First; COLT, Putnam, Aldrich.
- Am. Box Mach. v. Crosman*, 61 Fed. 888; 10 C. C. A. 146.....847
 Affg. 57 Fed. 1021, except as to terms of decree.
 First; Colt, Nelson, Webb, Per Curiam.
- Am. Brake Beam v. Pungs*, 141 Fed. 923; 73 C. C. A. 157.....160, 744
 Seventh; GROSSCUP.
- Am. Can v. Hickmott*, 142 Fed. 141; 73 C. C. A. 359....380, 435, 936, 937
 Revg. 137 Fed. 86.
 Ninth; GILBERT, Ross, Hawley.
- Am. Can v. Morris*, 142 Fed. 166; 73 C. C. A. 384.....103, 666
 Seventh; BAKER, Seaman, Anderson.
- Am. Car & Foundry v. Morton Trust*, 175 Fed. 568; 99 C. C. A. 190..App.
 594
 Revg. 161 Fed. 546.
 Third; BUFFINGTON, McPherson.
- Am. Caramel v. Mills*, 162 Fed. 147; 89 C. C. A. 171.....338, 777
 Modfg. 149 Fed. 743.
 Third; Dallas, Gray, ARCHBALD.
- Am. Caramel v. Mills*, 149 Fed. 743; 79 C. C. A. 449....61, 456, 624, 851
 Revg. 138 Fed. 142; see 162 Fed. 147.
 Third; Dallas, Gray, ARCHBALD.
- Am. Carriage v. Wyeth*, 139 Fed. 389; 71 C. C. A. 485452, 563, 665
 Sixth; Lurton, SEVERENS, Richards.

[References are to sections. "App." refers to Appendix]

- Am. Chocolate *v.* Helmstetter, 142 Fed. 978; 74 C. C. A. 240....603, 637,
754
Affg. in part 129 Fed. 919.
Second; Wallace, Lacombe, TOWNSEND.
- Am. Coat Pad *v.* Phoenix, 113 Fed. 629; 51 C. C. A. 339118, 271, 305,
386, 546, 572, 929
Fourth; Simonton, PURNELL, Waddill.
- Am. Cotton Tie *v.* Simmons, 106 U. S. 89; 27 L. Ed. 79; 1 S. Ct. 52...523,
524
BLATCHFORD.
- Am. Crayon *v.* Sexton, 139 Fed. 564; 71 C. C. A. 548.....196, 459, 468
Sixth; Lurton, Severens, RICHARDS.
- Am. Delinter *v.* American, 128 Fed. 709; 63 C. C. A. 307..398, 447, 674
Fifth; McCormick, SHELBY, Parlange.
- Am. Disappearing Bed *v.* Arnaelsteen, 182 Fed. 324; 105 C. C. A. 40
....App. 207, 325, 679
Ninth; GILBERT, Ross, Wolverton.
- Am. Electric Novelty *v.* Newgold, 113 Fed. 877; 51 C. C. A. 501.....332
Affg. 108 Fed. 957; see 99 Fed. 567.
Second; Wallace, TOWNSEND.
- Am. Featherbone *v.* Warren, 141 Fed. 655; 72 C. C. A. 649.....59
Revg. 133 Fed. 304.
Seventh; Crosseup, Baker, SEAMAN.
- Am. Fibre-Chamois *v.* Buckskin, 72 Fed. 508; 18 C. C. A. 662...111, 324,
325, 327
Revg. 69 Fed. 247; distinguishing *Locomotive v. Medart*, 158 U. S.
68, from *Cochrane v. Deener*, 94 U. S. 780.
Sixth; TAFT, Lurton, Hammond.
- Am. Fibre-Chamois *v.* Port Huron, 72 Fed. 516; 18 C. C. A. 670..411, 627
Sixth; TAFT, Lurton, Hammond.
- Am. Fur Refining *v.* Cimiotti, 123 Fed. 869; 59 C. C. A. 357..232, 473,
502
Revg. 120 Fed. 672.
Third; Acheson, Dallas, BUFFINGTON.
- Am. Fur Refining *v.* Cimiotti, 118 Fed. 838; 55 C. C. A. 513.....543, 546
Affg. 117 Fed. 623.
Third; ACHESON, Dallas, Gray.
- Am. Graphophone *v.* Leeds, 170 Fed. 327; 95 C. C. A. 511...App. 97, 862
Second; COXE, Ward, Noyes.
- Am. Graphophone *v.* Talking Machine, 98 Fed. 729; 39 C. C. A. 245..569
Seventh; Woods, Bunn, SEAMAN.
- Am. Graphophone *v.* Universal, 151 Fed. 595; 51 C. C. A. 139..626, 648
Revg. 145 Fed. 636, 643.
Second; Wallace, Lacombe, TOWNSEND.
- Am. Graphophone *v.* Victor, 183 Fed. 580; 106 C. C. A. 348.....App. 510
Revg. 178 Fed. 577; see 140 Fed. 860; 145 Fed. 350; 151 Fed. 595;
170 Fed. 327; 150 Fed. 147; 154 Fed. 58.
Second; Cox, WARD, Noyes.
- Am. Graphophone *v.* Victor, 188 Fed. 428; 110 C. C. A. 308.....App. 714
Affg. 188 Fed. 431.
Third; BUFFINGTON, Lanning, Young.
- Am. Grass Twine *v.* Choate, 159 Fed. 140; 86 C. C. A. 330.....626, 667
Seventh; Crosseup, BAKER, Kohlsaas.
- Am. Grass Twine *v.* Choate, 159 Fed. 429; 86 C. C. A. 409.....490
Seventh; Crosseup, BAKER, Kohlsaas.

[References are to sections. " App." refers to Appendix]

- Am. Heat Ins. *v.* Johnston, 52 Fed. 228; 3 C. C. A. 53.....871
 Revg. 48 Fed. 446.
 Third; Dallas, BUTLER, Green.
- Am. Lava *v.* Steward, 155 Fed. 731; 84 C. C. A. 157..56, 309, 780, 817, 904
 Affd. 215 U. S. 161; refusing to follow decision of C. C. A. 2d Circ.
 on same pat.; see 128 Fed. 599.
 Sixth; Lurton, SEVERENS, Richards.
- Am. Laundry Mach. *v.* Troy, 174 Fed. 415; 98 C. C. A. 612.....App. 631
 Affg. 171 Fed. 878; see 161 Fed. 556; 151 Fed. 59.
 Second; Lacombe, Coxe, Ward, Per Curiam.
- Am. Mattress *v.* Springfield, 165 Fed. 191; 91 C. C. A. 225.....496
 Seventh; GROSSCUP, Baker, Landis.
- Am. Ordnance *v.* Driggs-Seabury, 109 Fed. 83; 48 C. C. A. 241.....665
 Affg. 99 Fed. 982.
 Second; LACOMBE, Shipman.
- Am. Ordnance *v.* Driggs-Seabury, 114 Fed. 936; 52 C. C. A. 556.....602
 Affg. 99 Fed. 996.
 Second; WALLACE, Lacombe, Shipman.
- Am. Paper Bag *v.* Van Northwick, 52 Fed. 752; 3 C. C. A. 274....752,
 753, 764
 Seventh; Harlan, Woods, JENKINS.
- Am. Paper Pail *v.* National, 51 Fed. 229; 2 C. C. A. 165.....118, 541
 Affg. 48 Fed. 913; approving 41 Fed. 139.
 Second; Wallace, SHIPMAN.
- Am. Pneumatic *v.* Snyder, 180 Fed. 712; 104 C. C. A. 78....App. 68,
 214, 376
 Revg. 174 Fed. 152.
 Third; Buffington, BRADFORD, McPherson.
- Am. Road Mach. *v.* Pennock, 164 U. S. 26; 41 L. Ed. 337; 17 S. Ct. 1
207, 592
 Affg. 45 Fed. 252.
 FULLER.
- Am. Roll Paper *v.* Weston, 59 Fed. 147; 8 C. C. A. 56.....74, 103, 380
 Affg. 51 Fed. 237.
 Sixth; Taft, Lurton, SEVERENS.
- Am. Sales Book *v.* Bullivant, 117 Fed. 255; 54 C. C. A. 287....131, 404,
 Ninth; Gilbert, HAWLEY, De Haven.
- Am. Sales Book *v.* Carter-Crume, 150 Fed. 333; 80 C. C. A. 339.....107
 Revg. 145 Fed. 939.
 Second; Lacombe, TOWNSEND, Coxe.
- Am. School Furniture *v.* Vaught, 108 Fed. 571; 47 C. C. A. 496.....542
 Seventh; Woods, Jenkins, Grosseup, Per Curiam.
- Am. Soda Fountain *v.* Sample, 136 Fed. 857; 70 C. C. A. 415.....138
 Revg. 134 Fed. 402; see 126 Fed. 760; 130 Fed. 145.
 Third; ACHESON, Dallas, Gray.
- Am. Soda Fountain *v.* Sample, 130 Fed. 145; 64 C. C. A. 497.....630
 Revg. 126 Fed. 760.
 Third; Acheson, GRAY, Kirkpatrick.
- Am. Soda Fountain *v.* Sweitusch, 85 Fed. 968; 29 C. C. A. 506....876, 889
 Affg. 75 Fed. 573; dist. Gaskill *v.* Myers, 81 Fed. 854.
 Seventh; Woods, Jenkins, Showalter, Per Curiam.
- Am. Specialty *v.* New England, 176 Fed. 557; 100 C. C. A. 193..App. 214,
 387, 487, 787
 Second; LACOMBE, Ward, Noyes.

[References are to sections. "App." refers to Appendix]

- Am. Steel & Wire *v.* New Jersey, 194 Fed. 117; 114 C. C. A. 195...App.
458, 490
See 176 Fed. 564; 169 Fed. 793; 160 Fed. 108; 160 Fed. 125.
Eighth; Adams, Smith, AMIDON.
- Am. Stoker *v.* Underfeed, 188 Fed. 314; 110 C. C. A. 292...App. 212, 807
Affg. 182 Fed. 642.
Third; Buffington, LANNING, McPherson.
- Am. Stove *v.* Cleveland, 158 Fed. 978; 86 C. C. A. 182...32, 195, 207,
208, 398, 515, 903
Revg. 157 Fed. 562.
Sixth; Lurton, SEVERENS, Richards.
- Am. Street Car *v.* Jones, 142 Fed. 974; 74 C. C. A. 236...764
Revg. 122 Fed. 803.
Second; Wallace, TOWNSEND, Coxe.
- Am. Street Flushing Mach. *v.* St. Louis, 192 Fed. 121; 112 C. C. A. 582
...App. 843
Eighth; Hook, Smith, Marshall.
- Am. Sulphite *v.* De Grasse, 157 Fed. 660; 87 C. C. A. 260...411, 447, 629,
706, 807
Revg. 151 Fed. 47.
Second; Lacombe, COXE, Noyes.
- Am. Sulphite *v.* Howland, 80 Fed. 395; 25 C. C. A. 500...223, 380, 689,
865, 915, 938
Revg. 70 Fed. 986.
First; Colt, Webb, ALDRICH.
- Am. Sulphite Pulp Co. *v.* De Grasse, 193 Fed. 653; 113 C. C. A. 521...App.
292
Revg. 190 Fed. 39; see 157 Fed. 660.
Second; LACOMBE, Ward, Noyes.
- Am. Tobacco *v.* Streat, 83 Fed. 700; 28 C. C. A. 18...234, 473, 525, 674, 771
Fourth; GOFF, Simonton, Brawley.
- Am. Wood Paper *v.* Fiber, 90 U. S. 566; 23 L. Ed. 31...78, 204, 380,
818, 822, 871
STRONG.
- Am. Writing Mach. *v.* Wagner, 151 Fed. 576; 81 C. C. A. 120...72, 226, 413
Affg. 138 Fed. 108.
Second; Lacombe, Townsend, COXE.
- Anderson *v.* Collins, 122 Fed. 451; 58 C. C. A. 669...96, 223, 349, 409,
441, 468, 609
Eighth; Caldwell, SANBORN, Thayer.
- Anderson *v.* Eiler, 50 Fed. 775; 1 C. C. A. 659...754, 756
Affg. 46 Fed. 777.
Third; Acheson, BULLER, Green.
- Anderson *v.* Miller, 129 U. S. 70; 32 L. Ed. 635; 9 S. Ct. 224...103, 795
LAMAR.
- Anderson *v.* Potts, 108 Fed. 379; 47 C. C. A. 409...31, 190, 220
Seventh; Woods, Jenkins, Bunn.
- Andrews *v.* Hovey, 123 U. S. 267; 31 L. Ed. 160; 8 S. Ct. 101...857
Affg. 5 McCrary, 181; rehearing 124 U. S. 694; Eames *v.* Andrews,
122 U. S. 40; Beedle *v.* Bennett, id. 71.
BLATCHFORD.
- Andrews *v.* Hovey, 124 U. S. 694; 31 L. Ed. 557; 8 S. Ct. 676...30, 770,
857, 895, 923
Rehearing and affg. 123 U. S. 267; 8 Ct. 101.
BLATCHFORD.

XX CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Andrews *v.* Thum, 67 Fed. 911; 15 C. C. A. 67.....137, 636, 775
 Revg. 53 Fed. 84.
 First; COLT, Webb, Aldrich.
- Andrews *v.* Thum, 72 Fed. 290; 18 C. C. A. 566.....138
 See 64 Fed. 149; 67 Fed. 911; 70 Fed. 65; 71 Fed. 763.
 First; Colt, Webb, Aldrich, Per Curiam.
- Ansonia *v.* Electrical, 144 U. S. 11; 36 L. Ed. 327; 12 S. Ct. 601...63, 654,
 660, 666, 671
 Affg. 32 Fed. 81; 35 Fed. 68.
 BROWN; dissenting, Field.
- Anthony *v.* Gennert, 108 Fed. 396; 47 C. C. A. 426.....938
 Affg. 99 Fed. 95.
 Third; Acheson, Dallas, BUFFINGTON.
- Antisdal *v.* Chicago, 89 Fed. 308; 32 C. C. A. 216...46, 381, 385, 387, 567
 Seventh; Woods, Showalter, Baker.
- Anton *v.* Grier, 185 Fed. 796; 108 C. C. A. 173.....App. 597
 Third; Gray, Lanning, HOLLAND.
- Appleton *v.* Bacon, 67 U. S. 699; 17 L. Ed. 338.....25, 151, 884
 NELSON.
- Appleton *v.* Star, 60 Fed. 411; 9 C. C. A. 42.....670, 817
 Affg. 51 Fed. 284.
 Seventh; Woods, Jenkins, Bunn.
- Aquarama *v.* Old Mill, 115 Fed. 806; 53 C. C. A. 376.....563, 564
 Second; Wallace, LACOMBE, Townsend.
- Arey *v.* DeLorica, 55 Fed. 323; 5 C. C. A. 116.....736
 Revg. (at law) See same pat. in suit McDonald *v.* Whitney, 24 Fed. 600.
 First; Colt, Putnam, NELSON.
- Arlington *v.* Celluloid, 97 Fed. 91; 318 C. C. A. 60.....685
 Revg. 85 Fed. 449.
 Third; Dallas, Buffington, BRADFORD.
- Armat *v.* Edison, 125 Fed. 939; 60 C. C. A. 380.....544, 571
 Revg. 121 Fed. 559.
 Second; Wallace, TOWNSEND, Coxe.
- Armstrong *v.* Belding, 174 Fed. 410; 98 C. C. A. 361.....App. 387
 Affg. in part 172 Fed. 234.
 Second; LACOMBE, Coxe, Ward.
- Arnold *v.* Tyden, 193 Fed. 410; 113 C. C. A. 344.....App. 196
 Seventh; Grossep, Baker, SANBORN.
- Aron *v.* Manhattan, 132 U. S. 84; 33 L. Ed. 272; 10 S. Ct. 24...671, 672, 673
 Affg. 26 Fed. 314.
 BLATCHFORD.
- Ashcroft *v.* Boston, 97 U. S. 189; 24 L. Ed. 982.....216, 344
 CLIFFORD.
- Ashley *v.* Tatum, 186 Fed. 339; 108 C. C. A. 539.....App. 331
 Revg. 181 Fed. 840.
 Second; LACOMBE, Ward, Noyes.
- Ashley *v.* Tatum, 189 Fed. 357; 111 C. C. A. 279.....App. 203
 See 181 Fed. 840; 186 Fed. 339.
 Second; LACOMBE, Ward, Noyes.
- Ashton *v.* Coale, 52 Fed. 314; 3 C. C. A. 98.....111, 202, 203, 612, 809
 Affg. 50 Fed. 100.
 Fourth; Goff, HUGHES, Simonton.
- Atherton *v.* Atwood-Morrison, 102 Fed. 949; 43 C. C. A. 72...721, 801, 806, 807
 Revg. 99 Fed. 113.
 Third; Acheson, Dallas, GRAY.

[References are to sections. "App." refers to Appendix]

- Atkins *v.* Moore, 212 U. S. 285; 53 L. Ed. 515; 29 S. Ct. 390...App. 143
 See 29 App. D. C. 385.
 FULLER.
- Atkins *v.* Parke, 61 Fed. 953; 10 C. C. A. 189.....176, 449, 450, 765
 Sixth; Taft, Lurton, RICKS.
- Atlantic *v.* Brady, 107 U. S. 192; 27 L. Ed. 438; 2 S. Ct. 225..96, 638, 679
 BRADLEY.
- Atlas *v.* Simonds, 102 Fed. 643; 42 C. C. A. 398.....420, 421, 424, 743
 Affg. 102 Fed. 338.
 Third; Acheson, Dallas, GRAY.
- Austin *v.* American, 121 Fed. 76; 57 C. C. A. 330.....136, 230, 459, 544,
 561, 634
 Affg. 98 Fed. 992.
 Seventh; Jenkins, Baker, SEAMAN.
- Automatic Switch *v.* Cutler-Hammer, 147 Fed. 250; 77 C. C. A. 176....21,
 170
 Revg. 139 Fed. 870.
 Second; Wallace, Lacombe, Coxe, Per Curiam.
- Automatic Weighing Mach. *v.* Pneumatic, 166 Fed. 288; 92 C. C. A....206,
 613, 811, 860
 Revg. 158 Fed. 415.
 First; COLT, Lowell, Aldrich.
- Avery *v.* Case, 148 Fed. 214; 78 C. C. A. 110.....247, 673
 Revg. 139 Fed. 878.
 Seventh; BAKER, Seaman, Kohlsaat.
- Avery *v.* Case, 174 Fed. 147; 98 C. C. A. 181.....App. 299
 Affg. 163 Fed. 842.
 Seventh; GROSSCUP, Baker, Kohlsaat.
- Babcock *v.* Clarkson, 63 Fed. 607; 11 C. C. A. 351.....384
 Affg. 58 Fed. 581.
 First; Colt, PUTNAM, Nelson.
- Babcock *v.* Toledo, 170 Fed. 81; 95 C. C. A. 363.....App. 381
 Sixth; LURTON, Severens, Warrington.
- Badische *v.* Kalle, 104 Fed. 802; 44 C. C. A. 201.....79, 105, 106
 Affg. 94 Fed. 163.
 Second; Wallace, LACOMBE, Shipman.
- Bagley *v.* Empire, 58 Fed. 212; 7 C. C. A. 191.....596, 615, 674
 Second; Lacombe, SHIPMAN.
- Baker *v.* Crane, 138 Fed. 60; 70 C. C. A. 486.....843, 892
 See 125 Fed. 1.
 Seventh; Jenkins, Grosscup, BAKER.
- Baker *v.* Duncombe, 146 Fed. 744; 77 C. C. A. 234.....616, 646, 706
 Eighth; Sanborn, Hook, ADAMS.
- Baldwin *v.* Kresl, 76 Fed. 823; 22 C. C. A. 593.....389, 600, 636, 646, 656
 Seventh; Woods, Jenkins, SEAMAN.
- Ball *v.* Langles, 102 U. S. 128; 26 L. Ed. 104.....871, 880
 STRONG.
- Ball & Socket Fastener *v.* Ball, 58 Fed. 818; 7 C. C. A. 498.....207, 311,
 507, 719, 915
 Revg. 36 Fed. 309, 39 Fed. 790, and 53 Fed. 245; rehearing 60 Fed.
 399.
 First; PUTNAM, Nelson, Webb.
- Ball & Socket Fastener *v.* Edgerton, 96 Fed. 489; 37 C. C. A. 523.....635,
 637, 919
 First; Colt, PUTNAM, Webb.

[References are to sections. "App." refers to Appendix.]

- Ball & Socket Fastener *v.* Kraetzer, 150 U. S. 111; 37 L. Ed. 1019; 14 S. Ct. 48. 48, 135, 275, 532
 Affg. 39 Fed. 700.
 BROWN.
- Ballard *v.* Searles, 130 U. S. 50; 32 L. Ed. 846; 9 S. Ct. 418. 790
 BRADLEY.
- Baltimore & O. *v.* McCune, 174 Fed. 991; 98 C. C. A. 531. App. 103, 131
 Third; GRAY, Buffington, Lanning.
- Bannerman *v.* Sanford, 99 Fed. 294; 39 C. C. A. 534. 88, 704
 Affg. 85 Fed. 448.
 Second; Wallace, LACOMBE, Shipman.
- Bantz *v.* Frantz, 105 U. S. 160; 26 L. Ed. 1013. 871
 WOODS.
- Barbed Wire Patent — see Washburn *v.* Beat 'Em All, 143 U. S. 275.
- Barber *v.* National, 129 Fed. 370; 64 C. C. A. 46. 756, 800
 Sixth; LURTON; Severens, Richards.
- Barnard *v.* Gibson, 7 How. 650; 12 L. Ed. 857. 892, App. 117
 McLEAN.
- Barnes *v.* Walworth, 60 Fed. 605; 9 C. C. A. 154. 59, 532, 646
 Affg. 51 Fed. 88.
 Seventh; Woods, Jenkins, Bunn.
- Barr *v.* Chicago, 110 Fed. 972; 49 C. C. A. 194. 20, 629
 Seventh; Woods, JENKINS, Grosseup.
- Bartholomew *v.* Union, 113 Fed. 289; 51 C. C. A. 250. 543
 Seventh; Jenkins, Grosseup, Bunn, Per Curiam.
- Bate *v.* Hammond, 129 U. S. 151; 32 L. Ed. 645; 9 S. Ct. 225. . . . 420, 421
 Construed in Pohl *v.* Anchor, 134 U. S. 381.
 BLATCHFORD.
- Bate *v.* Sulzberger, 157 U. S. 1; 39 L. Ed. 601; 15 S. Ct. 508. . . . 420, 421,
 923
 Affg. Edison *v.* U. S. 35 Fed. 134; Bate *v.* Hammond, 35 Fed. 151;
 Bate *v.* Gillett, 31 Fed. 809; Accumulator *v.* Julien, 57 Fed. 838;
 Gramme *v.* Arnoux, 17 Fed. 838; approving Andrews *v.* Hovey,
 124 U. S. 694.
 HARLAN.
- Bates *v.* Coe, 98 U. S. 31; 25 L. Ed. 68. 67, 111, 187, 201, 320, 322, 383,
 498, 604, 629, 795, 804, 855, 883, 905
 CLIFFORD.
- Bates *v.* Excelsior, 89 Fed. 498; 32 C. C. A. 267. 593
 Revg. 89 Fed. 88.
 Seventh; Woods, Showalter, Bunn.
- Bates *v.* Force, 149 Fed. 220; 79 C. C. A. 178. 598
 Revg. 145 Fed. 529.
 Second; Wallace, Townsend, Coxe, Per Curiam.
- Battin *v.* Taggart, 58 U. S. 77; 15 L. Ed. 37. 874
 McLEAN.
- Beach *v.* Hobbs, 92 Fed. 146; 34 C. C. A. 248. 254, 378, 380, 605, 880
 Revg. 82 Fed. 916.
 First; COLT, Brown, Lowell.
- Beccher *v.* Atwater, 114 U. S. 523; 29 L. Ed. 232; 5 S. Ct. 1007. . 594, 871
 GRAY.
- Beedle *v.* Bennett, 122 U. S. 71; 30 L. Ed. 1074; 7 S. Ct. 1090. . 20, 532, 717
 Affg. Patent held void substantially reversing this case and Eames *v.*
 Andrews, 122 U. S. 40 in Andrews *v.* Hovey, 123 U. S. 267.
 MATTHEWS; dissenting, Bradley, Field, Gray.

[References are to sections. " App." refers to Appendix]

- Beer *v.* Walbridge, 100 Fed. 465; 40 C. C. A. 496. . . . 326, 443, 626, 629, 709
 Second; WALLACE, Lacombe, Shipman.
- Belding *v.* Challenge, 152 U. S. 100; 38 L. Ed. 370; 14 S. Ct. 492. . . . 601, 655
 SHIRAS.
- Belknap *v.* Schild, 161 U. S. 10; 16 L. Ed. 599; 16 S. Ct. 443. . . . 429, 498,
 515, 553, 837
 GRAY; Dissenting, Harlan.
- Bell *v.* MacKinnon, 149 Fed. 205; 79 C. C. A. 163. 390
 Second; Lacombe, TOWNSEND, Coxe.
- Bement *v.* National, 186 U. S. 70; 46 L. Ed. 1058; 22 S. Ct. 747. 744
 PECKHAM.
- Benbow-Brammer *v.* Straus, 166 Fed. 114; 92 C. C. A. 98. 378
 Affg. 158 Fed. 627; see 98 Fed. 880; 106 Fed. 918; 132 Fed. 614; 144
 Fed. 429; 149 Fed. 430; 157 Fed. 559; 159 Fed. 161.
 Second; Lacombe, COXE, Ward.
- Béné *v.* Jeantet, 129 U. S. 683; 32 L. Ed. 803; 9 S. Ct. 428. . . 197, 398, 494
 LAMAR.
- Benjamin *v.* Chambers, 59 Fed. 151; 8 C. C. A. 61. 225, 601
 See 51 Fed. 902.
 Third; Dallas, BUTLER, Green.
- Benjamin *v.* Dale, 158 Fed. 617; 85 C. C. A. 439. 348, 350, 506
 Revg. 141 Fed. 989.
 Second; Lacombe, Coxe, Ward, Per Curiam.
- Bennett *v.* Fowler, 75 U. S. 445; 19 L. Ed. 431. 348
 NELSON.
- Berliner *v.* Seaman, 113 Fed. 750; 51 C. C. A. 440. 137, 542, 576, 789
 See 108 Fed. 714; See 110 Fed. 30.
 Fourth; SIMONTON, Jackson, Purnell.
- Berliner *v.* Seaman, 110 Fed. 30; 49 C. C. A. 99. App. 540, 722
 Revg. 108 Fed. 714; see 113 Fed. 750.
 Fourth; SIMONTON, Brawley, Waddill.
- Bernard *v.* Frank, 179 Fed. 516; 101 C. C. A. 459. App. 577
 See 131 Fed. 269; 135 Fed. 102; 146 Fed. 137; 171 Fed. 117.
 Second; COXE, Ward, Noyes.
- Berry *v.* Wynkoop, 84 Fed. 646; 28 C. C. A. 505. 698
 Affg. 77 Fed. 833.
 Second; Wallace, Lacombe, SHIPMAN.
- Bettendorf *v.* Little, 123 Fed. 433; 59 C. C. A. 473. 74, 646
 Seventh; Jenkins, Grosscup, BAKER.
- Bibb *v.* Bowers, 142 Fed. 137; 73 C. C. A. 355. 198
 Fifth; PARDEE, Shelby, Maxey.
- Birdsall *v.* Coolidge, 93 U. S. 64; 23 L. Ed. 802. 282, 285, 292, 294
 CLIFFORD.
- Birdsall *v.* Shaliol, 112 U. S. 485; 28 L. Ed. 768; 5 S. Ct. 244. . . . 299, 338,
 764, 767, 796, 798
 GRAY.
- Birmingham *v.* Gates, 78 Fed. 350; 24 C. C. A. 132. . . . 359, 601, 610, 615, 657
 Following Gates *v.* Fraser, 153 U. S. 332. See 42 Fed. 49.
 Fifth; PARDEE, McCormick, Boardman.
- Bissell *v.* Goshen, 72 Fed. 545; 19 C. C. A. 25. . . . 116, 119, 120, 128, 142,
 539, 544, 545, 549
 See 72 Fed. 67. Following Richmond *v.* Atwood, 52 Fed. 10; Marden
v. Mfg. Co. 67 Fed. 809. Overruling Watch Co. *v.* Robbins, 52
 Fed. 337 on question of appeal.
 Sixth; Taft, LURTON, Hammond.

XXIV CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Black *v.* Thorne, 111 U. S. 122; 28 L. Ed. 372; 4 S. Ct. 326...292, 293, 298
 Affg. 12 Blatch. 20.
 FIELD.
- Black Diamond *v.* Excelsior, 156 U. S. 611; 39 L. Ed. 553; 15 S. Ct. 482
404, 664, 707
- BROWN.
- Blackledge *v.* Weir, 108 Fed. 71; 47 C. C. A. 212.....927
 Affg. 105 Fed. 1006.
 Seventh; Woods, Jenkins.
- Blair *v.* Eastman, 64 Fed. 491; 12 C. C. A. 603.....305
 Affg. 62 Fed. 400.
 First; Putnam, Nelson, Webb, Per Curiam.
- Blake *v.* San Francisco, 113 U. S. 679; 28 L. Ed. 1070: 5 S. Ct. 692..198,
 473, 671, 858
- WOODS.
- Blakey *v.* National, 95 Fed. 136; 37 C. C. A. 27.....567
 Third; Acheson, DALLAS, Bradford.
- Blanchard *v.* Putnam, 75 U. S. 420; 19 L. Ed. 433..311, 320, 411, 494, 629, 795
 Revg. 2 Bond. 84.
 CLIFFORD; dissenting opinion, Swayne, also Grier and Miller.
- Blauvelt *v.* Interior, 80 Fed. 906; 26 C. C. A. 243.....366
 Second; Lacombe, SHIPMAN.
- Bliss *v.* Reed, 106 Fed. 314; 45 C. C. A. 304.....164, 674, 805
 Affg. 102 Fed. 903.
 Third; Dallas, Gray, BUFFINGTON.
- Bloomer *v.* McQuewan, 14 How. 539; 14 L. Ed. 532.....418
 TANEY, Nelson. Dissenting opinion McLean.
- Bloomer *v.* Millinger, 68 U. S. 340; 17 L. Ed. 581.....769
 CLIFFORD.
- Blount *v.* Société, 53 Fed. 98; 3 C. C. A. 455...544, 554, 555, 560, 561, 562
 See same patent 52 Fed. 146; 51 Fed. 610.
 Sixth; JACKSON, Taft.
- Blumenthal *v.* Burrill, 53 Fed. 105; 3 C. C. A. 462.....649
 Affg. 43 Fed. 667.
 Second; SHIPMAN, Lacombe.
- Boesch *v.* Gräff, 133 U. S. 697; 33 L. Ed. 787; 10 S. Ct. 378....138, 153,
 288, 505, 836
 Revg. 33 Fed. 279; see 50 Fed. 660.
 FULLER.
- Boldt *v.* Nevison, 194 Fed. 871; 114 C. C. A. 617.....App. 323, 335, 636
 Sixth; Warrington, Knappen, SATER.
- Bolte *v.* Knight, 180 Fed. 412; 103 C. C. A. 558.....App. 331
 Affg. 180 Fed. 414.
 Seventh; GROSSCUP, Baker, Seaman.
- Bonnell *v.* Stoll, 61 Fed. 767; 10 C. C. A. 48.....667
 Affg. 57 Fed. 396.
 Third; Dallas, WALES, Green.
- Bonnette *v.* Kochler, 82 Fed. 428; 27 C. C. A. 200.....221, 443, 486
 Sixth; TAFT, Lurton, Severens.
- Bonsack *v.* Elliott, 69 Fed. 335; 16 C. C. A. 250.....63, 411, 608
 Revg. in part 63 Fed. 835; affd. on rehearing, 73 Fed. 834.
 Second; Brown, Lacombe, SHIPMAN.
- Bonsack *v.* Hulsc, 65 Fed. 864; 13 C. C. A. 180.....365
 Affg. 57 Fed. 519.
 Fourth; SIMONTON, Morris, Brawley.

[References are to sections. "App." refers to Appendix]

- Boss *v.* Thomas, 182 Fed. 811; 105 C. C. A. 243....App. 207, 636, 652, 696
 Affg. 182 Fed. 815.
 Eighth; Hook, Adams, REED.
- Bossert *v.* Pratt, 179 Fed. 385; 103 C. C. A. 45.....App. 201, 656, 741
 Second; Lacombe, Ward, Noyes, Per Curiam.
- Boston *v.* Allen, 91 Fed. 248; 33 C. C. A. 485.....293, 756, 903
 First; PUTNAM, Webb, Brown.
- Boston & Revere *v.* Bemis, 80 Fed. 287; 25 C. C. A. 420.....378, 527
 Affg. 75 Fed. 403; see 98 Fed. 121.
 First; PUTNAM, Webb, Aldrich.
- Boston & Revere *v.* Bemis, 98 Fed. 121; 38 C. C. A. 661.....790
 See 80 Fed. 287.
 First; PUTNAM, Aldrich, Brown.
- Boston Lasting Mach. *v.* Woodward, 82 Fed. 97; 27 C. C. A. 69..198, 380,
 384
 Affg. 75 Fed. 272.
 First; Colt, PUTNAM, Webb.
- Boston Woven Hose *v.* Pennsylvania, 164 Fed. 557; 90 C. C. A. 84....229,
 620
 Affg. 156 Fed. 787.
 First; PUTNAM, Lowell, Aldrich.
- Bothe *v.* Paddock, 50 Fed. 536; 1 C. C. A. 575.....592
 Eighth; Caldwell, Sanborn, SHIRAS.
- Bowers *v.* Lake Superior, 149 Fed. 983; 79 C. C. A. 493.....40, 751, 759
 Eighth; Sanborn, Hook, Adams.
- Boyd *v.* Janesville, 158 U. S. 260; 39 L. Ed. 973; 15 S. Ct. 837....217,
 629, 680
 Affg. 37 Fed. 887.
 SHIRAS.
- Boyden *v.* Burke, 14 How. 575; 14 L. Ed. 548.....181, 262, 410
 GRIER.
- Boyden *v.* Westinghouse, 70 Fed. 816; 17 C. C. A. 430.....197, 229, 257,
 377, 380, 426, 785, 893
 Revg. 66 Fed. 997.
 Fourth; Goff, Simonton, HUGHES.
- Boyer *v.* Cleveland, 185 Fed. 808; 108 C. C. A. 40.....App. 528
 See 171 Fed. 105.
 Sixth; Knappen, Cochran, SATER.
- Boyer *v.* Keller, 127 Fed. 130; 62 C. C. A. 244.....180, 214, 612
 Revg. 110 Fed. 217.
 Third; Acheson, Gray, ARCHBALD.
- Boynton *v.* Morris, 87 Fed. 225; 30 C. C. A. 617...50, 222, 223, 240, 606,
 706, 937
 Affg. 82 Fed. 440.
 Third; Acheson, DALLAS, Bradford.
- Braddock *v.* Macbeth, 64 Fed. 118; 12 C. C. A. 70.....334, 548
 Affg. 54 Fed. 173. See same patent 54 Fed. 167; 54 Fed. 169; 54
 Fed. 171.
 Third; DALLAS, Wales.
- Bradford *v.* Belknap, 115 Fed. 711; 53 C. C. A. 293.....696
 Affg. 105 Fed. 63.
 First; Colt, Aldrich, BROWN.
- Bradford *v.* Expanded, 146 Fed. 984; 77 C. C. A. 230.....682
 Revd. 214 U. S. 366, making good 136 Fed. 870.
 Third; DALLAS, Gray, McPherson.

XXVI CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Bradford *v.* Kisinger-Ison, 113 Fed. 811; 51 C. C. A. 483. . . . 327, 385, 764
 Sixth; Lurton, SEVERENS, Wanty.
- Bradley *v.* Eagle, 57 Fed. 980; 6 C. C. A. 661. 411, 807, 894
 Affg. 50 Fed. 193.
 Seventh; Gresham, Woods, JENKINS.
- Bradley *v.* Eagle, 58 Fed. 721; 7 C. C. A. 442. 315, 803
 Rehearing 57 Fed. 980.
 Seventh; JENKINS.
- Bradley *v.* Eccles, 126 Fed. 945; 61 C. C. A. 669. 124, 335, 442, 600
 Affg. 122 Fed. 867; revg. 122 Fed. 871.
 Second; LACOMBE, Townsend, Coxe.
- Bradley *v.* Eccles, 139 Fed. 447; 71 C. C. A. 291. 706
 Revg. 133 Fed. 308.
 Second; LACOMBE, Townsend, Coxe.
- Bradley *v.* Eccles, 143 Fed. 521; 71 C. C. A. 478. 661
 Revg. 138 Fed. 916.
 Second; Wallace, Lacombe, Townsend, Per Curiam.
- Brady *v.* Ajax, 160 Fed. 84; 87 C. C. A. 240. 823
 Revg. 155 Fed. 409.
 Third; GRAY, McPherson, Cross.
- Bragg *v.* Fitch, 121 U. S. 478; 30 L. Ed. 1008; 7 S. Ct. 978. 198
 Revg. 16 Fed. 243.
 BRADLEY.
- Brammer *v.* Schroeder, 106 Fed. 918; 46 C. C. A. 41. . . . 203, 223, 232, 374,
 464, 468, 472, 495
 Affg. 98 Fed. 880 and 886.
 Eighth; Caldwell, SANBORN, Adams.
- Brammer *v.* Witte, 159 Fed. 726; 86 C. C. A. 207. 226, 457, 473
 Eighth; SANBORN, Adams, Philips.
- Brennan *v.* Dowagiac, 162 Fed. 472; 89 C. C. A. 392. 837, 841, 845
 See 127 Fed. 143; 101 Fed. 716; 162 Fed. 479.
 Sixth; Lurton, SEVERENS, Richards.
- Bresnahan *v.* Tripp, 72 Fed. 920; 19 C. C. A. 237. 34, 229, 375, 541,
 545, 561
 Affg. 70 Fed. 982. Following *Electric v. Edison*, 60 Fed. 276; See
National v. American, 53 Fed. 367; approving *Cutcheon v. Herrick*,
 52 Fed. 147; applying *Davis v. Edison*, 60 Fed. 276; approving
Herrick v. Tripp, 60 Fed. 80.
 First; PUTNAM, Nelson, Webb.
- Bresnahan *v.* Tripp, 99 Fed. 280; 39 C. C. A. 508. 35, 37, 386, 891
 Affg. 92 Fed. 391
 First; Putnam, Webb, ALDRICH.
- Bresnahan *v.* Tripp, 102 Fed. 899; 43 C. C. A. 48. 189
 First; PUTNAM, Webb, Aldrich.
- Brickill *v.* Mayor, 60 Fed. 98; 8 C. C. A. 500. 287
 See opinion on demurrer, etc., 50 Fed. 274; 52 Fed. 737.
 Fourth; GOFF, Seymour, Simonton.
- Brickill *v.* Mayor, 112 Fed. 65; 50 C. C. A. 1. 220, 635, 674, 756, 846
 Revg. as to profits, 98 Fed. 113.
 Second; WALLACE, Brown, Thomas.
- Bridge *v.* Excelsior, 105 U. S. 618; 26 L. Ed. 1190. 507
 FIELD.
- Briggs *v.* Central, 60 Fed. 87; 8 C. C. A. 480. 672
 Affg. 54 Fed. 376.
 Second; WALLACE, Lacombe, Shipman.

CASES EXCERPTED, WITH ANNOTATIONS xxvii

[References are to sections. "App." refers to Appendix]

- Briggs v. Duell, 93 Fed. 972; 36 C. C. A. 38.....672
 Affg. 87 Fed. 479.
 Second; Wallace, LACOMBE, Shipman.
- Brigham v. Coffin, 149 U. S. 557; 37 L. Ed. 845; 13 S. Ct. 939.....775
 Affg. 37 Fed. 688.
 BROWN.
- Brill v. Peckham, 108 Fed. 267; 47 C. C. A. 315.....216, 226, 540
 See Brill v. R. R. 103 Fed. 289; Rev. in 189 U. S. 57.
 Second; WALLACE, Wheeler, Thomas.
- Brill v. Peckham, 189 U. S. 57; 47 L. Ed. 706; 23 S. Ct. 562.....122, 251
 Affg. 103 Fed. 289; 105 Fed. 626. Revg. 108 Fed. 267; 110 Fed. 377.
 FULLER.
- Brill v. St. Louis, 90 Fed. 666; 33 C. C. A. 213.....207, 214
 See 80 Fed. 909.
 Eighth; Sanborn, THAYER, Shiras.
- Brill v. Washington, 215 U. S. 527; 54 L. Ed. 311; 30 S. Ct. 177..App. 31
 Affg. 30 App. D. C. 255; see 134 Fed. 580; 125 Fed. 526; 135 Fed. 784.
 HOLMES, dissenting: McKenna.
- Brinkerhoff v. Alce, 146 U. S. 515; 36 L. Ed. 1068; 13 S. Ct. 221...47, 607
 Affg. 37 Fed. 92.
 FULLER.
- Brinton v. Paxton, 134 Fed. 78; 67 C. C. A. 204.....843, 845
 Affg. 107 Fed. 137.
 Third; Acheson, Gray, HOLLAND.
- Brookfield v. Elmer, 154 Fed. 197; 83 C. C. A. 180.....219
 Affg. 144 Fed. 418.
 Third; DALLAS, Gray, Buffington.
- Brookfield v. Novelty, 170 Fed. 960; 96 C. C. A. 127.....App. 299, 805
 Affg. 170 Fed. 830.
 Third; Gray, Buffington, ARCHBALD.
- Brooks v. Fiske, 15 How. 212; 14 L. Ed. 665.....223, 473
 CATRON. Dissent. Wayne, Nelson, McLEAN.
- Brooks v. Sacks, 81 Fed. 403; 26 C. C. A. 456.....71, 74, 349, 587
 Revg. 74 Fed. 935.
 First; Colt, PUTNAM, Webb.
- Brown v. Crane, 133 Fed. 235; 66 C. C. A. 676.....614
 Affg. 125 Fed. 34.
 Seventh; Jenkins, Grossepup, BAKER.
- Brown v. Davis, 116 U. S. 237; 29 L. Ed. 659; 6 S. Ct. 379..380, 876, 937
 Revg. 19 Blatchf. 263.
 BLATCHFORD.
- Brown v. District of Columbia, 130 U. S. 87; 32 L. Ed. 863; 9 S. Ct. 437
652, 696
 Affg. 3 Mackey, 502.
 FULLER.
- Brown v. Drohen, 175 Fed. 576; 99 C. C. A. 192.....App. 283, 292, 836,
 840
 Affg. 171 Fed. 438; see 140 Fed. 97; 148 Fed. 985; practically revg.
 165 Fed. 442, as to increasing damages.
 Second; Lacombe, COXE, Noyes.
- Brown v. Duchesne, 60 U. S. 183; 15 L. Ed. 595.....532
 TANEY.
- Brown v. Guild, 90 U. S. 181; 23 L. Ed. 161...62, 66, 216, 222, 223, 225,
 391, 473, 674, 690, 880, 913, 937
 BRADLEY. Dissent. opinion Clifford; also Miller and Davis.

xxviii CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

- Brown v. Huntington*, 134 Fed. 735; 67 C. C. A. 639.....694
 Affg. 131 Fed. 273.
 Second; LACOMBE, Townsend, Coxe.
- Brown v. King*, 107 Fed. 498; 46 C. C. A. 432380, 442, 657, 675
 Sixth; Lurton, Day, SEVERENS.
- Brown v. Lanyon*, 148 Fed. 838; 78 C. C. A. 528.....285
 Eighth; Van Devanter, ADAMS, Philips.
- Brown v. Lanyon*, 179 Fed. 309; 102 C. C. A. 497.....App. 129, 845, 893
 See 115 Fed. 150; 119 Fed. 918; 104 Fed. 345; 110 Fed. 665.
 Eighth; Sanborn, VAN DEVANTER, Munger.
- Brown v. Piper*, 91 U. S. 37; 23 L. Ed. 200....389, 687, 706, 712, 746, 795
 SWAYNE.
- Brown v. Stilwell*, 57 Fed. 731; 6 C. C. A. 528.....245, 377, 473
 Affg. 49 Fed. 738.
 Sixth; Jackson, TAFT, Hammond.
- Brown v. Stonemetz*, 58 Fed. 571; 7 C. C. A. 374.....812
 Affg. 57 Fed. 601.
 Third; Dallas, BUTLER, Green.
- Browning v. Colorado*, 61 Fed. 845; 10 C. C. A. 112.....637, 672
 Eighth; Caldwell, Sanborn, THAYER.
- Brunswick v. Klumpp*, 131 Fed. 255; 65 C. C. A. 447.....326, 341
 Affg. 126 Fed. 765. See 111 Fed. 904.
 Second; LACOMBE, Townsend, Coxe.
- Brunswick v. Phelan*, 79 Fed. 85; 24 C. C. A. 451.....655
 Affg. 76 Fed. 978.
 Second; Wallace, SHIPMAN, Lacombe.
- Brunswick v. Thum*, 111 Fed. 904; 50 C. C. A. 61.....626
 See this case reversed subsequently on new evidence in *Brunswick v.*
Klumpp, 131 Fed. 255.
 Second; Wallace, LACOMBE.
- Brusie v. Peck*, 54 Fed. 820; 4 C. C. A. 597.....760, 893
 Second; Lacombe, SHIPMAN.
- Brush v. California*, 51 Fed. 557; 2 C. C. A. 373.....116
 Affg. 49 Fed. 73.
 Ninth; McKenna, Ross, KNOWLES.
- Brush v. California*, 52 Fed. 945; 3 C. C. A. 368.....152, 277, 761, 763,
 764, 765, 766, 927
 Affg. 49 Fed. 73; App. 48 Fed. 224. See 51 Fed. 557.
 Ninth; McKenna, Gilbert, KNOWLES.
- Brush v. Condit*, 132 U. S. 39; 33 L. Ed. 251; 10 S. Ct. 1.....89, 104, 854
 Affg. 20 Fed. 826.
 BLATCHFORD.
- Brush v. Western*, 76 Fed. 761; 22 C. C. A. 543.....207, 504, 690, 893
 Affg. 69 Fed. 240.
 See same patent, 40 Fed. 826; 44 Fed. 284; 43 Fed. 533; 46 Fed. 79;
 52 Fed. 965.
 Seventh; Woods, Jenkins, Bunn.
- Bryce v. National*, 116 Fed. 186; 53 C. C. A. 611.....468
 Third; Acheson, Dallas, GRAY.
- Buchanan v. Perkins*, 135 Fed. 90; 67 C. C. A. 564.....614, 632, 693
 Affg. 129 Fed. 134.
 Third; Dallas, GRAY, Bradford.
- Buffington's v. Eustis*, 65 Fed. 804; 13 C. C. A. 143.....222, 597
 Affg. 65 Fed. 92.
 Eighth; Caldwell, SANBORN, Thayer.

[References are to sections. "App." refers to Appendix]

- Bullock v. General*, 149 Fed. 409; 79 C. C. A. 229.....599, 654, 908
 Revg. 146 Fed. 549.
 Sixth; Lurton, SEVERENS, Richards.
- Bullock v. General*, 162 Fed. 28; 89 C. C. A. 68.....63, 672
 Revg. in part 155 Fed. 740.
 Third; Dallas, GRAY, Buffington.
- Bullock v. Westinghouse*, 129 Fed. 105; 63 C. C. A. 607.....477, 505, 536,
 537, 538, 576, 577
 Sixth; LURTON, Severens, Richards.
- Bundy v. Columbian*, 64 Fed. 851; 12 C. C. A. 442.....222, 375, 532
 Affg. 59 Fed. 293.
 Second; Wallace, Lagombe, SHIPMAN.
- Bundy v. Detroit*, 94 Fed. 524; 36 C. C. A. 375.....208, 376, 380, 459, 485,
 529
 Sixth; Taft, LURTON, Clark.
- Burdell v. Denig*, 92 U. S. 716; 23 L. Ed. 764.....285, 289, 290, 404, 753
 MILLER.
- Burnham v. Union*, 110 Fed. 765; 49 C. C. A. 163.....45
 Sixth; Lurton, DAY, Severens.
- Burns v. Meyer*, 100 U. S. 671; 25 L. Ed. 738.....195
 BRADLEY.
- Burns v. Mills*, 143 Fed. 325; 74 C. C. A. 525627
 Seventh; GROSSCUP, Baker, Seaman.
- Burr v. Duryee*, 68 U. S. 531; 17 L. Ed. 750.....347, 380, 432, 500, 683,
 768, 874
 GRIER.
- Burr v. Duryee*, 68 U. S. 579; 17 L. Ed. 660.....871
 GRIER.
- Burt v. Ivory*, 133 U. S. 349; 33 L. Ed. 647; 10 S. Ct. 349.....440, 647, 671
 Revg. 15 Fed. 112; 2 Fed. 542.
 LAMAR.
- Busch v. Jones*, 184 U. S. 598; 46 L. Ed. 707; 22 S. Ct. 511.....71, 77,
 91, 688, 717
 Revg. in part 16 App. D. C. 23.
 McKENNA.
- Busell v. Stevens*, 137 U. S. 423; 34 L. Ed. 719; 11 S. Ct. 150.....437, 593,
 596, 612, 618
 Affg. 28 Fed. 575.
 LAMAR.
- Buser v. Novelty*, 151 Fed. 478; 81 C. C. A. 16.....10, 20, 74, 312
 Sixth; Lurton, Severens, COCHRAN.
- Bussey v. Excelsior*, 110 U. S. 131; 23 L. Ed. 95; 4 S. Ct. 38.....661
 Revg. 1 Fed. 640.
 BLATCHFORD.
- Butler v. Steckel*, 137 U. S. 21; 34 L. Ed. 582; 11 S. Ct. 25.....591, 627, 668
 Affg. 27 Fed. 219.
 BLATCHFORD.
- Butte City v. Pacific*, 60 Fed. 90; 8 C. C. A. 48.....603
 Affg. 52 Fed. 863.
 Ninth; McKENNA, Gilbert, Ross.
- Butte City v. Pacific*, 60 Fed. 410; 9 C. C. A. 41.....652
 Revg. 55 Fed. 760.
 Ninth; McKENNA, Gilbert, Ross.
- Butterworth v. Hill*, 114 U. S. 128; 29 L. Ed. 119; 5 S. Ct. 796....25, 723
 WAITE.
- Butterworth v. Hoe*, 112 U. S. 50; 28 L. Ed. 656; 5 S. Ct. 25 ...25, 114, 261,
 741
 MATTHEWS.

XXX CASES EXCEPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Byerly v. Sun, 184 Fed. 455; 106 C. C. A. 537 App. 347, 819
 Affg. 181 Fed. 138.
 Third; BUFFINGTON, Lanning, Cross.
- Byram v. Friedberger, 100 Fed. 963; 41 C. C. A. 121 330
 Affg. 87 Fed. 559.
 Third; Acheson, Gray, KIRKPATRICK.
- Calculagraph v. Automatic, 187 Fed. 276; 109 C. C. A. 618 App. 253
 See 132 Fed. 20; 136 Fed. 196; 144 Fed. 91; 153 Fed. 961; 154 Fed. 166.
 Second; Coxe, Ward, Noyes, Per Curiam.
- Caldwell v. Powell, 73 Fed. 488; 19 C. C. A. 592 327, 335
 Revg. 71 Fed. 970.
 Third; Acheson, Wales, GREEN.
- California v. Molitor, 113 U. S. 609; 28 L. Ed. 1106; 5 S. Ct. 618 113,
 Dismissing certification from Circuit Court. 496, 577
 BRADLEY.
- California v. Schaliche, 119 U. S. 401; 30 L. Ed. 471; 7 S. Ct. 391 456
 Vide same pat. Schillinger v. Gunther, 14 Blatchf. 152; Schillinger v.
 Gunther, 17 Blatchf. 66; California v. Monitor, 7 Sawy. 190;
 California v. Freeborn, 8 Sawy. 443; Schillinger v. Greenway, 21
 Blatchf. 383; Kuhl v. Mueller, 21 Fed. 510.
 BLATCHFORD.
- Cambria v. Carnegie, 96 Fed. 850; 37 C. C. A. 593 344
 Revd. 185 U. S. 403, making good 96 Fed. 850.
 Third; Acheson, Dallas, KIRKPATRICK.
- Cameron v. Saratoga, 159 Fed. 453; 86 C. C. A. 483 105, 639, 819
 Revg. in part 151 Fed. 242.
 Second; LACOMBE, Coxe, Ward.
- Campbell v. Bayley, 63 Fed. 463; 11 C. C. A. 284 774, 775
 Affg. 45 Fed. 564.
 Seventh; Woods, Bunn, Seaman.
- Campbell v. Am. Shipbuilding, 179 Fed. 498; 103 C. C. A. 122 App. 207
 Sixth; Severens, WARRINGTON, Knappen.
- Campbell v. Duplex, 101 Fed. 282; 41 C. C. A. 351 207, 637, 675
 Affg. 86 Fed. 315; see 69 Fed. 250.
 Sixth; Taft, Lurton, SEVERENS.
- Campbell v. Michle, 102 Fed. 159; 42 C. C. A. 235 684
 Affg. and rev. in part 96 Fed. 226.
 Seventh; Woods, Jenkins, Bunn.
- Campbell v. Richardson, 76 Fed. 976; 22 C. C. A. 669 214
 Revg. 72 Fed. 525.
 Third; Dallas, BUTLER, Wales.
- Camneyer v. Newton, 94 U. S. 225; 24 L. Ed. 72 399, 498, 746
 CLIFFORD.
- Campbell v. Haverhill, 155 U. S. 610; 39 L. Ed. 280; 15 S. Ct. 217 127,
 BROWN. 921
- Canda v. Michigan, 124 Fed. 486; 61 C. C. A. 194 97, 155, 195, 223,
 476, 494, 598, 630, 782, 926
 Sixth; Lurton, SEVERENS, Wanty.
- Canda v. Michigan, 152 Fed. 178; 81 C. C. A. 420 298, 827, 829, 843
 Sixth; Lurton, SEVERENS, Richards.
- Cantrell v. Wallick, 117 U. S. 689; 29 L. Ed. 1017; 6 S. Ct. 970 71, 320,
 WOODS. 322, 440, 647
- Capital v. Kinnear, 87 Fed. 333; 31 C. C. A. 3 656
 Revg. 81 Fed. 491.
 Sixth; Taft, Lurton, SEVERENS.

[References are to sections. " App." refers to Appendix]

| | |
|---|---------------|
| Capital v. National, 70 Fed. 709; 17 C. C. A. 355..... | 485 |
| Approving 53 Fed. 367. | |
| Second; Wallace, Lacombe, Shipman. Per Curiam. | |
| Card v. Colby, 64 Fed. 594; 12 C. C. A. 319 | 212 |
| Revg. 63 Fed. 462. | |
| Seventh; Woods, JENKINS, Bunn. | |
| Carlton v. Bokee, 84 U. S. 463; 21 L. Ed. 517..... | 186, 248, 871 |
| BRADLEY. | |
| Carmichael v. Jackson, 192 Fed. 937; 113 C. C. A. 327..... | App. 676 |
| Seventh; Grosscup, Baker, KOHLSAAT. | |
| Carnegie v. Brislin, 124 Fed. 213; 59 C. C. A. 651..... | 207, 214 |
| Revg. 118 Fed. 579. | |
| Third; Acheson, Dallas, GRAY. | |
| Carnegie v. Cambria, 185 U. S. 403; 46 L. Ed. 968; 22 S. Ct. 698..... | 100, |
| Revg. 96 Fed. 850. 105, 343, 344, 411, 508, 520, 631, 693, 822, 903 | |
| BROWN. | |
| Carnegie v. Colorado, 165 Fed. 195; 91 C. C. A. 229..... | 561, 717 |
| Eighth; Van Devanter, ADAMS, Philips. | |
| Carpenter v. Searle, 60 Fed. 82; 8 C. C. A. 476..... | 871 |
| Affg. 52 Fed. 809. | |
| Second; Wallace, Lacombe, SHIPMAN. | |
| Carroll v. Goldschmidt, 83 Fed. 508; 27 C. C. A. 566 | 36, 927 |
| Revg. 80 Fed. 520. | |
| Second; WALLACE, Lacombe, Shipman. | |
| Carter v. Hanes, 78 Fed. 346; 24 C. C. A. 128..... | 473, 605 |
| Affg. 70 Fed. 859. | |
| Fourth; Goff, SIMONTON, Morris. | |
| Carver v. Hyde, 16 Pet. 513; 10 L. Ed. 1051..... | 531, 589 |
| TANEY. | |
| Cary v. Acme, 108 Fed. 873; 48 C. C. A. 118..... | 577, 578 |
| Affg. 101 Fed. 269; see 99 Fed. 500. | |
| Second; Wallace, Shipman. Per Curiam. | |
| Cary v. DeHaven, 139 Fed. 262; 71 C. C. A. 388..... | 846 |
| Affg. 88 Fed. 698. | |
| Second; WALLACE, Lacombe, Townsend. | |
| Cary v. Neal, 98 Fed. 617; 39 C. C. A. 189..... | 332 |
| Affg. 90 Fed. 725. | |
| Second; SHIPMAN. | |
| Case v. Brown, 69 U. S. 320; 17 L. Ed. 817..... | 469, 871 |
| GRIER. | |
| Casein v. Collins, 174 Fed. 341; 98 C. C. A. 213..... | App. 871 |
| Affg. 172 Fed. 237. | |
| Third; Gray, BUFFINGTON, Lanning. | |
| Caverly v. Deere, 66 Fed. 305; 13 C. C. A. 452... .. | App. 601 |
| Affg. 52 Fed. 758. | |
| Seventh; Woods, Jenkins, Bunn. | |
| Cayuta v. Kennedy, 135 Fed. 537; 68 C. C. A. 563..... | 277 |
| Revg. in part 127 Fed. 355. | |
| Second; Wallace, Lacombe, TOWNSEND. | |
| Cazier v. Mackie-Lovejoy, 138 Fed. 654; 71 C. C. A. 104..... | 314, 458, |
| | 481 |
| Seventh; Jenkins, Grosscup, BAKER. | |
| Cazier v. Mackie-Lovejoy, 168 Fed. 701; 94 C. C. A. 215.... | App. 543, 578 |
| Seventh; Grosscup, Baker, Seaman. | |
| Cawood Patent — See Railroad and Turrill, 94 U. S. 695. | |

xxxii CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

| | |
|---|---------------|
| Celluloid <i>v.</i> Arlington, 52 Fed. 740; 3 C. C. A. 269..... | 245 |
| Affg. 44 Fed. 81; 31 Fed. 904 | |
| Third; ACHESON, Dallas, Wales. | |
| Centaur <i>v.</i> Heinsfurter, 84 Fed. 955; 28 C. C. A. 581..... | 928 |
| Eighth; BREWER, Sanborn, Riner. | |
| Central <i>v.</i> Coughlin, 141 Fed. 91; 72 C. C. A. 93 | 373, 473 |
| Fifth; Pardee, SHELBY, Maxey. | |
| Century Electric <i>v.</i> Westinghouse, 191 Fed. 350; 112 C. C. A. 8 .. | App. 129, |
| 212, 348, 349, 354, 358, 497, 500, 520, 741, 770 | |
| Eighth; SANBORN, Van Devanter, Reed. | |
| Cerealine <i>v.</i> Bates, 101 Fed. 272; 41 C. C. A. 341..... | 242, 649, 914 |
| Affg. 77 Fed. 970. | |
| Seventh; Woods, Jenkins, Grosscup. | |
| Chaffee <i>v.</i> Boston, 63 U. S. 217; 16 L. Ed. 240..... | 769 |
| CLIFFORD. | |
| Chapin <i>v.</i> Friedberger, 158 Fed. 409; 85 C. C. A. 519..... | 550 |
| Dismissing appeal 151 Fed. 264. | |
| Third; DALLAS, Buffington, Cross. | |
| Chauche <i>v.</i> Pare, 75 Fed. 283; 21 C. C. A. 329..... | 171, 765 |
| Ninth; GILBERT, Ross, Morrow. | |
| Chemical <i>v.</i> Raymond, 71 Fed. 179; 18 C. C. A. 31..... | 243, 814 |
| Affg. 68 Fed. 570. | |
| Third; ACHESON, Butler, Green. | |
| Chester <i>v.</i> Tindel-Morris, 165 Fed. 899; 91 C. C. A. 577..... | 562 |
| Affg. 163 Fed. 304. | |
| Third; Dallas, LANNING. | |
| Chicago Grain Door <i>v.</i> National, 173 Fed. 918; 97 C. C. A. 324... App. | 373, |
| 658 | |
| Sixth; Lurton, SEVERENS, Warrington. | |
| Chicago & Northwestern <i>v.</i> Sayles, 97 U. S. 554; 24 L. Ed. 1053.... | 199, 640 |
| BRADLEY. | |
| Chicago Pneumatic Tool <i>v.</i> Cleveland, 159 Fed. 143; 86 C. C. A. 51 ... | 507 |
| Affg. 154 Fed. 953. | |
| Third; Gray, Holland, Cross. | |
| Chicago Sugar Ref., <i>In re</i> , 87 Fed. 750; 31 C. C. A. 221..... App. | 545 |
| See 84 Fed. 977. | |
| Seventh; Woods, Showalter, Baker. | |
| Chicago Sugar Ref. <i>v.</i> Pope, 84 Fed. 977; 28 C. C. A. 594..... | 819 |
| Rev. 79 Fed. 957. | |
| Seventh; Woods, Jenkins, SHOWALTER. | |
| Chicago Wooden Ware <i>v.</i> Miller, 133 Fed. 541; 66 C. C. A. 517.... | 303, 435 |
| Seventh; Jenkins, Grosscup, BAKER. | |
| Childs <i>v.</i> LeBrocq, 178 Fed. 719; 102 C. C. A. 211 | App. 761 |
| Second; Lacombe, Coxe, WARD. | |
| Chinnock <i>v.</i> Paterson, 112 Fed. 531; 50 C. C. A. 384..... | 325, 550 |
| Rev. 110 Fed. 199. | |
| Third; ACHESON, Dallas, Kirkpatrick. | |
| Christensen, <i>In re</i> , 194 U. S. 458; 48 L. Ed. 1072; 24 S. Ct. 729..... | 538 |
| FULLER. | |
| Christensen <i>v.</i> Westinghouse, 129 Fed. 96; 63 C. C. A. 598..... | 537 |
| See 123 Fed. 632; 126 Fed. 764. | |
| Second; WALLACE, Townsend, Coxe. | |
| Christensen <i>v.</i> Westinghouse, 135 Fed. 774; 68 C. C. A. 476.. | 537, 577, 578 |
| See 121 Fed. 562; 128 Fed. 749. | |
| Second; WALLACE, Townsend, Coxe. | |

CASES EXCERPTED, WITH ANNOTATIONS xxxiii

[References are to sections. "App." refers to Appendix]

- Christie v. Seybold*, 55 Fed. 69; 5 C. C. A. 33.....584, 811, 861, 867
 See interference proceeding, s. c. 54 O. G. 957.
 Sixth; Jackson, TAFT, Hammond.
- Christy v. Hygea*, 93 Fed. 965; 36 C. C. A. 31.....635
 Affg. 87 Fed. 902.
 Fourth; Goff, Brawley, Waddill.
- Chuse v. Ide*, 89 Fed. 491; 32 C. C. A. 260.....195, 233, 398
 Seventh; Woods, Showalter, Bunn.
- Cimiotti v. American*, 198 U. S. 399; 49 L. Ed. 1100; 25 S. Ct. 697..204, 375,
 Affg. 123 Fed. 869. 456, 526, 699
 Record of Cimiotti cases: 95 Fed. 474, affd. 115 Fed. 498; 98 Fed. 297,
 affd. 115 Fed. 498; 108 Fed. 82, affd. 115 Fed. 498; 113 Fed. 588,
 affd. 115 Fed. 507; 113 Fed. 698 and 699, affd. 143 Fed. 508; 115
 Fed. 498, affg. 95 Fed. 474 and 108 Fed. 82; 115 Fed. 507, affg.
 113 Fed. 588; 115 Fed. 510; 117 Fed. 623, affd. 118 Fed. 838;
 118 Fed. 838, affg. 117 Fed. 623; 118 Fed. 1021, affd. 123 Fed.
 479; 120 Fed. 672, reved. 123 Fed. 869, but affd. 198 U. S. 399;
 123 Fed. 479, affg. 118 Fed. 1021; 123 Fed. 869, affd. 198 U. S.
 399; 143 Fed. 508, affg. 113 Fed. 698 and 113 Fed. 699; 168 Fed.
 529, affg. 158 Fed. 171.
- DAY.
- Cimiotti v. American*, 115 Fed. 498; 53 C. C. A. 230....78, 230, 453, 607, 608
 Affg. 98 Fed. 297.
 Second; Wallace, COXE, Hazel.
- Cimiotti v. American*, 168 Fed. 529; 93 C. C. A. 546.....App. 546, 836
 Affg. 158 Fed. 171.
 Third; DALLAS, Gray, Buffington.
- Cimiotti v. Bowsky*, 143 Fed. 508; 74 C. C. A. 617.....508, 831
 See 113 Fed. 698; 95 Fed. 474; 108 Fed. 82; 198 U. S. 399.
 Second; Wallace, COXE, Thomas.
- Cincinnati v. American*, 143 Fed. 322; 74 C. C. A. 522.....219
 Sixth; Lurton, Severens, RICHARDS.
- Clancey v. Troy*, 157 Fed. 554; 85 C. C. A. 314.....277, 721, 754
 Revg. 152 Fed. 188.
 Second; Lacombe, COXE, WARD.
- Clark v. Bonsfield*, 77 U. S. 133; 19 L. Ed. 862.....231, 337
 NELSON.
- Clark v. Deere*, 80 Fed. 534; 25 C. C. A. 619.....111
 Seventh; Woods, Jenkins, Showalter.
- Clark v. Ferguson*, 119 U. S. 335; 30 L. Ed. 406; 7 S. Ct. 382.....662, 667
 Affg. 21 Blatchf. 376.
 BLATCHFORD.
- Clark v. Willimantic*, 140 U. S. 481; 35 L. Ed. 521; 11 S. Ct. 84665,
 96, 217, 397, 411, 483, 809, 862
 Revg. 27 Fed. 865.
 BRADLEY.
- Clark v. Wooster*, 119 U. S. 322; 30 L. Ed. 392; 7 S. Ct. 217..292, 717, 725
 BRADLEY.
- Clark Blade v. Gillette*, 194 Fed. 421; 114 C. C. A. 383.....App. 9, 247
 Affg. 187 Fed. 149.
 Third; Gray, BUFFINGTON, Lanning.
- Clements v. Odorless*, 109 U. S. 641; 27 L. Ed. 1060; 3 S. Ct. 525.....871
 BLATCHFORD.
- Clerk v. Tannage*, 84 Fed. 643; 28 C. C. A. 501.....518, 532
 Third; Acheson, Butler, KIRKPATRICK.

XXXIV CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Cleveland v. Chicago*, 135 Fed. 783; 68 C. C. A. 485.....525
 See 127 Fed. 130.
 Third; Acheson, DALLAS, Gray.
- Cleveland v. Detroit*, 131 Fed. 853; 68 C. C. A. 233.....54, 277, 349, 916
 Revg. 131 Fed. 740.
 Sixth; Lurton, SEVERENS, Richards.
- Cleveland v. Kauffman*, 135 Fed. 360; 68 C. C. A. 658.....638, 673
 Revg. 126 Fed. 658.
 Third; Acheson, DALLAS, Gray.
- Clifford v. Capell*, 165 Fed. 193; 91 C. C. A. 227.....897
 Third; Gray, BUFFINGTON, Archbald.
- Clinton v. Hendrick*, 86 Fed. 137; 29 C. C. A. 612.....456, 635
 Revg. 78 Fed. 632.
 Third; Acheson, DALLAS, Bradford.
- Clisby v. Reese*, 88 Fed. 645; 32 C. C. A. 80.....48, 60
 Seventh; Woods, Showalter, BUNN.
- Clough v. Gilbert*, 106 U. S. 178; 27 L. Ed. 138; 1 S. Ct. 198.....71, 89,
 375, 468, 635
 BLATCHFORD.
- Coates v. Boker*, 119 Fed. 358; 56 C. C. A. 94675
 Revg. 115 Fed. 637.
 Second; Lacombe, Townsend, COXE.
- Coburn v. Chandler*, 97 Fed. 333; 38 C. C. A. 201.....208
 Affg. 91 Fed. 260.
 First; Colt, PUTNAM, Webb.
- Cochrane v. Badische*, 111 U. S. 293; 28 L. Ed. 433; 4 S. Ct. 455.....77,
 519, 823, 871, 914
 Revg. 3 B. & A. 235; 15 Blatchf. 290; 16 Blatchf. 155.
 BLATCHFORD.
- Cochrane v. Deener*, 94 U. S. 780; 24 L. Ed. 139.....423, 436, 468, 815
 BRADLEY. Dissenting, Clifford, Strong.
- Codman v. Amia*, 74 Fed. 634; 20 C. C. A. 566.....626
 Affg. 70 Fed. 710.
 First; COLT, Putnam, Webb.
- Coffield v. Fletcher*, 167 Fed. 321; 93 C. C. A. 25.....887
 Sixth; Lurton, SEVERENS, Richards.
- Coffin v. Ogden*, 85 U. S. 120; 21 L. Ed. 821.....71, 391
 SWAYNE.
- Cohn v. Stephenson*, 142 Fed. 467; 73 C. C. A. 583.....561
 Third; Acheson, DALLAS, Gray.
- Cohn v. United States*, 93 U. S. 366; 23 L. Ed. 907.....105
 STRONG. Dissenting opinion, Clifford.
- Collar Button Case* — See *Krementz v. Cottle*, 148 U. S. 556.
- Collins v. Coes*, 130 U. S. 56; 32 L. Ed. 858; 9 S. Ct. 514.....344
 Revg. 3 Fed. 225; Affg. 21 Fed. 38.
 FULLER.
- Colt v. Wesson*, 127 Fed. 333; 62 C. C. A. 167.....85
 Affg. 122 Fed. 90.
 First; PUTNAM, Aldrich, Lowell.
- Colt's Co. v. N. Y. Sporting Goods*, 186 Fed. 625; 108 C. C. A. 489.. App. 273
 See 180 Fed. 777.
 Second; Lacombe, Coxe, Ward, Per Curiam.
- Columbia v. Duerr*, (Selden Pat.) 184 Fed. 893; 107 C. C. A. 215... App. 63,
 103, 186, 194, 203, 241, 273, 363, 374, 414, 456, 604, 672, 727, 905
 Revg. 172 Fed. 923.
 Second; Lacombe, Ward, NOYES.

[References are to sections. "App." refers to Appendix]

- Columbia *v.* Duff, 184 Fed. 876; 107 C. C. A. 200.....App. 128
 See 168 Fed. 57.
 Third; BUFFINGTON, Lanning, Bradford.
- Columbia *v.* Kokomo, 143 Fed. 116; 74 C. C. A. 310.....434, 435, 453,
 Revg. 139 Fed. 578. 456, 506, 528
 Seventh; Grosscup, Baker, SEAMAN.
- Columbia Wire *v.* Kokomo, 194 Fed. 108; 114 C. C. A. 186.....App. 837
 See 143 Fed. 116.
 Seventh; Grosscup, BAKER, Kohlsaas.
- Columbus *v.* Robbins, 148 U. S. 266; 37 L. Ed. 445; 13 S. Ct. 594...113, 143
 See 52 Fed. 337.
 FULLER.
- Columbus *v.* Robbins, 52 Fed. 337; 3 C. C. A. 103.....130
 Overruled in Bissell *v.* Goshen, 72 Fed. 545. See 148 U. S. 266.
 Sixth; JACKSON, Taft, Hammond.
- Columbus *v.* Robbins, 64 Fed. 384; 12 C. C. A. 174....229, 608, 626, 674
 Affg. 50 Fed. 545; see 52 Fed. 337; 148 U. S. 266; 52 Fed. 215.
 Sixth; TAFT, Lurton, Ricks.
- Columbus *v.* Standard, 148 Fed. 622; 78 C. C. A. 394.....80, 81, 90
 Affg. 145 Fed. 186.
 Sixth; Lurton, Severens, COCHRAN.
- Commercial *v.* Avery, 159 Fed. 935; 87 C. C. A. 206.....702
 Affg. 152 Fed. 642.
 Seventh; Baker, Seaman, Sanborn. Per Curiam.
- Commercial *v.* Fairbank, 135 U. S. 176; 34 L. Ed. 88; 10 S. Ct. 972....398,
 Affg. 27 Fed. 78. 420, 531, 687, 889
 BLATCHFORD.
- Comptograph *v.* Burroughs, 183 Fed. 321; 105 C. C. A. 533.....App. 385
 Affg. 175 Fed. 787; see 146 Fed. 981.
 Seventh; GROSSCUP, Baker, Seaman.
- Comptograph *v.* Mechanical, 145 Fed. 331; 76 C. C. A. 205.....448, 452,
 Revg. 140 Fed. 136. 651, 673
 First; COLT, Putnam, Lowell.
- Computing *v.* Automatic, 204 U. S. 609; 51 L. Ed. 645; 27 S. Ct. 307....207,
 Affg. 26 App. D. C. 238. 633, 675
 DAY.
- Confectioner's *v.* Panoualias, 134 Fed. 393; 67 C. C. A. 391.....897
 Second; Lacombe, Townsend, COXE.
- Conley *v.* King Bridge, 137 Fed. 137; 109 C. C. A. 412.....App. 63, 460
 Affg. as to pat. 735, 769 and revg. as to pat. 701, 544, 175 Fed. 79.
 Third; Gray, BUFFINGTON, Young.
- Consolidated Bunting *v.* Metropolitan, 60 Fed. 93; 8 C. C. A. 485...192, 235
 Revg. 46 Fed. 288; disapproving 29 Fed. 449.
 Second; Wallace, LACOMBE, Shipman.
- Consolidated Car Heating *v.* West End, 85 Fed. 662; 29 C. C. A. 386...85,
 Modfg. 82 Fed. 993. 133, 189, 241, 635
 First; Colt, Webb, ALDRICH.
- Consolidated Electric *v.* Holtzer, 67 Fed. 907; 15 C. C. A. 63.....444,
 627, 667, 672
 Revg. 60 Fed. 748.
 First; PUTNAM, Nelson, Webb.
- Consolidated Electric Storage *v.* Accumulator, 55 Fed. 485; 5 C. C. A. 202
561
 Affg. 53 Fed. 796; see same pat. 38 Fed. 117; 39 Fed. 490; 40 Fed. 328.
 Third; ACHESON, Butler, Wales.

XXXVI CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Consolidated Engine *v.* Landers, 160 Fed. 79; 87 C. C. A. 235.....456
 Affg. 151 Fed. 775.
 Second; Lacombe, Ward, Noyes.
- Consolidated Fastener *v.* Hays, 100 Fed. 984; 41 C. C. A. 14235, 391,
 Affg. 95 Fed. 168. 457, 539, 561
 Second; LACOMBE, Shipman.
- Consolidated Fastener *v.* Littauer, 84 Fed. 164; 28 C. C. A. 133....192, 541
 Affg. 79 Fed. 795.
 Second; Wallace, LACOMBE, Shipman.
- Consolidated Fruit Jar *v.* Wright, 94 U. S. 92; 24 L. Ed. 68.....6, 856
 SWAYNE.
- Consolidated Piedmont *v.* Pacific, 58 Fed. 226; 7 C. C. A. 195.....118
 See 53 Fed. 385; 53 Fed. 382.
 Ninth; McKENNA, Gilbert.
- Consolidated Piedmont *v.* Pacific, 53 Fed. 385; 3 C. C. A. 570..118, 465, 468
 Ninth; McKENNA, Ross, Knowles.
- Consolidated Ry. Elect. *v.* Adams, 161 Fed. 343; 88 C. C. A. 355 ...65, 71,
 Revg. 153 Fed. 193. 867
 Seventh; Grosscup, Baker, SEAMAN.
- Consolidated Roller Mill *v.* Barnard, 156 U. S. 261; 39 L. Ed. 417; 15 S. Ct.
 333230, 640
 BROWN.
- Consolidated Roller Mill *v.* Walker, 138 U. S. 124; 34 L. Ed. 920; 11 S. Ct.
 292.....224, 646, 654, 671
 Affg. 43 Fed. 575.
 BLATCHFORD.
- Consolidated Rubber Tire *v.* Diamond, 162 Fed. 892; 89 C. C. A. 582
573, 625, 893
 Affd. 220 U. S. 428; see 151 Fed. 237; 157 Fed. 677.
 Second; Lacombe, COXE, Noyes.
- Consolidated Rubber Tire *v.* Diamond, 157 Fed. 677; 85 C. C. A. 349
31, 561, 564
 Affd. 220 U. S. 428.
 Second; LACOMBE, Ward, Noyes.
- Consolidated Rubber Tire *v.* Ferguson, 183 Fed. 756; 106 C. C. A. 330
App. 723
 See 169 Fed. 888.
 Second; COXE, WARD, Martin.
- Consolidated Rubber Tire *v.* Firestone, 151 Fed. 237; 80 C. C. A. 589..622
 Affd. 220 U. S. 428; affg. 147 Fed. 739.
 Second; Lacombe, Townsend, COXE.
- Consolidated Safety Valve *v.* Crosby, 113 U. S. 157; 28 L. Ed. 939; 5 S. Ct.
 513.....626, 635, 690, 862, 905
 Revg. 7 Fed. 768; see Ashcroft *v.* R. R. 5 O. G. 725; affd. in 97 U. S. 189.
 BLATCHFORD.
- Consolidated Safety Valve *v.* Crosby, 141 U. S. 441; 35 L. Ed. 809; 12 S. Ct.
 49.....284, 828, 835, 837, 842
 Affg. 44 Fed. 66; see 113 U. S. 157; 7 Fed. 768.
 BLATCHFORD.
- Consolidated Store Service *v.* Seybold, 105 Fed. 978; 45 C. C. A. 152..195
 Affg. 100 Fed. 299.
 Seventh; Woods, Jenkins, GROSSCUP.
- Consumers Gas Co. *v.* Danville, 50 Fed. 778; 1 C. C. A. 663.....311, 322
 Affg. 47 Fed. 43.
 Third; ACHESON, Butler, Green.

CASES EXCERPTED, WITH ANNOTATIONS xxxvii

[References are to sections. " App." refers to Appendix]

- Continental Paper Bag *v.* Eastern, 210 U. S. 405; 52 L. Ed. 1122; 28 S. Ct. 748129, 212, 223, 378, 427, 453, 594, 745
 Affg. 150 Fed. 741.
 MCKENNA.
- Continental Paper Bag *v.* Eastern, 150 Fed. 741; 80 C. C. A. 407..548, 552
 Affd. 210 U. S. 405; affg. 142 Fed. 479.
 First; Colt, LOWELL, Aldrich; dissenting, Aldrich.
- Continental Rubber *v.* Single Tube, 178 Fed. 452; 101 C. C. A. 436
App. 861
 Affg. 174 Fed. 50; see same pat. 98 Fed. 624; 112 Fed. 423.
 Third; Gray, LANNING, McPherson.
- Continuous *v.* Schmertz, 153 Fed. 577; 82 C. C. A. 587.....543
 Third; Gray, Holland, LANNING.
- Cook *v.* Sandusky, 28 L. Ed. 124.....103, 525
 WAITE.
- Cook *v.* Sterling, 150 Fed. 766; 80 C. C. A. 502.....168, 759
 Affg. 118 Fed. 45.
 Seventh; GROSSCUP, Seaman, Kohlsaar.
- Coon *v.* Wilson, 113 U. S. 268; 28 L. Ed. 963; 5 S. Ct. 537.....871
 Revg. 18 Blatchf. 532.
 BLATCHFORD.
- Co-Operating *v.* Hallock, 128 Fed. 596; 64 C. C. A. 104.....118, 546
 Sixth; LURTON, Severens, Richards.
- Corbin *v.* Eagle, 150 U. S. 38; 37 L. Ed. 989; 14 S. Ct. 28207, 661,
 Affg. 37 Fed. 338. 871, 873
 JACKSON.
- Corn Planter Patent — see *Brown v. Guild*, 90 U. S. 181.
- Cornell *v.* Weidner, 127 U. S. 261; 32 L. Ed. 148; 8 S. Ct. 1152.....872
 GRAY.
- Corning *v.* Burden, 15 How. 252; 14 L. Ed. 683.....245, 398, 411, 426,
 GRIER. 484, 629, 690, 768, 815, 819
- Corning *v.* Troy, 15 How. 451; 14 L. Ed. 768.....115, 116, 134, 140
 GRIER.
- Cornley *v.* Marckwold, 131 U. S. 159; 33 L. Ed. 117; 9 S. Ct. 744.....842
 Affg. 23 Blatchf. 163.
 BLATCHFORD.
- Corrington *v.* Westinghouse, 178 Fed. 711; 103 C. C. A. 479....App. 2, 74,
 Revg. 173 Fed. 69. 206, 803, 812, 862
 Second; Lacombe, COXE, Ward.
- Cortelyou *v.* Johnson, 207 U. S. 196; 52 L. Ed. 167; 28 S. Ct. 105478
 Affg. 145 Fed. 933.
 BREWER.
- Cortelyou *v.* Johnson, 145 Fed. 933; 76 C. C. A. 455.....257, 477, 478
 Revg. 138 Fed. 110.
 Second; COXE, Townsend, Holt. Dissenting in part, TOWNSEND.
- Cotto-Waxo *v.* Perolin, 185 Fed. 267; 107 C. C. A. 373....App. 194, 207,
 208, 213, 434
 Eighth; Sanborn, Hook, Reed; dissenting, SANBORN.
- Coupe *v.* Royer, 155 U. S. 565; 39 L. Ed. 263; 15 S. Ct. 199.....226, 285,
 SHIRAS. 404, 777, 837
- Covel *v.* Rich, 142 Fed. 468; 73 C. C. A. 584.....616
 Seventh; Grosscup, BAKER, Seaman.
- Cowles *v.* Lowrey, 79 Fed. 331; 24 C. C. A. 616..519, 639, 640, 691, 753, 816
 Revg. 68 Fed. 354.
 Sixth; Lurton, SEVERENS, Hammond.

XXXVIII CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

| | |
|---|------|
| <p><i>Craig v. Michigan</i>, 81 Fed. 870; 26 C. C. A. 659.....</p> <p style="padding-left: 2em;">Affg. 72 Fed. 173.</p> <p style="padding-left: 2em;">Sixth; Taft, Lurton, SAGE.</p> | 207 |
| <p><i>Cramer v. Singer</i>, 93 Fed. 636; 35 C. C. A. 508.....</p> <p style="padding-left: 2em;">Ninth; GILBERT, Ross, Hawley.</p> | 386 |
| <p><i>Cramer v. Singer</i>, 147 Fed. 917; 78 C. C. A. 53.....</p> <p style="padding-left: 2em;">Ninth; Gilbert, Ross, Morrow.</p> | 37 |
| <p><i>Crawford v. Heysinger</i>, 123 U. S. 589; 31 L. Ed. 269; 8 S. Ct. 399.....</p> <p style="padding-left: 2em;">BLATCHFORD.</p> | 889 |
| <p><i>Crier v. Innes</i>, 170 Fed. 324; 95 C. C. A. 508....</p> <p style="padding-left: 2em;">App. 31, 277, 332, 335,</p> <p style="padding-left: 2em;">Affg. 160 Fed. 103, except as to costs. 548, 579, 777</p> <p style="padding-left: 2em;">Second; Lacombe, Ward, NOYES.</p> | |
| <p><i>Crosby v. Ashton</i>, 94 Fed. 516; 36 C. C. A. 335.....</p> <p style="padding-left: 2em;">First; Colt, PUTNAM, Webb.</p> | 118 |
| <p><i>Crouch v. Roemer</i>, 103 U. S. 797; 26 L. Ed. 426.....</p> <p style="padding-left: 2em;">WAITE.</p> | 592 |
| <p><i>Crown v. Alluminum</i>, 108 Fed. 845; 48 C. C. A. 72....</p> <p style="padding-left: 2em;">3, 7, 10, 30, 57, 219,</p> <p style="padding-left: 2em;">314, 363, 371, 434, 444, 453, 532, 626, 631, 636, 702, 848, 871, 873,</p> <p style="padding-left: 2em;">875, 878</p> <p style="padding-left: 2em;">Revg. 100 Fed. 849.</p> <p style="padding-left: 2em;">Fourth; Goff, Simonton, BRAWLEY.</p> | |
| <p><i>Crown v. Baltimore</i>, 136 Fed. 184; 69 C. C. A. 519.....</p> <p style="padding-left: 2em;">See 136 Fed. 199.</p> <p style="padding-left: 2em;">Second; Wallace, Coxe. Per Curiam.</p> | 133 |
| <p><i>Crown v. Standard</i>, 136 Fed. 841; 69 C. C. A. 200.....</p> <p style="padding-left: 2em;">359, 626, 906, 919</p> <p style="padding-left: 2em;">See <i>Imperial v. Crown</i>, 139 Fed. 312.</p> <p style="padding-left: 2em;">Third Circuit holding this patent good.</p> <p style="padding-left: 2em;">Second; WALLACE, Lacombe, Coxe. Dissenting in part, COXE.</p> | |
| <p><i>Crozier v. Krupp</i>, 224 U. S. 290; 56 L. Ed. 771; 32 S. Ct. 488....</p> <p style="padding-left: 2em;">App. 498</p> <p style="padding-left: 2em;">Revg. 32 App. D. C. 1. WHITE.</p> | |
| <p><i>Cummer v. Atlas</i>, 193 Fed. 993; 113 C. C. A. 611... </p> <p style="padding-left: 2em;">App. 274, 344, 387, 655</p> <p style="padding-left: 2em;">Sixth; Warrington, Knappen, DENISON.</p> | |
| <p><i>Cumming v. Baker</i>, 144 Fed. 395; 75 C. C. A. 373.....</p> <p style="padding-left: 2em;">Ninth; Gilbert, Ross, Hawley.</p> | 198 |
| <p><i>Curtis v. Overman</i>, 58 Fed. 784; 7 C. C. A. 493.....</p> <p style="padding-left: 2em;">Revg. 53 Fed. 247.</p> <p style="padding-left: 2em;">Also revg. <i>Mfg. Co. v. Clark</i>, 46 Fed. 789.</p> <p style="padding-left: 2em;">Second; Wallace, Lacombe, SHIPMAN.</p> | 541 |
| <p><i>Cushman v. Goddard</i>, 95 Fed. 664; 37 C. C. A. 221..</p> <p style="padding-left: 2em;">222, 385, 436, 616, 711</p> <p style="padding-left: 2em;">Affg. 90 Fed. 727.</p> <p style="padding-left: 2em;">First; PUTNAM, Webb, Aldrich.</p> | |
| <p><i>Cutler-Hammer v. Automatic</i>, 159 Fed. 447; 86 C. C. A. 477.....</p> <p style="padding-left: 2em;">Affg. 153 Fed. 197.</p> <p style="padding-left: 2em;">Second; LACOMBE, Ward, Noyes.</p> | 591 |
| <p><i>Dable v. Flint</i>, 137 U. S. 41; 34 L. Ed. 618; 11 S. Ct. 8.....</p> <p style="padding-left: 2em;">366, 532, 933</p> <p style="padding-left: 2em;">Affg. 42 Fed. 686.</p> <p style="padding-left: 2em;">GRAY.</p> | |
| <p><i>Daimler v. Conklin</i>, 170 Fed. 70; 95 C. C. A. 346.....</p> <p style="padding-left: 2em;">App. 175, 505</p> <p style="padding-left: 2em;">Revg. 160 Fed. 679.</p> <p style="padding-left: 2em;">Second; Lacombe, Coxe, WARD.</p> | |
| <p><i>Dalton v. Jennings</i>, 93 U. S. 271; 23 L. Ed. 925.....</p> <p style="padding-left: 2em;">MILLER.</p> | 601 |
| <p><i>Dalzell v. Dueber</i>, 149 U. S. 315; 37 L. Ed. 749; 13 S. Ct. 886.....</p> <p style="padding-left: 2em;">Revg. 38 Fed. 597. 174, 368, 800</p> <p style="padding-left: 2em;">GRAY. Dissenting, BREWER.</p> | 168, |

CASES EXCERPTED, WITH ANNOTATIONS XXXIX

[References are to sections. "App." refers to Appendix]

- Dane *v.* Chicago, 131 U. S. cxxvi app.; 23 L. Ed. 82.....103, 608, 669
BRADLEY.
- D'Arcy *v.* Staples, 161 Fed. 733; 88 C. C. A. 606.....31, 496, 615
See 148 Fed. 19.
Sixth; Lurton, SEVERENS, Richards.
- Dashiell *v.* Grosvenor, 162 U. S. 425; 40 L. Ed. 1025; 16 S. Ct. 805.....782
Rev. 62 Fed. 584; Affg. 66 Fed. 334.
BROWN.
- Dashiell *v.* Grosvenor, 66 Fed. 334; 13 C. C. A. 593....372, 425, 498, 553
Rev. 62 Fed. 584.
Fourth; Goff, Simonton, Brawley.
- Davey *v.* Prouty, 107 Fed. 505; 46 C. C. A. 439.....458, 486, 506
Affg. 96 Fed. 336.
First; PUTNAM, Webb, Aldrich.
- Davis *v.* Edison, 60 Fed. 276; 8 C. C. A. 615.....523, 524, 539
Affg. 58 Fed. 878.
Distinguished in Thomson *v.* Kelsey, 75 Fed. 1005.
First; PUTNAM, Nelson, Webb.
- Davis *v.* Morris, 81 Fed. 407; 26 C. C. A. 460.....95
Rev. 78 Fed. 129.
Third; Acheson, Dallas, BUFFINGTON.
- Davis *v.* Parkman, 71 Fed. 961; 18 C. C. A. 398...44, 229, 273, 601, 626, 630
Affg. 45 Fed. 693.
First; PUTNAM, Nelson, Webb.
- Davis *v.* Perry, 120 Fed. 941; 57 C. C. A. 231.....527
Rev. 115 Fed. 333.
Second; Wallace, TOWNSEND, Coxe.
- Davis *v.* Tagliabue, 159 Fed. 712; 86 C. C. A. 466.....162, 166
Rev. 148 Fed. 705; 150 Fed. 372.
Second; Lacombe, Ward, NOYES.
- Day *v.* Fair Haven, 132 U. S. 98; 33 L. Ed. 265; 10 S. Ct. 11...207, 220, 661
Affg. 23 Fed. 189.
FULLER.
- Daylight *v.* American, 142 Fed. 454; 73 C. C. A. 570...93, 224, 623, 686
Rev. 140 Fed. 174.
Third; Dallas, Gray, BUFFINGTON.
- Dayton *v.* Westinghouse, 118 Fed. 562; 55 C. C. A. 390....351, 353, 631,
667, 688, 817
Affg. 106 Fed. 724.
Sixth; Lurton, Day, SEVERENS.
- Dean *v.* Mason, 61 U. S. 198; 15 L. Ed. 876.....299, 789, 839
McLEAN.
- DeBeaumont *v.* Williams, 80 Fed. 995; 26 C. C. A. 298.....217
Affg. 71 Fed. 812.
Third; ACHESON, Butler, Buffington.
- Decoco *v.* Gilchrist, 125 Fed. 293; 60 C. C. A. 207:.....92, 98, 193, 398,
626, 692
First; Colt, PUTNAM, Aldrich.
- Dederick *v.* Seigmund, 51 Fed. 233; 2 C. C. A. 169.....641
Affg. 42 Fed. 842.
Second; Lacombe, SHIPMAN.
- Deere *v.* Case, 56 Fed. 841; 6 C. C. A. 157.....612
Seventh; Gresham, Woods, Bunn.
- Deere *v.* Dowagiac, 153 Fed. 177; 82 C. C. A. 351.....312, 548
Eighth; Sanborn, Hook, ADAMS.

xi CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

- Deere v. Rock Island, 84 Fed. 171; 28 C. C. A. 308.....674
 Seventh; Woods, Jenkins, SHOWALTER.
- Deering v. Kelly, 103 Fed. 261; 43 C. C. A. 225.....836, 927
 Sixth; Lurton, Day, SEVERENS.
- Deering v. Winona, 155 U. S. 286; 39 L. Ed. 153; 15 S. Ct. 118....12, 61,
 95, 201, 224, 230, 408, 493, 590, 651
 Revg. 40 Fed. 236.
 BROWN.
- DeLamar v. DeLamar, 117 Fed. 240; 54 C. C. A. 272.....198, 676, 904
 Affg. 110 Fed. 538.
 Ninth; Gilbert, Ross, Morrow.
- DeLamater v. Heath, 58 Fed. 414; 7 C. C. A. 279.....212, 853, 856
 Second; LACOMBE, Shipman.
- DeLaval v. Iowa, 194 Fed. 423; 114 C. C. A. 385.....App. 74, 129
 Eighth; SANBORN, Hook, Adams.
- DeLaval v. Vermont, 135 Fed. 772; 68 C. C. A. 474.....80, 411, 704
 Affg. 126 Fed. 536.
 Second; WALLACE, Lacombe, Townsend.
- DeLaVergne v. Featherstone, 147 U. S. 209; 37 L. Ed. 138; 13 S. Ct. 283
39, 300
 Revg. 49 Fed. 916.
 FULLER.
- DeLaVergne v. Valentine, 66 Fed. 765; 14 C. C. A. 77.....239
 Seventh; Woods, Baker, Grosseup.
- Delaware v. Shelby, 160 Fed. 928; 88 C. C. A. 110.....154, 208, 459
 Affg. 151 Fed. 64.
 Third; DALLAS, Gray, Buffington.
- Delaware & A. Tel. v. Delaware, 50 Fed. 677; 2 C. C. A. 1.....479
 See 47 Fed. 633.
 Third; Acheson, BUTLER, Green.
- DeLong v. Francis, 168 Fed. 900; 94 C. C. A. 240.....App. 627, 666
 Affg. 150 Fed. 597.
 Second; Lacombe, Coxe, NOYES.
- DeLorica v. Whitney, 63 Fed. 611; 11 C. C. A. 355.....403, 468, 623, 734,
 737
 First; PUTNAM, Nelson, Webb.
- Denning v. Bray, 61 Fed. 651; 10 C. C. A. 6.....155, 270, 764
 Affg. 56 Fed. 1019.
 Second; Wallace, LACOMBE, Shipman.
- Densmore v. Scofield, 102 U. S. 375; 26 L. Ed. 214.....746
 SWAYNE.
- Derby v. Thompson, 146 U. S. 476; 36 L. Ed. 1051; 13 S. Ct. 181..246, 456
 Revg. 32 Fed. 830
 BROWN.
- Devlin v. Paynter, 64 Fed. 398; 12 C. C. A. 188.....457
 Affg. 63 Fed. 122.
 Third; ACHESON, Dallas, Wales.
- Dey v. Bundy, 178 Fed. 812; 102 C. C. A. 260.....App. 585, 795
 Affg. 169 Fed. 807.
 Second; LACOMBE, Coxe, Noyes.
- Dey v. Syracuse, 161 Fed. 111, 88 C. C. A. 275.....202, 206
 Affg. 152 Fed. 440.
 Second; Lacombe, COXE, Ward.
- Diamond Meter v. Westinghouse, 152 Fed. 704; 81 C. C. A. 630.....679
 Seventh; Grosseup, BAKER, Seaman.

[References are to sections. "App." refers to Appendix]

- Diamond Rubber v. Consolidated**, 220 U. S. 428; 55 L. Ed. 527; 31 S. Ct. 444
 App. 440, 564, 598, 602, 625, 626, 634, 667, 674, 691, 692, 693, 916
 Affg. 157 Fed. 677 and 162 Fed. 892; affg. also *Rubber Tire v. Columbia*, 91 Fed. 978, *Consolidated v. Finley*, 116 Fed. 629, *Consolidated v. Firestone*, 151 Fed. 237 and 147 Fed. 739, *Rubber Tire v. Milwaukee*, 154 Fed. 358. Revg. as to pat. *Goodyear v. Rubber Tire*, 116 Fed. 363, *Rubber Tire v. Victor*, 123 Fed. 85; see 191 Fed. 832.
- MCKENNA.**
Diamond State v. Goldie, 84 Fed. 972; 28 C. C. A. 589. . . . 89, 380, 486,
 Affg. 81 Fed. 173. 635, 643
 Third; Dallas, Butler, KIRKPATRICK.
- Diamond Stone Sawing v. Brown**, 166 Fed. 306; 92 C. C. A. 224. . . . 834,
 836, 842
 Affg. 155 Fed. 753; see 130 Fed. 896; 137 Fed. 910; 111 Fed. 380.
 Second; Lacombe, COXE, Ward.
- Dickerson v. Matheson**, 57 Fed. 524; 6 C. C. A. 466. . . . 505
 Affg. 50 Fed. 73.
 Second; Lacombe, SHIPMAN.
- Dickerson v. Sheldon**, 98 Fed. 621; 39 C. C. A. 191. . . . 505
 Second; Wallace, LACOMBE, Shipman.
- Dickerson v. Tinling**, 84 Fed. 192; 28 C. C. A. 139. . . . 505
 Eighth; SANBORN, Thayer, Riner.
- Dixon-Woods v. Pfeifer**, 55 Fed. 390; 5 C. C. A. 148. . . . 916
 Affg. 51 Fed. 292.
 Affg. same pat. 28 Fed. 561; 37 Fed. 333.
 Second; Lacombe, SHIPMAN.
- Dobson v. Cubley**, 149 U. S. 117; 37 L. Ed. 671; 13 S. Ct. 796. . . 503, 530
 Affg. 39 Fed. 276.
SHIRAS.
- Dobson v. Dornan**, 118 U. S. 10; 30 L. Ed. 63; 6 S. Ct. 946. . . . 231, 247,
 290, 295, 298, 331, 334, 496
 See *Dobson v. Hartford*, 114 U. S. 439.
BLATCHFORD.
- Dobson v. Hartford**, 114 U. S. 439; 29 L. Ed. 177; 5 S. Ct. 945. . . . 229,
 Revg. 10 Fed. 385. 298, 337
BLATCHFORD. Dissenting Bradley.
- Dobson v. Lees**, 137 U. S. 258; 34 L. Ed. 652; 11 S. Ct. 71. . . . 178, 871
 Affg. 30 Fed. 625.
FULLER.
- Dodge v. Fulton**, 92 Fed. 995; 35 C. C. A. 140. . . . 570
 Second; Wallace, LACOMBE, Shipman.
- Dodge v. Jones**, 159 Fed. 715; 86 C. C. A. 191. . . . 411, 859
 Affg. 153 Fed. 186.
 Third; Dallas, GRAY, Buffington.
- Dodge v. New York**, 150 Fed. 738; 80 C. C. A. 404. . . . 596
 Affg. 139 Fed. 976.
 Second; Wallace, Lacombe, TOWNSEND.
- Doig v. Morgan**, 122 Fed. 460; 59 C. C. A. 616 70, 624, 633
 Affg. 117 Fed. 305.
 Second; Wallace, LACOMBE, COXE.
- Donallan v. Tannage**, 79 Fed. 385; 24 C. C. A. 647. . . . 123
 See 75 Fed. 287.
 Dismissed on appeal but not on merits.
 First; PUTNAM, Aldrich, Brown.

[References are to sections. "App." refers to Appendix]

- Donner *v.* American, 165 Fed. 199; 91 C. C. A. 233.....702
 Revg. 160 Fed. 971.
 Third; Gray, BUFFINGTON, Cross.
- Doten *v.* City of Boston, 138 Fed. 406; 70 C. C. A. 308.....827, 837
 First; Colt, Putnam, LOWELL.
- Double Pointed *v.* Two Rivers, 109 U. S. 117; 27 L. Ed. 877; 3 S. Ct. 105
 BLATCHFORD.50, 675
- Dougherty *v.* Doyle, 63 Fed. 475; 11 C. C. A. 298.....207
 Affg. 59 Fed. 470.
 Second; Lacombe, Shipman. Per Curiam.
- Dowagiac *v.* Brennan, 127 Fed. 143; 62 C. C. A. 257.....374
 Revg. 118 Fed. 143; see 101 Fed. 716; 118 Fed. 136; 187 U. S. 644;
 108 Fed. 67; 121 Fed. 988.
 Sixth; Lurton, SEVERENS, Richards.
- Dowagiac *v.* Minnesota, 124 Fed. 735; 61 C. C. A. 57.....536
 See 118 Fed. 136.
 Eighth; SANBORN, Van Devanter, Shiras.
- Dowagiac *v.* Minnesota, 118 Fed. 136; 55 C. C. A. 86.....376, 456, 459,
 See 124 Fed. 735. 506, 531, 622, 674
 Eighth; Sanborn, Thayer, CARLAND.
- Dowagiac *v.* Minnesota, 183 Fed. 314; 105 C. C. A. 526.....App. 277,
 836, 843, 845
 Affg. 183 Fed. 318; see 101 Fed. 716; 118 Fed. 136; 121 Fed. 988;
 127 Fed. 143.
 Eighth; Hook, ADAMS, McPherson.
- Dowagiac *v.* Superior, 115 Fed. 886; 53 C. C. A. 36....207, 459, 461, 598,
 267, 674, 917
 Sixth; Lurton, Day, SEVERENS.
- Dowagiac *v.* Superior, 162 Fed. 479; 98 C. C. A. 399.....837, 841
 See 115 Fed. 886; 162 Fed. 472.
 Sixth; Lurton, SEVERENS, Richards.
- Downes *v.* Teter-Heany, 150 Fed. 122; 80 C. C. A. 76820, 822
 Affg. 144 Fed. 106.
 Third; Gray, Buffington, LANNING.
- Downton *v.* Yaeger, 108 U. S. 466; 27 L. Ed. 789; 3 S. Ct. 10.....106
 Affg. 1 Fed. 199.
 WOODS.
- Doze *v.* Smith, 69 Fed. 1002; 16 C. C. A. 581.....144, 376
 Affg. 66 Fed. 327.
 Eighth; Caldwell, Sanborn, THAYER.
- Drake *v.* Brownell, 123 Fed. 86; 59 C. C. A. 216.....325, 696, 697
 Sixth; LURTON, Severens, Wanty.
- Draper *v.* American, 161 Fed. 728; 88 C. C. A. 588.....94, 481, 484, 550,
 634, 937
 First; Colt, PUTNAM, Aldrich.
- Drewson *v.* Hartje, 131 Fed. 734; 65 C. C. A. 548.....396, 613
 Sixth; LURTON, Severens, Richards.
- Dreyfus *v.* Searle, 124 U. S. 60; 31 L. Ed. 352; 8 S. Ct. 390.....669, 819
 BLATCHFORD.
- Dryfoos *v.* Wiese, 124 U. S. 32; 31 L. Ed. 362; 8 S. Ct. 354.....217, 376,
 Affg. 22 Blatchf. 19. 426, 871
 BLATCHFORD.
- DuBois *v.* Kirk, 158 U. S. 58; 39 L. Ed. 895; 15 S. Ct. 729.....273, 277,
 Affg. 33 Fed. 252; 46 Fed. 486. 348, 495, 531, 562, 585
 BROWN. Dissenting, Field.

CASES EXCERPTED, WITH ANNOTATIONS . xliii

[References are to sections. " App." refers to Appendix]

- Dueber v. Robbins*, 75 Fed. 17; 21 C. C. A. 198.....285, 598, 626
 Revg. 71 Fed. 186; see 64 Fed. 384.
 Sixth; TAFT, Lurton, Hammond.
- Duer v. Corbin*, 149 U. S. 216; 37 L. Ed. 707; 13 S. Ct. 850...88, 224, 636
 Affg. 37 Fed. 338.
 BROWN.
- Duff v. Forgie*, 59 Fed. 772; 8 C. C. A. 261.....204, 373, 504
 Affg. 57 Fed. 748.
 Third; Dallas, Butler, GREEN.
- Duff v. Gilliland*, 139 Fed. 16; 71 C. C. A. 428.....176
 Revg. 135 Fed. 581.
 Third; Acheson, Dallas, GRAY.
- Duff v. Sterling*, 107 U. S. 636; 27 L. Ed. 517; 2 S. Ct. 487.....224, 507
 BLATCHFORD.
- Dunbar v. Eastern*, 81 Fed. 201; 26 C. C. A. 330.....48, 768
 Revg. 75 Fed. 567.
 Second; WALLACE, Lacombe, Shipman.
- Dunbar v. Meyers*, 94 U. S. 187; 24 L. Ed. 34....341, 343, 389, 400, 473,
 599, 667, 676, 679, 696, 706
 CLIFFORD.
- Duncan v. Cincinnati*, 171 Fed. 656; 96 C. C. A. 400....App. 222, 441, 500,
 656
 Sixth; Lurton, SEVERENS, Warrington.
- Duner v. Grand Rapids*, 171 Fed. 863; 96 C. C. A. 531....App. 223, 701
 Affg. 171 Fed. 867.
 Sixth; Lurton, SEVERENS, Warrington.
- Dunham v. Dennison*, 154 U. S. 103; 38 L. Ed. 924; 14 S. Ct. 986.....371
 Affg. 40 Fed. 667.
 GRAY.
- Dunlap v. Schofield*, 152 U. S. 244; 38 L. Ed. 426; 14 S. Ct. 576...281, 337,
 516
 Revg. 42 Fed. 323.
 GRAY.
- Dunlap v. Willbrandt*, 151 Fed. 223; 80 C. C. A. 575245, 485
 Eighth; Sanborn, Van Devanter, HOOK. Dissenting, SANBORN.
- Dunn v. Standard*, 163 Fed. 521; 90 C. C. A. 331.....208
 Sixth; LURTON, Severens, Richards.
- Duplex v. Campbell*, 69 Fed. 250; 16 C. C. A. 220....252, 534, 543, 546, 561
 See 64 Fed. 782.
 Sixth; TAFT, Lurton, Severens.
- Durand v. Schulze*, 61 Fed. 819; 10 C. C. A. 97.....222, 244, 820, 821
 Affg. 60 Fed. 392.
 Third; Acheson, Butler, WALES.
- Durham v. Seymour*, 161 U. S. 235; 40 L. Ed. 682; 16 S. Ct. 452.....143
 Affg. 23 Wash. L. Rep. 273.
 FULLER.
- Eachus v. Broomall*, 115 U. S. 429; 28 L. Ed. 419; 6 S. Ct. 229...322, 389,
 881
 MATTHEWS.
- Eagle v. Corbin*, 64 Fed. 789; 12 C. C. A. 418.....225
 Revg. 52 Fed. 980.
 Second; Wallace, Lacombe, SHIPMAN.
- Eagleton v. West*, 111 U. S. 490; 28 L. Ed. 493; 4 S. Ct. 593....56, 181, 300
 Affg. 18 Blatchf. 218. Distinguished 147 U. S. 209.
 BLATCHFORD.

xliv . CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

| | |
|--|---------------------------------------|
| Eames v. Andrews, 122 U. S. 40; 30 L. Ed. 1064; 7 S. Ct. 1073..... | 320, |
| Affg. 15 Fed. 109. | 625, 873, 916 |
| See Andrews v. Hovey, 123 U. S. 267; Andrews v. Carrman, 13 Blatchf. 307; Andrews v. Wright, 13 O. G. 969; Andrews v. Cross, 19 Blatchf. 294; Green v. French, 11 Fed. 591; Andrews v. Creegan, 19 Blatchf. 113; Andrews v. Long, 2 McCrary, 577; Andrews v. Cone, Andrews v. Hovey, 5 McCrary, 181. | |
| MATTHEWS. Dissenting Bradley, Field, Gray. | |
| Eames v. Godfrey, 68 U. S. 78; 17 L. Ed. 547..... | 456, 473 |
| DAVIS. | |
| Eames v. Worcester, 123 Fed. 67; 60 C. C. A. 37..... | 86, 431, 501, 600, 601, 612 |
| Ninth; Gilbert, Ross, Hawley. Dissenting HAWLEY. | |
| Eastman v. Getz, 84 Fed. 458; 28 C. C. A. 459..... | 411, 672, 676 |
| Affg. 77 Fed. 412. | |
| Second; Wallace, Lacombe, SHIPMAN. | |
| Eastman v. Mayor, 134 Fed. 844; 69 C. C. A. 628.... | 178, 412, 415, 853, 858 |
| Revg. 81 Fed. 182; see 9 Fed. 500; 35 Fed. 504; 36 Fed. 261; 45 Fed. 243; 47 Fed. 515; 105 Fed. 631. | |
| Second; Wallace, Townsend, COXE. | |
| Eby v. King, 158 U. S. 366; 39 L. Ed. 1018; 15 S. Ct. 972..... | 532, 871, 874, 880, 885, 887 |
| BROWN. | |
| Ecaubert v. Appleton, 67 Fed. 917; 15 C. C. A. 73..... | 21, 170, 275, 389, 396, 411, 811, 895 |
| Modifying 62 Fed. 742; see 52 O. G. 2107. | |
| Second; Wallace, Lacombe, SHIPMAN. | |
| Eccles v. Bradley, 158 Fed. 98; 85 C. C. A. 566..... | 459 |
| Second; Cox, Ward, Noyes. Per Curiam. | |
| Eclipse v. Farrow, 199 U. S. 581; 50 L. Ed. 317; 26 S. Ct. 150..... | 760, 761, 897 |
| Revg. 24 App. D. C. 311. | |
| HOLMES. | |
| Economy v. Lamprey, 65 Fed. 1000; 13 C. C. A. 271..... | 787 |
| Affg. 62 Fed. 590. | |
| First; Colt, Putnam, Nelson. Per Curiam. | |
| Eddy v. Dennis, 95 U. S. 560; 24 L. Ed. 363..... | 635 |
| HUNT. | |
| Edison v. American, 114 Fed. 926; 52 C. C. A. 546..... | 87, 640, 823 |
| Revg. 110 Fed. 660, 664. | |
| Second; WALLACE, Lacombe, Townsend. | |
| Edison v. Crouse, 152 Fed. 437; 81 C. C. A. 579..... | 225, 903 |
| Revg. 146 Fed. 539. | |
| Second; Lacombe, TOWNSEND, Cox. | |
| Edison v. Electric, 66 Fed. 309; 13 C. C. A. 487..... | 89 |
| Affg. 60 Fed. 401. | |
| Second; Wallace, LACOMBE, Shipman. | |
| Edison v. Mt. Morris, 58 Fed. 572; 7 C. C. A. 375..... | 565, 573 |
| Modifying as to injunction order, 57 Fed. 642. | |
| See 47 Fed. 454; 52 Fed. 300. | |
| Second; Wallace, SHIPMAN. | |
| Edison v. Novelty, 167 Fed. 977; 93 C. C. A. 387..... | App. 602, 631 |
| Revg. 161 Fed. 549. | |
| Third; Dallas, Gray, ARCHBALD. | |
| Edison v. Peninsular, 101 Fed. 831; 43 C. C. A. 479..... | 477, 756 |
| Affg. 95 Fed. 669. | |
| Sixth; LURTON, Day, Clark. | |

[References are to sections. "App." refers to Appendix]

- Edison *v.* Sawyer-Man, 53 Fed. 592; 3 C. C. A. 605.....381, 573, 579, 729
 Second; Wallace, Lacombe, Shipman. Per Curiam.
- Edison *v.* United States, 52 Fed. 300; 3 C. C. A. 83....23, 230, 421, 635,
 Affg. 47 Fed. 454. 697, 742, 914
 Second; LACOMBE, Shipman.
- Edison *v.* United States, 59 Fed. 501; 8 C. C. A. 200.....573
 See 52 Fed. 300.
 Second; Lacombe, Shipman. Per Curiam.
- Egbert *v.* Lippmann, 104 U. S. 333; 26 L. Ed. 755.....854, 856
 Woods. Dissenting opinion MILLER.
- Eldred *v.* Kirkland, 130 Fed. 342; 64 C. C. A. 588.....633, 647
 See 106 Fed. 509.
 Second; Wallace, Lacombe, COXE.
- Electric Accumulator *v.* Brush, 52 Fed. 130; 2 C. C. A. 682.....9, 17, 19,
 84, 105, 222, 344, 358, 361, 812
 Modfg. and affg. 47 Fed. 48; see same pat. 38 Fed. 117; 41 Fed. 679.
 Second; Lacombe, SHIPMAN.
- Electric Controller *v.* Westinghouse, 171 Fed. 83; 96 C. C. A. 187
App. 621, 673, 812
 Sixth; Lurton, Warrington, KNAPPEN.
- Electric Gas Lighting *v.* Boston, 139 U. S. 481; 35 L. Ed. 250; 11 S. Ct. 586
12, 203, 871, 876, 885, 889
 Affg. 29 Fed. 455; approving 21 Fed. 568, and 23 Fed. 195.
 BLATCHFORD.
- Electric Gas Lighting *v.* Fuller, 59 Fed. 1003. 8 C. C. A. 442.....502
 Affg. 55 Fed. 64.
 First; Colt, PUTNAM, Nelson.
- Electric Mfg. Co. *v.* Edison, 61 Fed. 834; 10 C. C. A. 106....29, 77, 544,
 561, 570
 Affg. 57 Fed. 616.
 Seventh; Woods, JENKINS, Bunn.
- Electric Protection *v.* American, 184 Fed. 916; 107 C. C. A. 238...App. 68,
 117, 118, 202, 212, 374, 376, 456, 459, 503, 608
 Revg. in part 181 Fed. 350.
 Eighth; Sanborn, Van Devanter, REED; dissenting, SANBORN.
- Electric Signal *v.* Hall, 114 U. S. 87; 29 L. Ed. 96; 5 S. Ct. 1069..503, 612
 MATTHEWS.
- Electric Smelting *v.* Carborundum, 102 Fed. 618; 42 C. C. A. 537....223,
 Revg. 83 Fed. 492. 584, 914
 Third; Dallas, Gray, BRADFORD.
- Electric Smelting *v.* Pittsburg, 125 Fed. 926; 60 C. C. A. 636....197, 441,
 782, 905
 Affg. in part 111 Fed. 742.
 Second; Wallace, Lacombe, COXE.
- Electric Storage *v.* Gould, 158 Fed. 610; 85 C. C. A. 432.....226
 Affg. 148 Fed. 695.
 Second; Lacombe, Townsend, Coxe, Per Curiam.
- Elgin *v.* Creamery, 80 Fed. 293; 25 C. C. A. 426.....363, 385
 Seventh; Woods, Jenkins, Showalter.
- Elgin *v.* Nichols, 65 Fed. 215; 12 C. C. A. 578.....722, 764
 Seventh; Harlan, Woods, Bunn.
- Elgin *v.* Nichols, 105 Fed. 780; 45 C. C. A. 49.....298, 299
 Seventh; Woods, Grosseup, Bunn.
- Elite *v.* Dececco, 150 Fed. 581; 80 C. C. A. 567.....546
 Third; Gray, BUFFINGTON.

xlvi **CASES EXCERPTED, WITH ANNOTATIONS**

[References are to sections. " App." refers to Appendix]

| | |
|---|--|
| Elizabeth v. American, 97 U. S. 126; 24 L. Ed. 1000..... | 3, 6, 7, 83, 296, 413, 414, 669, 833, 837, 838, 842, 847, 851, 853 |
| BRADLEY. | |
| Elliott v. Youngstown, 181 Fed. 345; 104 C. C. A. 175..... | App. 441, 584, 616, 620, 631 |
| Revg. 173 Fed. 315. Third; Buffington, Lanning, ARCHBALD. | |
| Emerson v. Nimocks, 99 Fed. 737; 40 C. C. A. 87..... | 691, 912 |
| Revg. 88 Fed. 280. Fourth; Goff, MORRIS, Waddill. | |
| Empire Circuit v. Channon, 168 Fed. 705; 94 C. C. A. 211..... | App. 228 |
| Seventh; GROSSCUP, Baker, Seaman. | |
| Empire Cream Separator v. Sears, 160 Fed. 668; 87 C. C. A. 556..... | 487 |
| Modfg. 157 Fed. 238. Second; Lacombe, COXE, Noyes. | |
| Empire State Nail v. American, 74 Fed. 864; 21 C. C. A. 152..... | 894 |
| Revg. 71 Fed. 588. First; PUTNAM, Nelson. | |
| Empire Target v. Cleveland, 102 Fed. 354; 42 C. C. A. 393..... | 77 |
| Revg. in part 97 Fed. 44. Third; Acheson, Dallas, McPHERSON. | |
| Eppler v. Campbell, 86 Fed. 141; 29 C. C. A. 616..... | 90, 207, 490 |
| Revg. 83 Fed. 208. First; PUTNAM, Aldrich, Lowell. | |
| Erie v. American, 70 Fed. 58; 16 C. C. A. 632..... | 195, 207, 374, 468 |
| Revg. 66 Fed. 558. Third; Acheson, Dallas, WALES. | |
| Ertel v. Stahl, 65 Fed. 517; 13 C. C. A. 29..... | 567 |
| Revg. 62 Fed. 920. Seventh; Woods, JENKINS, Baker. | |
| Ertel v. Stahl, 65 Fed. 519; 13 C. C. A. 31..... | 563, 572 |
| Seventh; Woods, JENKINS, Baker. | |
| Estey v. Burdett, 109 U. S. 633; 27 L. Ed. 1058; 3 S. Ct. 531..... | 601 |
| BLATCHFORD. | |
| Eunson v. Dodge, 85 U. S. 414; 21 L. Ed. 766..... | 311, 418, 484 |
| HUNT. | |
| Eureka v. Bailey, 78 U. S. 488; 20 L. Ed. 209..... | 310, 484, 795 |
| MILLER. | |
| Evans v. Eaton, 3 Wheat. 454; 4 L. Ed. 433..... | 58, 440, 441, 908, 918 |
| See S. C. 7 Wheat. 356. MARSHALL. | |
| Evans v. Eaton, 7 Wheat. 356; 5 L. Ed. 472..... | 197, 204, 411, 440, 506, |
| See S. C. 3 Wheat. 454; affg. 3 Wash. 443. 600, 915 | |
| STORY. Dissenting opinion LIVINGSTON. Johnson and Duvall also dissenting. | |
| Evans v. Hittich, 7 Wheat. 453; 5 L. Ed. 496..... | 393, 395 |
| See Evans v. Eaton, 7 Wheat. 356. Affg. 3 Wash. 408. STORY. | |
| Evans v. Rood, 99 Fed. 990; 40 C. C. A. 209..... | 105 |
| Revg. 92 Fed. 371. Third; Acheson, Gray, KIRKPATRICK. | |
| Evans v. Suess, 83 Fed. 706; 28 C. C. A. 24..... | 111 |
| Affg. 81 Fed. 198. Seventh; Woods, Jenkins, Showalter. | |

[References are to sections. "App." refers to Appendix]

Evans v. Suess, 86 Fed. 779; 30 C. C. A. 367.....685
 Affg. 83 Fed. 706.
 Seventh; Woods, Jenkins, Showalter. Dissenting SHOWALTER.

Excelsior Elevator v. Foote, 79 Fed. 442; 24 C. C. A. 673.....659
 Affg. 74 Fed. 792.
 Second; LACOMBE, Shipman.

Excelsior Needle v. Morse-Keefer, 101 Fed. 448; 41 C. C. A. 448..227, 701
 Affg. 97 Fed. 627.
 Second; Wallace, LACOMBE, Shipman.

Excelsior Supply v. Weed Chain, 192 Fed. 35; 113 C. C. A. 1...App. 691,
 Modfg. and affg. 179 Fed. 232; see 192 Fed. 41. 698
 Seventh; GROSSCUP, Baker, Kohlsaat.

Excelsior Wood Pipe v. Allen, 104 Fed. 553; 44 C. C. A. 30.....769
 Ninth; GILBERT, Ross, Hawley.

Excelsior Wood Pipe v. Pacific, 185 U. S. 282; 46 L. Ed. 910; 22 S. Ct. 681
714, 718, 722
 See 109 Fed. 497.
 BROWN.

Excelsior Wood Pipe v. Seattle, 117 Fed. 140; 55 C. C. A. 156....134, 765,
 798, 807
 Ninth; Gilbert, Ross, Hawley.

Expanded v. Board, 111 Fed. 395; 49 C. C. A. 406.....212
 Affg. 103 Fed. 287.
 Eighth; SANBORN, Thayer, Lochren.

Expanded v. Bradford, 214 U. S. 366; 53 L. Ed. 1034; 29 S. Ct. 652
App. 426, 608, 631, 817, 819
 Revg. 146 Fed. 984, making good 136 Fed. 870; affg. 164 Fed 849, and
 thus revg. 157 Fed. 564.
 DAY.

Expanded v. General, 164 Fed. 849; 90 C. C. A. 611.....817
 Affd. 214 U. S. 366; revg. 157 Fed. 564; see 146 Fed. 984.
 Sixth; Lurton, SEVERENS, Richards.

Fairbanks v. Stickney, 123 Fed. 79; 59 C. C. A. 209.....274, 608, 630
 Revg. 115 Fed. 720.
 Eighth; Caldwell, Sanborn, THAYER.

Falk v. Missouri, 103 Fed. 295; 43 C. C. A. 240.....635
 Affg. 91 Fed. 155.
 Eighth; Caldwell, THAYER, Rogers.

Faries v. Brown, 102 Fed. 508; 42 C. C. A. 483.....326
 Seventh; Woods, Grosscup, Seaman. Per Curiam.

Faries v. Brown, 121 Fed. 547; 57 C. C. A. 609.....635
 See 102 Fed. 508.
 Seventh; Jenkins, GROSSCUP, Baker.

Farmer's v. Challenge, 128 U. S. 506; 32 L. Ed. 529; 9 S. Ct. 146.....871
 Affg. 23 Fed. 42.
 GRAY.

Farmer's v. Spruks, 127 Fed. 691; 62 C. C. A. 447....78, 506, 635, 673,
 Revg. 119 Fed. 594. 692, 693, 699
 Fourth; Goff, Simonton, BRAWLEY.

Farquhar v. National, 102 Fed. 714; 42 C. C. A. 600.....924
 Revg. 99 Fed. 160.
 Third; Acheson, DALLAS, Bradford.

Fassett v. Ewart, 62 Fed. 404; 10 C. C. A. 441.....356, 383
 Affg. 58 Fed. 360.
 Seventh; JENKINS, Baker.

xlviii CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

- Faulkner *v.* Empire, 67 Fed. 913; 15 C. C. A. 69.....166
 Affg. 55 Fed. 819.
 Second; Wallace, LACOMBE, Shipman.
- Fay *v.* Cordesman, 109 U. S. 408; 27 L. Ed. 979; 3 S. Ct. 236....187, 466
 BLATCHFORD.
- Fay *v.* Mason, 127 Fed. 325; 62 C. C. A. 159.....398, 628
 Revg. 120 Fed. 506.
 Second; Lacombe, TOWNSEND.
- Featherstone *v.* Bidwell, 57 Fed. 631; 6 C. C. A. 487.....871, 885
 Revg. 53 Fed. 113.
 Second; WALLACE, Lacombe, Shipman.
- Fellows *v.* Borden's, 187 Fed. 1005; 109 C. C. A. 535.....App. 340, 790
 Affg. 180 Fed. 421.
 Second; Coxe, Ward, Noyes, Per Curiam.
- Ferguson *v.* Roos, 71 Fed. 416; 18 C. C. A. 162.....503, 600
 Seventh; Woods, Jenkins, Showalter.
- Ferry-Hallock *v.* Herman, 178 Fed. 550; 101 C. C. A. 230....App. 118, 566
 Revg. 171 Fed. 437; see 129 Fed. 389.
 Second; COXE, Ward, Holt.
- Fidelity *v.* Expanded, 183 Fed. 568; 106 C. C. A. 114.....App. 273
 Affg. 177 Fed. 604.
 Third; Buffington, Lanning, CROSS.
- Fielding *v.* Crouse, 154 Fed. 377; 83 C. C. A. 331.....623
 Second; Wallace, Lacombe, Townsend. Per Curiam.
- Fisher *v.* American, 71 Fed. 523; 18 C. C. A. 235.....671
 Affg. 69 Fed. 331.
 Second; Wallace, Lacombe, SHIPMAN.
- Florsheim *v.* Schilling, 137 U. S. 64; 34 L. Ed. 574; 11 S. Ct. 20....591,
 609, 624, 696
 Affg. 26 Fed. 256.
 LAMAR.
- Flower *v.* Detroit, 127 U. S. 563; 32 L. Ed. 175; 8 S. Ct. 1291.....888
 Affg. 22 Fed. 292.
 BLATCHFORD.
- Fond Du Lac *v.* May, 137 U. S. 395; 34 L. Ed. 714; 11 S. Ct. 98....612,
 617, 669, 684, 734
 Revg. 27 Fed. 691.
 BLATCHFORD.
- Foos *v.* Springfield, 49 Fed. 641; 1 C. C. A. 410.....49
 Affg. 44 Fed. 595.
 Sixth; Brown, JACKSON.
- Force *v.* Sawyer-Boss, 143 Fed. 894; 75 C. C. A. 102.....288, 843, 845
 See 131 Fed. 884.
 Second; Lacombe, TOWNSEND, Coxe.
- Ford *v.* Bancroft, 98 Fed. 309; 39 C. C. A. 91.....497
 Affg. 85 Fed. 457.
 First; COLT, Webb, Aldrich.
- Ford *v.* Tannage, 84 Fed. 644; 28 C. C. A. 503.....518, 561
 See same patent 70 Fed. 1003; 77 Fed. 191; 81 Fed. 178.
 Third; Acheson, Butler, KIRKPATRICK.
- Forest City *v.* Barnard, 176 Fed. 561; 100 C. C. A. 197.....App. 598
 Sixth; Lurton, SEVERENS, Warrington.
- Forgie *v.* Oil Well, 58 Fed. 871; 7 C. C. A. 551.....392, 409, 638, 682, 684
 Affg. 57 Fed. 742.
 Third; Dallas, Butler, GREEN.

[References are to sections. "App." refers to Appendix]

- Forncrook v. Root*, 127 U. S. 176; 32 L. Ed. 97; 8 S. Ct. 1247. . . . 217, 468
 Affg. 21 Fed. 328.
 BLATCHFORD.
- Forsyth v. Garlock*, 142 Fed. 461; 73 C. C. A. 577. . . . 390, 410
 First; Colt, PUTNAM, Aldrich.
- Foster v. Taylor*, 191 Fed. 1003; 111 C. C. A. 667. . . . App. 755
 Affg. 189 Fed. 407.
 Second; Lacombe, Ward, Noyes, Per Curiam.
- Foster v. Taylor*, 184 Fed. 71; 106 C. C. A. 467. . . . App. 775
 Affg. 180 Fed. 994.
 Second; Lacombe, WARD, Noyes.
- Fowler v. City of N. Y.* 121 Fed. 747; 58 C. C. A. 113. . . . 327, 698
 Affg. 110 Fed. 749.
 Second; Wallace, COXE.
- Fowler v. National*, 172 Fed. 661; 97 C. C. A. 187. . . . App. 223
 Third; GRAY, Lanning, Young.
- Fox v. Knickerbocker*, 165 Fed. 442; 91 C. C. A. 386. . . . 283, 322
 Affg. 158 Fed. 422.
 Second; Lacombe, COXE, Noyes.
- Fox v. Perkins*, 52 Fed. 205; 3 C. C. A. 32. . . . 198, 214, 216, 440, 636, 886
 Sixth; Brown, JACKSON, Taft.
- Frank v. Barnard*, 185 Fed. 810; 108 C. C. A. 42. . . . App. 137
 See 185 Fed. 812.
 Second; COXE, Ward, Noyes.
- Franklin v. Illinois*, 138 Fed. 58; 70 C. C. A. 484. . . . 880
 Affg. 128 Fed. 48.
 Seventh; Jenkins, GROSSCUP, Baker.
- Frasch v. Moore*, 211 U. S. 1; 53 L. Ed. 65; 29 S. Ct. 6. . . . 143
 Affg. 27 App. D. C. 25.
 FULLER; dissenting, White, McKenna.
- Frazer v. Gates*, 85 Fed. 441; 29 C. C. A. 261. . . . 229, 592, 593
 Revg. 79 Fed. 75.
 See same subject 153 U. S. 332; 78 Fed. 350.
 Seventh; Woods, Jenkins, Bunn.
- Freeman v. Asmus*, 145 U. S. 226; 36 L. Ed. 685; 12 S. Ct. 821. . . . 871
 Revg. 27 Fed. 684.
 BLATCHFORD.
- Freeman Co. v. Gen. Electric*, 191 Fed. 168; 111 C. C. A. 646. . . . App. 189,
 Affg. 190 Fed. 34. . . . 608
 Third; Gray, BUFFINGTON, Lanning.
- Fresno v. Fruit*, 101 Fed. 826; 42 C. C. A. 43. . . . 927
 Modifying 94 Fed. 845.
 Ninth; Gilbert, Hawley, DEHAVEN.
- Frick v. Geiser*, 100 Fed. 94; 40 C. C. A. 291. . . . 162
 Revg. 92 Fed. 189.
 Third; Acheson, Gray, KIRKPATRICK.
- Frost v. Cohn*, 119 Fed. 505; 56 C. C. A. 185. . . . 108, 656, 697
 Affg. 112 Fed. 1009.
 Second; WALLACE, Townsend.
- Frost v. Samstag*, 180 Fed. 739; 105 C. C. A. 37. . . . App. 697
 Revg. 173 Fed. 793.
 Second; WARD, Noyes, Hand.
- Fry v. Rookwood*, 101 Fed. 723; 41 C. C. A. 634. . . . 616
 Affg. 90 Fed. 494.
 Sixth; LURTON, Day, Severens.

I

CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Fuller *v.* Berger, 120 Fed. 274; 56 C. C. A. 588.....645, 747
Seventh; Jenkins, Grosscup, BAKER. Dissenting GROSSCUP.
- Fuller *v.* Yentzer, 94 U. S. 288; 24 L. Ed. 103.....223, 472, 473, 683, 771
CLIFFORD. Dissenting Strong, Waite, Miller, Bradley.
- Fuller *v.* Yentzer, 94 U. S. 299; 24 L. Ed. 107.....440, 468, 607
CLIFFORD. Dissenting Waite, Strong, Miller, Bradley.
- Fuller-Warren *v.* Michigan, 86 Fed. 463; 30 C. C. A. 193.....590
Rev. 81 Fed. 376.
Seventh; Woods, Jenkins, Showalter.
- Fullerton *v.* Anderson-Barngrover, 166 Fed. 443; 92 C. C. A. 295..836, 842
Ninth; GILBERT, Ross, Morrow; dissenting, Ross.
- Gage *v.* Herring, 107 U. S. 640; 27 L. Ed. 601; 2 S. Ct. 819....202, 340,
GRAY. 466, 499, 872, 889
- Galt *v.* Parlin, 60 Fed. 417; 9 C. C. A. 49.....672
Affg. 52 Fed. 749.
Seventh; Woods, Jenkins, Bunn.
- Galvin *v.* City, 115 Fed. 511; 53 C. C. A. 165.....599, 699
Sixth; Lurton, DAY, Cochran.
- Gamewell, *In re*, 73 Fed. 908; 20 C. C. A. 111.....128, 805
Petition for supplemental bill in review of 52 Fed. 464; 61 Fed. 948.
First; PUTNAM, Nelson, Webb.
- Gamewell *v.* Municipal, 61 Fed. 208; 9 C. C. A. 450.....111, 544, 550
Explaining *Richmond v. Atwood*, 52 Fed. 10; see *Lockwood v. Wicks*,
75 Fed. 118.
First; Putnam, Nelson, Webb. Per Curiam.
- Gamewell *v.* Municipal, 61 Fed. 949; 10 C. C. A. 184.....61, 355, 618
Affg. 52 Fed. 464.
First; Putnam, NELSON, Webb. Dissenting on second patent,
PUTNAM.
- Gamewell *v.* Municipal, 77 Fed. 490; 23 C. C. A. 250.....273, 274, 410
See s. c. 52 Fed. 464; 61 Fed. 208.
First; PUTNAM, Nelson, Webb.
- Gandy *v.* Main, 143 U. S. 587; 36 L. Ed. 272; 12 S. Ct. 598.....59, 104,
Rev. 28 Fed. 570. 487, 629, 634, 668
BROWN.
- Gandy *v.* Marble, 122 U. S. 432; 30 L. Ed. 1223; 7 S. Ct. 1290.....13
BLATCHFORD.
- Gardner *v.* Herz, 118 U. S. 180; 30 L. Ed. 158; 6 S. Ct. 1027....322, 636,
Affg. 20 Blatchf. 538. 667, 672, 675, 871
BLATCHFORD.
- Garratt *v.* Seibert, 131 U. S. exxvi App.; 21 L. Ed. 956.....473
STRONG.
- Garratt *v.* Seibert, 98 U. S. 75; 25 L. Ed. 84.....315, 411, 629, 895
See *Garratt v. Seibert*, 21 L. Ed. 956.
STRONG.
- Garretson *v.* Clark, 111 U. S. 120; 28 L. Ed. 371; 4 S. Ct. 291.....845
Affg. 15 Blatchf. 70.
FIELD.
- Gaskill *v.* Myers, 81 Fed. 854; 26 C. C. A. 642.....337, 873
Ninth; Gilbert, Ross, Hawley. Dissenting GILBERT.
- Gates *v.* Fraser, 153 U. S. 332; 38 L. Ed. 734; 14 S. Ct. 883.....463
Affg. 42 Fed. 49.
SHIRAS.
- Gates *v.* Fraser, 55 Fed. 409; 5 C. C. A. 154.....216
Seventh; Woods, Jenkins, BUNN.

[References are to sections. "App." refers to Appendix]

- Gates v. Overland*, 147 Fed. 700; 78 C. C. A. 88.....658
 See *Gates v. Fraser*, 153 U. S. 332; *Birmingham v. Gates*, 78 Fed. 350.
 Eighth; Sanborn, VAN DEVANTER, Philips.
- Gay v. Camp*, 68 Fed. 67; 15 C. C. A. 226.....836
 Rehearing of 65 Fed. 794.
 Fourth; Fuller, Goff, SIMONTON.
- Gayler v. Wilder*, 10 How. 477; 13 L. Ed. 504....61, 85, 151, 152, 164,
 169, 175, 590, 765, 926, 934
 TANEY; dissenting McLEAN, DANIEL, Grier.
- Gen. Electric v. Allis-Chalmers*, 194 Fed. 413; 114 C. C. A. 375...App. 133
 See 190 Fed. 145; 194 Fed. 414.
 Third; Gray, Buffington, Lanning, Per Curiam.
- Gen. Electric v. Allis-Chalmers*, 178 Fed. 273; 101 C. C. A. 537...App. 491
 Affg. 171 Fed. 666.
 Third; Gray, Buffington, LANNING.
- Gen. Electric v. Bullock*, 152 Fed. 427; 81 C. C. A. 569.....673, 919
 Revg. 146 Fed. 552.
 Sixth; Lurton, Severens, RICHARDS.
- Gen. Electric v. Corliss*, 160 Fed. 672; 87 C. C. A. 560..... 86
 Revg. 154 Fed. 671.
 Second; LACOMBE, COXE, NOYES.
- Gen. Electric v. Hartman*, 187 Fed. 131; 109 C. C. A. 49....App. 635, 693
 First; Colt, Putnam, ALDRICH.
- Gen. Electric v. Hill-Wright*, 174 Fed. 996; 98 C. C. A. 566...App. 457, 632
 Revg. 170 Fed. 189; see 137 Fed. 600.
 Second; Lacombe, COXE, NOYES; dissenting, NOYES.
- Gen. Electric v. International*, 126 Fed. 755; 61 C. C. A. 329.....223, 937
 Sixth; Lurton, Severens, RICHARDS.
- Gen. Electric v. Morgan-Gardner*, 168 Fed. 52; 93 C. C. A. 474....App.
 386, 780
 Revg. 159 Fed. 951.
 Seventh; Grosscup, BAKER, Seaman.
- Gen. Electric v. New England*, 128 Fed. 738; 63 C. C. A. 448....548, 800
 Revg. 123 Fed. 310.
 Second; Lacombe, Townsend, COXE.
- Gen. Electric v. Richmond*, 178 Fed. 84; 102 C. C. A. 138....App. 871,
 880, 884, 887
 Seventh; Grosscup, BAKER, Kohlsaas.
- Gen. Electric v. Sangamo*, 174 Fed. 246; 98 C. C. A. 154....App. 430, 585
 Seventh; GROSSCUP, Baker, Anderson.
- Gen. Electric v. Wagner*, 130 Fed. 772; 66 C. C. A. 82.....631
 Affg. 123 Fed. 101.
 Second; Lacombe, TOWNSEND, COXE.
- Gen. Electric v. Webster*, 113 Fed. 756; 51 C. C. A. 446.....195, 229
 First; COLT, Putnam, Aldrich.
- Gen. Electric v. Winona*, 183 Fed. 418; 105 C. C. A. 652....App. 628, 744
 Seventh; Baker, SEAMAN, Kohlsaas.
- Gen. Electric v. Winona*, 188 Fed. 77; 110 C. C. A. 147....App. 654
 Seventh; GROSSCUP, Kohlsaas, Carpenter.
- Gen. Electric v. Yost*, 139 Fed. 568; 71 C. C. A. 552.....427, 658
 Affg. 131 Fed. 874.
 Second; Wallace, TOWNSEND, COXE.
- Gen. Fire Extinguisher v. Mellers*, 110 Fed. 529; 49 C. C. A. 138....223
 Affg. 110 Fed. 528.
 Seventh; Woods, Jenkins, GROSSCUP.

[References are to sections. "App." refers to Appendix]

Gen. Knit Fabric *v.* Steber, 194 Fed. 99; 114 C. C. A. 177..App. 87, 494, 634
 See 190 Fed. 47.
 Second; Lacombe, COXE, Ward.

Gerard *v.* Diebold, 54 Fed. 889; 4 C. C. A. 644.....195
 Affg. 48 Fed. 380; re-affirmed 61 Fed. 209.
 Fifth; McCormick, LOCKE, Billings.

Gerard *v.* Diebold, 61 Fed. 209; 9 C. C. A. 451.....247, 598
 Affg. 48 Fed. 380; 54 Fed. 889.
 Fifth; McCormick, LOCKE.

Germain *v.* Wilgus, 67 Fed. 597; 14 C. C. A. 561.....567, 718, 720, 801
 Ninth; Gilbert, KNOWLES, Bellinger.

Germer *v.* Art, 150 Fed. 141; 80 C. C. A. 9.....49, 904
 Sixth; LURTON, Severens, Richards.

Gibbon *v.* Loewer, 79 Fed. 325; 24 C. C. A. 612.....599, 662
 Revg. 74 Fed. 555; 55 Fed. 62.
 Third; ACHESON, Butler, Wales.

Gill *v.* United States, 160 U. S. 426; 40 L. Ed. 488; 16 S. Ct. 322....366,
 Affg. 25 Ct. Cl. 415. 387, 429
 BROWN.

Gill *v.* Wells, 89 U. S. 1; 22 L. Ed. 699....374, 377, 468, 604, 605, 612,
 CLIFFORD. 674, 888, 889

Gillette *v.* Sendelbach, 146 Fed. 758; 77 C. C. A. 55..... 25
 Seventh; Grosseup, BAKER, Kohlsaaf.

Gimbel *v.* Hogg, 97 Fed. 791; 38 C. C. A. 419.....336
 Revg. 94 Fed. 518.
 Third; ACHESON, Dallas, Gray.

Glendale *v.* Smith, 100 U. S. 110; 25 L. Ed. 547.....141
 WAITE.

Globe-Wernicke *v.* Brown, 121 Fed. 90; 57 C. C. A. 344.....721
 Seventh; Jenkins, BAKER, Seaman.

Globe-Wernicke *v.* Macey, 119 Fed. 696; 56 C. C. A. 304..43, 508, 636, 929
 Sixth; Lurton, Day, SEVERENS.

Godfrey *v.* Eames, 68 U. S. 317; 17 L. Ed. 684.....5, 902
 SWAYNE. Dissenting, Clifford.

Gold *v.* Gold, 187 Fed. 273; 109 C. C. A. 615.....App. 25, 277, 358
 Affg. 181 Fed. 544.
 Second; Lacombe, COXE, Noyes.

Good Form *v.* White, 160 Fed. 661.....630, 631
 Revg. 153 Fed. 759.
 Second; Cox, Ward, Noyes. Per Curiam.

Goodyear *v.* Dancel, 119 Fed. 692; 56 Fed. 300.....App. 897
 Revg. 106 Fed. 551; 109 Fed. 336.
 Second; WALLACE, Townsend, Cox.

Goodyear *v.* Davis, 102 U. S. 222; 26 L. Ed. 149....208, 378, 520, 821, 870
 See Smith *v.* Goodyear, 93 U. S. 486.
 STRONG.

Goodyear *v.* Jackson, 112 Fed. 146; 50 C. C. A. 159.....477, 523, 524
 First; COLT, Putnam, Webb.

Goodyear *v.* Rubber, 116 Fed. 363; 53 C. C. A. 583....49, 195, 597, 598,
 623, 908
 Revd. as to validity of pat. 220 U. S. 428.
 Sixth; LURTON, Day, Severens.

Goodyear *v.* Spaulding, 110 Fed. 393; 49 C. C. A. 88.....224, 487
 Affg. 101 Fed. 990.
 First; COLT, Putnam, Webb.

[References are to sections. " App." refers to Appendix]

- Gordon *v.* Warder, 150 U. S. 47; 37 L. Ed. 992; 14 S. Ct. 32.96, 217,
 Affg. 38 Fed. 592. 484, 532
 SHIRAS.
- Gorham *v.* White, 81 U. S. 511; 20 L. Ed. 731.329, 331, 335
 Modified 148 U. S. 511.
 STRONG. Dissenting Miller, Field, Bradley.
- Gormully *v.* Western, 84 Fed. 968; 28 C. C. A. 586.652
 Seventh; Woods, Jenkins, BUNN.
- Gormley & Jeffery *v.* U. S. Agency, 177 Fed. 691; 101 C. C. A. 479
 Affg. 169 Fed. 831.App. 253
 Second; Lacombe, Coxe, Noyes, Per Curiam.
- Goshen *v.* Bissell, 72 Fed. 67; 19 C. C. A. 13.188, 247, 426, 427, 432,
 486, 545, 679
 Sixth; Taft, LURTON, Hammond.
- Goshen *v.* Single Tube, 166 Fed. 431; 92 C. C. A. 183.513, 755
 See 142 Fed. 531; 157 Fed. 678.
 Seventh; Baker, Seaman, SANBORN.
- Gosling *v.* Roberts, 106 U. S. 39; 27 L. Ed. 61; 1 S. Ct. 26.230, 871
 BLATCHFORD.
- Goss *v.* Scott, 108 Fed. 253; 47 C. C. A. 302.45, 67, 156, 634, 635, 926
 Revg. 103 Fed. 650; see 89 Fed. 818.
 Third; Dallas, Gray, BUFFINGTON.
- Goss *v.* Scott, 110 Fed. 402; 49 C. C. A. 97. 85, 135
 On rehearing affg. 108 Fed. 253.
 Third; Dallas, Gray, BUFFINGTON.
- Gottfried *v.* Miller, 104 U. S. 521; 26 L. Ed. 851.156, 159, 761
 WOODS.
- Gould *v.* Cincinnati, 194 Fed. 680; — C. C. A. —App. 615, 636
 Affg. 194 Fed. 681.
 Sixth; Warrington, KNAPPEN, Denison.
- Gould *v.* Sessions, 67 Fed. 163; 14 C. C. A. 366.537, 578
 See 49 Fed. 855; 63 Fed. 1001; 60 Fed. 753.
 Second; Wallace, SHIPMAN, Brown.
- Gould *v.* Trojan, 74 Fed. 794; 21 C. C. A. 97.230
 Reversing 70 Fed. 622.
 Second; Wallace, LACOMBE, Shipman.
- Gould Storage Battery *v.* Electric, 192 Fed. 28; 112 C. C. A. 416.App.
 151, 164, 680
 Affg. 192 Fed. 29.
 Second; Lacombe, COXE, Noyes.
- Goulds *v.* Cowing, 105 U. S. 253; 26 L. Ed. 987.290, 298, 438
 WAITE.
- Graham *v.* Earl, 92 Fed. 155; 34 C. C. A. 267.344, 406, 481
 Ninth; Gilbert, Hawley, DEHAVEN.
- Grant *v.* Raymond, 6 Pet. 218; 8 L. Ed. 376.312, 889
 MARSHALL.
- Grant *v.* Walter, 148 U. S. 547; 37 L. Ed. 552; 13 S. Ct. 699.244, 344,
 Affg. 38 Fed. 594. 616, 636, 903
 JACKSON.
- Gray *v.* Grinberg, 159 Fed. 138; 86 C. C. A. 328331, 494, 721
 Affg. 147 Fed. 732.
 Third; Dallas, Buffington, Cross.
- Gray Tel. *v.* Baird, 174 Fed. 417; 98 C. C. A. 353.App. 97, 682
 Revg. as to pat. 593,720; affg. as to pat. 598,610.
 Seventh; Grosscup, Baker, KOHLSAAT.

liv CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

- Green v. American*, 78 Fed. 119; 24 C. C. A. 41.....608
 Revg. 75 Fed. 680; see 69 Fed. 333.
 Third; Dallas, Butler, WALES.
- Greene v. Buckley*, 135 Fed. 520; 68 C. C. A. 70.....72, 201, 207, 398, 432,
 469, 507
 Revg. 120 Fed. 952, 955.
 Second; Wallace, Lacombe, TOWNSEND.
- Greene v. United*, 124 Fed. 961; 60 C. C. A. 93.....124, 890
 First; PUTNAM, Aldrich, Brown.
- Greene v. United*, 132 Fed. 973; 66 C. C. A. 43.....216
 Revg. 115 Fed. 155.
 First; Putnam, Aldrich, BROWN.
- Greenwald v. Enochs*, 183 Fed. 583; 106 C. C. A. 351....App. 389, 614, 631
 Revg. 180 Fed. 478.
 Third; BUFFINGTON, Lanning, Cross.
- Greenwood v. Dover*, 194 Fed. 91; 114 C. C. A. 169.....App. 25
 Revg. 177 Fed. 946; see 23 App. D. C. 251.
 First; Colt, PUTNAM, Aldrich.
- Greist v. Parsons*, 125 Fed. 116; 60 C. C. A. 34.....672
 Seventh; Jenkins, Grosscup, BAKER.
- Grier v. Wilt*, 120 U. S. 412; 30 L. Ed. 712; 7 S. Ct. 718....224, 380, 390,
 485, 491, 502
 Revg. 5 Fed. 450.
 BLATCHFORD.
- Grimes v. Allen*, 102 Fed. 606; 42 C. C. A. 559.....443
 Affg. 89 Fed. 869.
 Seventh; Woods, Jenkins, GROSSCUP.
- Griswold v. Harker*, 62 Fed. 389; 10 C. C. A. 435....213, 487, 517, 608, 624
 Revg. 55 Fed. 991. See same pat. held void 68 Fed. 494.
 Eighth; Caldwell, SANBORN, Thayer.
- Griswold v. Wagner*, 68 Fed. 494; 15 C. C. A. 525.....616
 Affg. 65 Fed. 513; distinguishing *Griswold v. Harker*, 62 Fed. 389.
 Sixth; Taft, LURTON, Severens.
- Groth v. International*, 61 Fed. 284; 9 C. C. A. 507.....201, 222
 Revg. 57 Fed. 658.
 Second; Wallace, Lacombe, SHIPMAN.
- Grove, In re*, 180 Fed. 62; 103 C. C. A. 416.....App. 111, 136, 137, 536,
 538, 577
 Revg. 176 Fed. 925.
 Third; Buffington, LANNING, Bradford.
- Grushlaw v. Phoenix*, 183 Fed. 222; 105 C. C. A. 484.....App. 543, 554
 Affg. 181 Fed. 166; see 181 Fed. 163.
 Third; Buffington, Lanning, Cross.
- Guggenheim v. Kirchhofer*, 66 Fed. 755; 14 C. C. A. 72.....760
 Second; WALLACE, Lacombe.
- Guidet v. Brooklyn*, 105 U. S. 550; 26 L. Ed. 1106.....431, 871
 WAITE.
- Gunn v. Bridgeport*, 152 Fed. 434; 81 C. C. A. 576.....591
 Revg. 148 Fed. 239.
 Second; Lacombe, TOWNSEND, COXE.
- Haberman, In re*, 147 U. S. 525; 37 L. Ed. 266; 13 S. Ct. 527....142, 545
 BLATCHFORD.
- Haffecke v. Clark*, 50 Fed. 531; 1 C. C. A. 570.....270, 668, 762
 Revg. 46 Fed. 770.
 Fourth; Goff, HUGHES.

[References are to sections. "App." refers to Appendix]

- Hailes *v.* Albany, 123 U. S. 582; 31 L. Ed. 284; 8 S. Ct. 262..344, 871, 922
BRADLEY.
- Hailes *v.* Van Wormer, 87 U. S. 353; 22 L. Ed. 247.....212, 249
STRONG.
- Haines *v.* McLaughlin, 135 U. S. 584; 22 L. Ed. 241; 10 S. Ct. 876....207,
FULLER. 402, 404, 491, 492, 503, 736, 857
- Hale *v.* World, 127 Fed. 964; 62 C. C. A. 596.....207
Sixth; Lurton, Severens, RICHARDS.
- Hall *v.* General, 169 Fed. 290; 94 C. C. A. 580.....App. 87, 97, 698, 702
Affg. 168 Fed. 62.
Second; Lacombe, COXE, Noyes.
- Hall *v.* General, 153 Fed. 907; 82 C. C. A. 653.....552, 563, 567
Second; Wallace, Lacombe, COXE.
- Hall *v.* MacNeale, 107 U. S. 90; 27 L. Ed. 367; 2 S. Ct. 73...415, 854, 858
BLATCHFORD.
- Hamilton *v.* Diamond, 137 Fed. 417; 69 C. C. A. 532.....578
Affg. 130 Fed. 893.
Third; Acheson, Dallas, Gray. Per Curiam.
- Hammond *v.* Goodyear, 58 Fed. 411; 7 C. C. A. 276.....217
Revg. Hammond *v.* Hathaway, 48 Fed. 305; 48 Fed. 834. See 32 Fed.
791; 38 Fed. 602-604; 41 Fed. 519; 47 Fed. 452. See Hammond
v. Weld, 72 Fed. 171.
Second; Wallace, LACOMBE.
- Hammond *v.* Mason, 92 U. S. 724; 23 L. Ed. 767.....152, 753, 800, 931
MILLER.
- Hammond *v.* Stockton, 70 Fed. 716; 17 C. C. A. 356334
Ninth; Gilbert, Ross, Hawley.
- Hammond *v.* Weld, 72 Fed. 171; 18 C. C. A. 502.....253
See Hammond *v.* Goodyear, 58 Fed. 411; Hammond *v.* Hathaway, 48
Fed. 305.
First; Putnam, Nelson, WEBB.
- Handy Things *v.* Tucker, 188 Fed. 68; 110 C. C. A. 138.....App. 2
Seventh; Grosseup, Baker, SEAMAN.
- Hanifen *v.* Godshalk, 84 Fed. 649; 28 C. C. A. 507....85, 398, 850, 903
Revg. 78 Fed. 811.
Third; Shiras, ACHESON, Butler. Dissenting BUTLER.
- Hanifen *v.* Lupton, 101 Fed. 462; 41 C. C. A. 462.....311
Revg. 95 Fed. 465.
Third; ACHESON, Dallas, Kirkpatrick.
- Hanifen *v.* Price, 102 Fed. 509; 42 C. C. A. 484.....256
Revg. 96 Fed. 435; see 78 Fed. 811; 84 Fed. 649.
Second; Wallace, Lacombe, SHIPMAN.
- Hanks *v.* International, 194 U. S. 303; 48 L. Ed. 989; 24 S. Ct. 700....395
FULLER.
- Hanks *v.* International, 122 Fed. 74; 58 C. C. A. 180.....896
See 194 U. S. 303.
Second; Wallace, COXE.
- Hapgood *v.* Hewitt, 119 U. S. 226; 30 L. Ed. 369; 7 S. Ct. 193.... 271,
Affg. 11 Biss. 184. 366, 367, 372, 756
BLATCHFORD.
- Harder *v.* United States, 160 Fed. 463; 87 C. C. A. 447.....203, 601
Affg. 149 Fed. 434.
Seventh; Grosseup, BAKER, Seaman.
- Hardison *v.* Brinkman, 156 Fed. 962; 87 C. C. A. 8.....202, 373, 374, 496
Ninth; GILBERT, Ross, Hunt.

[References are to sections. "App." refers to Appendix]

- Harper *v.* Wilgus, 56 Fed. 587; 6 C. C. A. 45.....131, 141, 638
Ninth; McKenna, GILBERT, Hawley.
- Hart *v.* Anchor, 92 Fed. 657; 34 C. C. A. 606.....67, 70, 547, 777, 889
Revg. 82 Fed. 911.
First; Colt, Brown, LOWELL.
- Hartell *v.* Tilghman, 99 U. S. 547; 25 L. Ed. 357.....714
MILLER. Dissenting opinion Bradley, Swayne.
- Hartford *v.* Hollander, 163 Fed. 948; 90 C. C. A. 308.....144
Revg. 158 Fed. 103.
Second; Coxe, Ward, Noyes, Per Curiam.
- Hartshorn *v.* Saginaw, 119 U. S. 664; 30 L. Ed. 539; 7 S. Ct. 421.....12,
MATTHEWS. 309, 871, 885, 889
- Hartz *v.* Cleveland, 95 Fed. 681; 37 C. C. A. 227.....141, 162, 800
Sixth; Taft, LURTON, Clark.
- Hatch *v.* Electric, 100 Fed. 975; 41 C. C. A. 133....67, 230, 305, 561, 566,
First; PUTNAM, Aldrich, Brown. 570, 938
- Haughey *v.* Lee, 151 U. S. 282; 38 L. Ed. 162; 14 S. Ct. 331.....387, 437
SHIRAS.
- Hay *v.* Heath, 71 Fed. 411; 18 C. C. A. 157.....593, 594, 610
Revg. 67 Fed. 246.
Seventh; Woods, Jenkins, Showalter.
- Hayes-Young *v.* St. Louis, 137 Fed. 80; 70 C. C. A. 1.....13, 807
Affg. 130 Fed. 900.
Eighth; SANBORN, Philips, Riner.
- Hayward *v.* Andrews, 106 U. S. 672; 27 L. Ed. 271; 1 S. Ct. 544.....720
MATTHEWS.
- Hayward *v.* Ellis, 187 Fed. 128; 109 C. C. A. 46.....App. 637
First; COLT, Putnam, Aldrich.
- Heald *v.* Rice, 104 U. S. 737; 26 L. Ed. 910.....646, 881, 888
MATTHEWS.
- Heap *v.* Greene, 91 Fed. 792; 34 C. C. A. 86.....208, 532
Revg. 75 Fed. 405.
First; Putnam, BROWN, Lowell.
- Heap *v.* Tremont, 82 Fed. 449; 27 C. C. A. 316. .68, 230, 378, 424, 454, 616, 621
Revg. 75 Fed. 406; affd. on rehearing 84 Fed. 1017.
First; PUTNAM, Webb, Aldrich.
- Heaton *v.* Eureka, 77 Fed. 288; 25 C. C. A. 267....476, 532, 720, 746, 899
Revg. 65 Fed. 619.
Sixth; Taft, LURTON, Hammond.
- Heaton *v.* Schlochtermeyer, 72 Fed. 520; 18 C. C. A. 674.....324
Affg. 69 Fed. 592.
Sixth; TAFT, Lurton, Hammond.
- Hecker *v.* Fowler, 69 U. S. 123; 17 L. Ed. 759.....807
CLIFFORD.
- Hedges *v.* Seibert, 50 Fed. 643; 1 C. C. A. 594.....134
See 35 Fed. 509.
Third; ACHESON, Butler.
- Heekin *v.* Baker, 138 Fed. 63; 70 C. C. A. 559....376, 476, 527, 635, 675
Revg. 127 Fed. 828.
Eighth; Sanborn, VAN DEVANTER, Amidon.
- Heide *v.* Panoulis, 188 Fed. 914; 110 C. C. A. 656.....App. 131, 735
See 178 Fed. 101.
Second; LACOMBE, Coxe, Noyes.
- Heller *v.* National, 168 Fed. 249; 93 C. C. A. 551.....App. 536
Second; Lacombe, Ward, Noyes. Per Curiam.

[References are to sections. "App." refers to Appendix]

Hemolin v. Harway, 166 Fed. 434; 92 C. C. A. 186.....846
 See 138 Fed. 54.
 Second; LACOMBE, Ward, Noyes.

Hemolin v. Harway, 138 Fed. 54; 70 C. C. A. 480.....914
 Affg. 131 Fed. 483.
 Second; Wallace, Lacombe, TOWNSEND.

Hendey v. Prentice, 162 Fed. 481; 89 C. C. A. 401.....378
 Affg. 155 Fed. 133.
 First; Colt, Putnam, LOWELL.

Hendrie v. Sayles, 98 U. S. 546; 25 L. Ed. 176.....152, 418
 CLIFFORD.

Hendy v. Golden, 127 U. S. 370; 32 L. Ed. 207; 8 S. Ct. 1275202, 313,
 Affg. 8 Sawy. 468. 380, 664, 799
 BLATCHFORD.

Hennebique v. Myers, 172 Fed. 869; 97 C. C. A. 289.....App. 421
 Third; GRAY, BUFFINGTON, ARCHBALD; dissenting, BUFFINGTON.

Henry v. Dick, 224 U. S. 1; 56 L. Ed. 645; 32 S. Ct. 364....App. 157,
 477, 510, 714, 718, 721, 722, 899
 Affg. 149 Fed. 424; petition for rehearing denied.
 LURTON; dissenting, WHITE, Hughes, Lamar.

Herman v. Youngstown, 191 Fed. 579; 112 C. C. A. 185....App. 220,
 246, 344, 400, 491, 507, 584, 745
 See 181 Fed. 345.
 Sixth; Warrington, Knappen, DENISON.

Herrick v. Giant, 60 Fed. 80; 8 C. C. A. 475.....141
 Affg. 52 Fed. 147.
 First; Putnam, Nelson, Webb. Per Curiam.

Herzog v. N. Y. Telephone, 176 Fed. 349; 99 C. C. A. 623.....App. 195
 Affg. 172 Fed. 425.
 Second; Lacombe, Ward, NOYES.

Hestonville v. McDuffee, 185 Fed. 798; 109 C. C. A. 606....App. 199, 915
 Revg. 181 Fed. 503; see 148 Fed. 1023.
 Third; Gray, BUFFINGTON, Lanning.

Hickory v. Frazier, 100 Fed. 99; 40 C. C. A. 296.....600, 690
 Affg. 89 Fed. 202.
 Seventh; Woods, BUNN, Allen.

Hicks v. Kelsey, 85 U. S. 670; 21 L. Ed. 852.....696
 BRADLEY.

Higgin v. Scherer, 100 Fed. 459; 40 C. C. A. 491.....326
 Sixth; TAFT, Lurton, Day.

Highland v. Schmertz, 178 Fed. 944; 102 C. C. A. 316.....App. 118, 660
 Revg. 178 Fed. 944; see 168 Fed. 73; 178 Fed. 977; 144 Fed. 117; 97
 Fed. 950; 178 Fed. 973.
 Third; GRAY, Lanning, McPherson.

Hildreth v. Norton, 159 Fed. 428; 86 C. C. A. 408.....567, 575
 Affg. 154 Fed. 82.
 Second; LACOMBE, Coxe, Noyes.

Hilker v. U. S. Mop, 191 Fed. 613; 112 C. C. A. 176....App. 98, 658
 Sixth; Warrington, KNAPPEN, Denison.

Hill v. Wooster, 132 U. S. 693; 33 L. Ed. 502; 10 S. Ct. 22825, 582, 667
 Revg. 22 Fed. 830.
 BLATCHFORD.

Hillard v. Fisher, 159 Fed. 439; 86 C. C. A. 469....66, 93, 352, 459, 634
 Affg. 151 Fed. 34.
 Second; Lacombe, COXE, Noyes.

lviii **CASES EXCERPTED, WITH ANNOTATIONS**

[References are to sections. "App." refers to Appendix]

- Hillard *v.* Remington, 186 Fed. 334; 108 C. C. A. 534. . . . App. 584, 657, 666
 Second; COXE, Ward, Noyes.
- Hillborn *v.* Hale, 69 Fed. 958; 16 C. C. A. 569. . . . 208, 277, 341, 656, 673, 876
 Third; SHIRAS, Acheson, Dallas.
- Hobbie *v.* Jennison, 149 U. S. 355; 37 L. Ed. 766; 13 S. Ct. 879. . . . 512, 763
 Affg. 40 Fed. 887.
 BLATCHFORD.
- Hobbs *v.* Beach, 180 U. S. 383; 45 L. Ed. 586; 21 S. Ct. 409. . . . 255, 422,
 423, 501, 635, 670, 884, 937
 Affg. 92 Fed. 146; Revg. 82 Fed. 916.
 BROWN.
- Hobbs *v.* Gooding, 111 Fed. 403; 49 C. C. A. 414. . . . 376, 631, 635, 792
 First; Colt, PUTNAM, Aldrich.
- Hobbs *v.* Gooding, 113 Fed. 615; 51 C. C. A. 335. . . . 578
 First; Colt, Putnam, ALDRICH.
- Hobbs *v.* Gooding, 176 Fed. 259; 100 C. C. A. 83. . . . App. 794
 Revg. 166 Fed. 933.
 First; Colt, PUTNAM, Aldrich.
- Hocke *v.* New York Central, 122 Fed. 467; 58 C. C. A. 627. . . . 698
 Affg. 117 Fed. 320.
 Second; WALLACE, Lacombe.
- Hoe *v.* Miehle, 149 Fed. 213; 79 C. C. A. 171. . . . 526
 Affg. 141 Fed. 112.
 Second; LACOMBE, Townsend, Coxe.
- Hoff *v.* Iron Clad, 139 U. S. 326; 35 L. Ed. 179; 11 S. Ct. 580. . . . 483, 696
 Affg. 31 Fed. 45; revg. 27 Fed. 301.
 BROWN.
- Hogan *v.* Westmorland, 154 Fed. 66; 83 C. C. A. 178. . . . 326
 Revg. 145 Fed. 199.
 Third; Gray, BUFFINGTON, Lanning.
- Hogg *v.* Emerson, 6 How. 437; 12 L. Ed. 505. . . 111, 205, 222, 242, 266,
 740, 905, 913, 915
 Affg. 2 Blatchf. 1.
 WOODBURY.
- Hogg *v.* Emerson, 11 How. 587; 13 L. Ed. 824. . . . 285, 289, 291, 918
 WOODBURY. Dissenting Taney, Daniel, Grier, CATRON.
- Hohorst *v.* Hamburg-American, 91 Fed. 655; 34 C. C. A. 39. . . 295, 728, 840
 Affg. 84 Fed. 354.
 Second; Wallace, LACOMBE, Shipman.
- Hollister *v.* Benedict, 113 U. S. 59; 28 L. Ed. 901; 5 S. Ct. 717. . . . 636,
 657, 715, 747
 MATTHEWS.
- Holloway *v.* Whiteley, 71 U. S. 522; 18 L. Ed. 335. . . . 25, 262, 889, 927
 SWAYNE.
- Holman *v.* Jones, 61 Fed. 105; 9 C. C. A. 385. . . . 216
 Revg. 58 Fed. 973.
 Third; Acheson, BUTLER, Green.
- Holmes *v.* Kirkpatrick, 133 Fed. 232; 66 C. C. A. 286. . . . 411
 Ninth; Gilbert, Ross, Hawley.
- Holmes *v.* McGill, 108 Fed. 238; 47 C. C. A. 296. . . . 764, 897
 Second; Wallace, SHIPMAN.
- Holmes *v.* Truman, 67 Fed. 542; 14 C. C. A. 517. . . . 298, 411, 736
 Ninth; GILBERT, Hawley, Hanford.
- Holt *v.* Best, 172 Fed. 409; 97 C. C. A. 107. . . . App. 403, 404
 Ninth; Gilbert, Ross, Morrow.

[References are to sections. "App." refers to Appendix]

- Holzapfels *v.* Rahtjens, 183 U. S. 51; 46 L. Ed. 49; 22 S. Ct. 6....398, 928
 Revg. 101 Fed. 267.
 PECKHAM.
- Hopkins *v.* Corbin, 103 U. S. 786; 26 L. Ed. 610.....871
 WOODS.
- Horn *v.* Pelzer, 91 Fed. 665; 34 C. C. A. 45.....254, 878
 Revg. 87 Fed. 869.
 Third; ACHESON, Butler, Kirkpatrick, dissenting, Butler.
- Hoskin *v.* Fisher, 125 U. S. 217; 31 L. Ed. 759; 8 S. Ct. 834.....871, 875,
 877, 879
 BLATCHFORD.
- Hoskin *v.* Matthes, 108 Fed. 404; 47 C. C. A. 434.....266, 691
 Seventh; Woods, Jenkins, GROSSCUP.
- Hotchkiss *v.* Greenwood, 11 How. 248; 13 L. Ed. 683.....592, 652, 696
 NELSON; dissenting opinion WOODBURY.
- Hotel *v.* Lorraine, 160 Fed. 467; 87 C. C. A. 451.....148, 698
 Affg. 155 Fed. 298.
 Second; Lacombe, COXE, Ward.
- Houghton *v.* Whitin, 153 Fed. 740; 83 C. C. A. 84.....624, 648, 697, 873
 First; Colt, Putnam, ALDRICH.
- Houston *v.* Stern, 74 Fed. 636; 20 C. C. A. 568.....297, 404
 Fifth; PARDEE, McCormick, Speer.
- Howard *v.* Gibbs, 157 Fed. 676; 85 C. C. A. 348.....545
 Revg. and affg. 153 Fed. 291.
 First; Colt, PUTNAM, Lowell.
- Howe *v.* National, 134 U. S. 388; 33 L. Ed. 963; 10 S. Ct. 570...222, 671,
 672, 903
 Affg. 21 Fed. 630.
 FULLER.
- Hoyt *v.* Horne, 145 U. S. 302; 36 L. Ed. 713; 12 S. Ct. 922...453, 487, 626
 Revg. 35 Fed. 830.
 BROWN.
- Hubbell *v.* United States, 171 U. S. 203; 43 L. Ed. 136; 18 S. Ct. 828
387, 894
 Rehearing denied 179 U. S. 86; affg. 20 Ct. Cl. 354.
 BROWN.
- Hubbell *v.* United States, 179 U. S. 77; 45 L. Ed. 95; 21 S. Ct. 24..207, 208
 Affg. 20 Ct. Cl. 354; see 31 Ct. Cl. 464; 171 U. S. 203.
 SHIRAS.
- Huber *v.* Mott, 125 Fed. 944; 60 C. C. A. 182.....215
 Affg. 113 Fed. 599.
 Second; Wallace, Lacombe, TOWNSEND.
- Huber *v.* Nelson, 148 U. S. 270; 37 L. Ed. 447; 13 S. Ct. 603....6, 420,
 871, 872
 Affg. 38 Fed. 830.
 BLATCHFORD.
- Hunt *v.* Cassidy, 53 Fed. 257; 3 C. C. A. 252...208, 292, 297, 298, 380,
 393, 404, 407, 409, 411
 Ninth; McKenna, Ross, KNOWLES.
- Hunt *v.* Cassidy, 64 Fed. 585; 12 C. C. A. 316.....287
 Ninth; GILBERT, Morrow.
- Hunt *v.* Milwaukee, 148 Fed. 220; 78 C. C. A. 116.....144, 441
 Seventh; Baker, SEAMAN, Kohlsaat.
- Hurd *v.* Seim, 191 Fed. 832; 112 C. C. A. 346.....App. 31
 Revg. 189 Fed. 591; see 157 Fed. 678; 162 Fed. 892; 220 U. S. 428.
 Second; LACOMBE, Ward, Noyes.
- Hurlbut *v.* Schillinger, 130 U. S. 456; 32 L. Ed. 1011; 9 S. Ct. 584..290, 882
 BLATCHFORD.

lx CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Hurlbut *v.* United States, 124 Fed. 66; 59 C. C. A. 626.....681
 Affg. 119 Fed. 188.
 Second; Wallace, Lacombe, COXE. Per Curiam.
- Hutter *v.* De Q. Bottle, 128 Fed. 283; 62 C. C. A. 652.....494, 602, 797
 Revg. in part 119 Fed. 190.
 Second; Wallace, Lacombe, COXE.
- Hygienic *v.* Provident, 176 Fed. 525; 100 C. C. A. 121.....App. 277
 Revg. in part 170 Fed. 523.
 Second; Lacombe, Ward, NOYES.
- Hygienic *v.* Way, 137 Fed. 592; 70 C. C. A. 553.....928
 Revg. 133 Fed. 245.
 Third; Acheson, DALLAS, Gray.
- Hyndman *v.* Roots, 97 U. S. 224; 24 L. Ed. 975.....459
 SWAYNE.
- Ide *v.* Trorlicht, 115 Fed. 137; 53 C. C. A. 341.....2, 12, 273, 350, 441,
 459, 558, 609, 871
 Eighth; Caldwell, SANBORN, Thayer.
- Ideal *v.* Crown, 131 Fed. 244; 65 C. C. A. 436...68, 69, 92, 222, 322, 398, 622
 Affg. 123 Fed. 666; see 108 Fed. 847.
 Fourth; Goff, BRAWLEY, Purnell.
- Illinois *v.* Robbins, 52 Fed. 215; 3 C. C. A. 42.....473
 Affg. 50 Fed. 542.
 Seventh; Harlan, Woods, Jenkins.
- Imhaeuser *v.* Buerk, 101 U. S. 647; 25 L. Ed. 945.....320, 373, 468, 494
 Affg. 14 Blatchf. 19.
 CLIFFORD.
- Imperial *v.* Crown, 139 Fed. 312; 71 C. C. A. 442...67, 213, 253, 503, 631,
 656
 Revg. 123 Fed. 669.
 See C. C. A. 2nd Cir. in disagreement with 4th Cir. 136 Fed. 841.
 Fourth; Goff, Pritchard, BRAWLEY. Dissenting Goff.
- Imperial *v.* Stein, 77 Fed. 612; 23 C. C. A. 353.....322, 732
 Revg. 69 Fed. 616.
 Second; Wallace, Lacombe, Shipman. Per Curiam.
- Incandescent Lamp Patent, 159 U. S. 465; 40 L. Ed. 221; 16 S. Ct. 75
 Affg. 40 Fed. 21.245, 915
 BROWN.
- Indiana *v.* Case, 154 Fed. 365; 83 C. C. A. 343.....510, 744, 767, 807
 Revg. 148 Fed. 21.
 Seventh; Grosscup, BAKER, Kohlsaas.
- Indiana *v.* Crocker, 103 Fed. 496; 43 C. C. A. 287.....690
 Affg. 90 Fed. 488.
 Seventh; Woods, Jenkins, Grosscup.
- Industrial *v.* Wilcox, 112 Fed. 535; 50 C. C. A. 387.....355
 Revg. 110 Fed. 210.
 Third; Acheson, Dallas, KIRKPATRICK.
- Inman *v.* Beach, 71 Fed. 420; 18 C. C. A. 165.....635, 673, 777
 Affg. 63 Fed. 597.
 Second; Wallace, LACOMBE, Shipman.
- Insurance Co. *v.* Eggleston, 96 U. S. 572; 24 L. Ed. 2.....841
 BRADLEY.
- Interior *v.* Perkins, 80 Fed. 528; 25 C. C. A. 613.....672, 696
 Revg. 51 Fed. 286.
 Seventh; Woods, Jenkins, Bunn.
- International Mfg. Co. *v.* Brammer, 138 Fed. 396; 71 C. C. A. 633...468
 Eighth; Sanborn, Philips, RINER.

[References are to sections. "App." refers to Appendix]

- International Telephone v. Kellogg*, 171 Fed. 651; 96 C. C. A. 395
 ...App. 11, 701, 727, 851
 Affg. 158 Fed. 104.
 Seventh; GROSSEUP, BAKER, Seaman.
- International Time Recording v. Bundy*, 159 Fed. 464; 86 C. C. A. 494...457,
 Revg. 152 Fed. 494. 506
 Second; LACOMBE, Ward, Noyes.
- International Time Recording v. Dey*, 142 Fed. 736; 74 C. C. A. 68....500,
 603, 674, 700, 909
 Second; Lacombe, Townsend, COXE.
- International Tooth Crown v. Bennett*, 77 Fed. 313; 23 C. C. A. 179...245
 Affg. 72 Fed. 169; revg. 30 Fed. 775.
 Second; Lacombe, Townsend. Per Curiam.
- International Tooth Crown v. Gaylord*, 140 U. S. 55; 35 L. Ed. 347;
 11 S. Ct. 716.....18, 414, 437, 660
 BROWN.
- Interurban v. Westinghouse*, 186 Fed. 166; 108 C. C. A. 298....App. 37,
 62, 74, 544, 546, 561, 579
 See 171 Fed. 83.
 Sixth; SEVERENS, Warrington, Knappen.
- Ironclad v. Dairyman's*, 143 Fed. 512; 74 C. C. A. 372....98, 207, 222,
 Revg. 138 Fed. 123. 496, 938
 Second; WALLACE, Townsend, COXE.
- Irrington v. Utica Drop Forge*, 191 Fed. 169; 111 C. C. A. 647....App. 594
 Revg. 189 Fed. 619.
 Third; Gray, BUFFINGTON, Lanning.
- Irwin v. Hasselman*, 97 Fed. 964; 38 C. C. A. 587.....207, 671
 Affg. 86 Fed. 642.
 Seventh; Jenkins, GROSSEUP, SEAMAN.
- Ives v. Hamilton*, 92 U. S. 426; 23 L. Ed. 494.....379, 380, 919
 BRADLEY.
- Ives v. Sargent*, 119 U. S. 652; 30 L. Ed. 544; 7 S. Ct. 436...871, 876, 877
 Affg. 21 Blatchf. 417.
 MATTHEWS.
- Jackes-Evans v. Hemp*, 140 Fed. 254; 71 C. C. A. 646.....326
 Eighth; Van Devanter, Hook, LOCHREN.
- Jackson v. Birmingham*, 79 Fed. 801; 25 C. C. A. 196.....200, 245, 344
 Affg. 72 Fed. 269.
 Second; Wallace, LACOMBE, Shipman.
- Jacobs v. Almond*, 177 Fed. 935; 101 C. C. A. 215....App. 636, 908
 Second; Lacombe, Ward, Noyes. Per Curiam.
- Jacobs v. Baker*, 74 U. S. 295; 19 L. Ed. 200.....337, 614, 684
 GRIER.
- James v. Campbell*, 104 U. S. 356; 26 L. Ed. 786....356, 429, 715, 721,
 815, 823, 885, 886
 BRADLEY. Dissenting opinion MILLER.
- Janowitz v. Levison*, 82 Fed. 63; 27 C. C. A. 61.....616, 646
 Revg. 80 Fed. 731.
 Second; Wallace, Lacombe, Shipman. Per Curiam.
- Jefferson v. Westinghouse*, 134 Fed. 392; 67 C. C. A. 189.....564
 Revg. 128 Fed. 751.
 Third; Acheson, Dallas, Gray. Per Curiam.
- Jefferson v. Westinghouse*, 139 Fed. 385; 71 C. C. A. 481.....893
 Affg. 135 Fed. 365. See 121 Fed. 831; 134 Fed. 392.
 Third; ACHESON, Dallas, Gray.

lxii CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

| | |
|--|--------------------------|
| Jeffrey v. Independent, 83 Fed. 191; 27 C. C. A. 512..... | 376 |
| Revg. 76 Fed. 981. Sixth; Taft, LURTON, Severens. | |
| Jenner v. Bowen, 139 Fed. 556; 71 C. C. A. 540..... | 727, 851, 855 |
| Sixth; LURTON, Severens. | |
| Jensen v. Norton, 67 Fed. 236; 14 C. C. A. 383..... | 374 |
| Ninth; Ross, HANFORD, Morrow. | |
| Jewell v. Jackson, 140 Fed. 340; 72 C. C. A. 304..... | 222, 462, 937 |
| Eighth; SANBORN, Van Devanter, Hook. | |
| Johns v. Robertson, 77 Fed. 985; 23 C. C. A. 601..... | 379 |
| Affg. 60 Fed. 900. Second; Lacombe, SHIPMAN. | |
| Johnson v. Chisholm, 115 Fed. 625; 53 C. C. A. 123..... | 100 |
| Revg. 84 Fed. 384; 106 Fed. 191. Third; Acheson, Dallas, Gray. Dissenting GRAY. | |
| Johnson v. Flushing, 105 U. S. 539; 26 L. Ed. 1162..... | 638, 731, 871 |
| WOODS. | |
| Johnson v. Foos, 141 Fed. 73; 72 C. C. A. 105.... | 101, 273, 277, 342, 476, |
| Sixth; LURTON, Severens, Richards. | 548, 569, 686, 817 |
| Johnson v. McCurdy, 108 Fed. 671; 47 C. C. A. 577..... | 691 |
| Affg. 102 Fed. 965. Seventh; Woods, Jenkins, Grosscup. Dissenting WOODS. | |
| Johnson v. Mueser, 212 U. S. 283; 53 L. Ed. 514; 29 S. Ct. 390..... | 143 |
| Affg. 29 App. D. C. 61; following 211 U. S. 1. FULLER. | |
| Johnson v. Powers, 85 Fed. 863; 29 C. C. A. 459..... | 211 |
| Affg. 81 Fed. 626. Seventh; Woods, Jenkins, Bunn. Per Curiam. | |
| Johnson v. Seaman, 108 Fed. 951; 48 C. C. A. 158..... | 579 |
| Revg. 106 Fed. 915. Third; Acheson, DALLAS, Buffington. | |
| Johnson v. Toledo, 119 Fed. 885; 56 C. C. A. 415..... | 656, 672 |
| Affg. 116 Fed. 490. Sixth; LURTON, Day, Severens. | |
| Johnson v. Union, 55 Fed. 487; 5 C. C. A. 204..... | 579 |
| Revg. 52 Fed. 867. Third; Acheson, BUTLER, Wales. | |
| Johnson v. Western, 178 Fed. 819; 102 C. C. A. 267.... | App. 201, 209, 365, |
| Eighth; Sanborn, Van Devanter, MUNGER. | 381, 384, 490 |
| Johns-Pratt v. Sachs, 175 Fed. 70; 99 C. C. A. 92..... | App. 271, 381 |
| Revg. 168 Fed. 311. Second; LACOMBE, Coxe, Ward. | |
| Jones v. Cyphers, 126 Fed. 753; 62 C. C. A. 21..... | 616, 795 |
| Affg. 115 Fed. 324. Second; LACOMBE, Townsend, Coxe. | |
| Jones v. Davis, 138 Fed. 62; 70 C. C. A. 558..... | 219 |
| Revg. 133 Fed. 550. Third; Acheson, DALLAS, Gray. | |
| Jones v. Morehead, 68 U. S. 155; 17 L. Ed. 662..... | 532, 789 |
| MILLER. | |
| Jones v. Munger, 49 Fed. 61; 1 C. C. A. 158..... | 223, 377, 469, 674 |
| Fifth; Pardee, LOCKE, Bruce. | |
| Jones v. Munger, 50 Fed. 785; 1 C. C. A. 668..... | 117 |
| Rehearing 49 Fed. 61. Fifth; PARDEE, Locke, Bruce. | |

[References are to sections. "App." refers to Appendix]

Judd *v.* Fowler, 61 Fed. 821; 10 C. C. A. 100.....499
 Second; Wallace, Lacombe, SHIPMAN.

Justi *v.* Clark, 108 Fed. 659; 47 C. C. A. 565.....638, 691, 889
 Affg. 100 Fed. 855.
 Seventh; Woods, Jenkins, GROSSCUP.

Kahn *v.* Starrels, 135 Fed. 532; 68 C. C. A. 82.....485
 Revg. 131 Fed. 464.
 Third; Acheson, DALLAS, Gray.

Kahn *v.* Starrels, 136 Fed. 597; 69 C. C. A. 371.....273
 See 131 Fed. 464.
 Third; Acheson, Dallas, Gray. Per Curiam.

Kalamazoo *v.* Duff, 113 Fed. 264; 51 C. C. A. 221.....191, 485, 622
 Sixth; Lurton, Day, CLARK.

Kansas City *v.* Devol, 81 Fed. 726; 26 C. C. A. 578.....72, 804, 926
 Revd. 84 Fed. 463; see 72 Fed. 717.
 Eighth; Caldwell, Sanborn, THAYER.

Keasby *v.* American, 143 Fed. 490; 74 C. C. A. 510.....400, 644
 Revg. 137 Fed. 602.
 Third; Acheson, Dallas, GRAY.

Keeler *v.* Standard, 157 U. S. 659; 39 L. Ed. 848; 15 S. Ct. 738....450,
 763, 927
 Revg. 37 Fed. 693; 41 Fed. 51.
 SHIRAS. Dissenting BROWN, Fuller, Field.

Keene *v.* Barratt, 100 Fed. 590; 40 C. C. A. 571.....131, 735, 752, 927
 Seventh; Woods, Jenkins, Bunn.

Kelley *v.* Diamond, 123 Fed. 882; 59 C. C. A. 370.....208
 Affg. 120 Fed. 282.
 Third; Acheson, Dallas, BUFFINGTON. Dissenting ACHESON.

Kelley *v.* Diamond, 136 Fed. 855; 69 C. C. A. 599.....891
 See 132 Fed. 978; 131 Fed. 89; 130 Fed. 893; 129 Fed. 756; 120 Fed.
 282; 123 Fed. 882.
 Third; ACHESON, Dallas, Gray.

Kellogg *v.* Dean, 182 Fed. 991; 105 C. C. A. 545.....App. 376, 490, 598,
 Affg. 168 Fed. 549. 631, 936
 Sixth; Severens, WARRINGTON.

Kelly *v.* Clow, 89 Fed. 297; 32 C. C. A. 205.....95, 207, 608, 612
 Affg. 84 Fed. 352.
 Seventh; Woods, Showalter, BAKER.

Kelly *v.* Springfield, 92 Fed. 614; 34 C. C. A. 570.....87
 Affg. 81 Fed. 617.
 Sixth; TAFT, Lurton, Severens.

Kendall *v.* Windsor, 62 U. S. 322; 16 L. Ed. 1652, 6, 11, 934
 DANIEL.

Kenney *v.* Bent, 97 Fed. 337; 38 C. C. A. 205.....627, 694
 Affg. 91 Fed. 259.
 First; Colt, PUTNAM, Brown.

Kennedy *v.* Hazelton, 128 U. S. 667; 32 L. Ed. 576; 9 S. Ct. 202.....151,
 Affg. 33 Fed. 293. 629, 779, 847, 931
 GRAY; dissenting Fuller, Bradley.

Kennicott *v.* Bain, 185 Fed. 520; 107 C. C. A. 626.....App. 552, 559, 574
 Seventh; Grosscup, Baker, Seaman.

Keplinger *v.* DeYoung, 10 Wheat. 358; 6 L. Ed. 341.....521
 WASHINGTON.

Kessler *v.* Eldred, 206 U. S. 285; 51 L. Ed. 1065; 27 S. Ct. 61131, 33
 MOODY.

lxiv CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

| | |
|--|----------------------------------|
| Kessler <i>v.</i> Inks, 108 Fed. 412; 47 C. C. A. 442..... | 601 |
| Seventh; Woods, Jenkins, GROSSCUP. | |
| Keyes <i>v.</i> Eureka, 158 U. S. 150; 39 L. Ed. 929; 15 S. Ct. 772 | 366, 568, |
| Affg. 45 Fed. 199. | 720, 721, 730, 760 |
| FULLER. | |
| Keyes <i>v.</i> Grant, 118 U. S. 25; 30 L. Ed. 54; 6 S. Ct. 974..... | 402, 734 |
| MATTHEWS. | |
| Keystone Bridge <i>v.</i> Phoenix, 95 U. S. 274; 24 L. Ed. 344 | 207, 226, 230, |
| | 392 |
| BRADLEY. | |
| Keystone Lantern <i>v.</i> Spear, 136 Fed. 595; 69 C. C. A. 369..... | 473 |
| Revg. 131 Fed. 879. | |
| Third; Acheson, Dallas, McPHERSON. | |
| Keystone Mfg. Co. <i>v.</i> Adams, 151 U. S. 139; 38 L. Ed. 103; 14 S. Ct. 295 |293, 298, 299, 626, 842, 844 |
| Revg. 35 Fed. 579; 41 Fed. 595. | |
| SHIRAS. | |
| Kibbe <i>v.</i> Jennings, 122 U. S. 640; 30 L. Ed. 861..... | 331 |
| WAITE. | |
| Kilbourne <i>v.</i> Bingham, 50 Fed. 697; 1 C. C. A. 617..... | 640, 696 |
| Affg. 47 Fed. 57. | |
| Sixth; Jackson, SWAN. | |
| Kilburn <i>v.</i> Holmes, 121 Fed. 750; 58 C. C. A. 116..... | 532 |
| Ninth; Gilbert, Ross, DEHAVEN. | |
| Kilmer <i>v.</i> Griswold, 67 Fed. 1017; 15 C. C. A. 161..... | 115 |
| Revg. 62 Fed. 119. | |
| Second; Wallace, LACOMBE, Shipman. Dissenting SHIPMAN. | |
| King <i>v.</i> Gallun, 109 U. S. 99; 27 L. Ed. 870; 3 S. Ct. 202..... | 47, 593, 708 |
| WOODS. | |
| King <i>v.</i> Hubbard, 97 Fed. 795; 38 C. C. A. 423..... | 378, 454 |
| Affg. 89 Fed. 713. | |
| Sixth; Taft, Lurton, Severens. | |
| Kings County <i>v.</i> U. S. Consolidated, 182 Fed. 59; 104 C. C. A. 499 |App. 87, 204, 461, 544, 562 |
| Sec 182 Fed. 1022. | |
| Ninth; GILBERT, Ross, Wolverton. | |
| Kinloch <i>v.</i> Electric, 113 Fed. 652; 51 C. C. A. 362.... | 12, 129, 377, 459, |
| Affg. 111 Fed. 175. | 468, 499 |
| Eighth; Caldwell, SANBORN, Thayer. | |
| Kinloch <i>v.</i> Western, 113 Fed. 659; 51 C. C. A. 369..... | 441, 612, 626, 656 |
| Eighth; Caldwell, SANBORN, Thayer. | |
| Kinnear <i>v.</i> Wilson, 142 Fed. 970; 74 C. C. A. 232..... | 207, 349, 634 |
| Second; WALLACE, Townsend, Coxe. | |
| Kinsman <i>v.</i> Parkhurst, 59 U. S. 289; 15 L. Ed. 385..... | 125, 270, 847 |
| CURTIS. | |
| Kinzel <i>v.</i> Luttrell, 67 Fed. 926; 15 C. C. A. 82..... | 473 |
| Sixth; Taft, Lurton, Severens. | |
| Kirchberger <i>v.</i> American, 128 Fed. 599; 64 C. C. A. 107.... | 54, 71, 85, |
| | 98, 411, 821 |
| Revd. on validity of pat. 215 U. S. 161; affg. 155 Fed. 731, 740; see | |
| 124 Fed. 764; 132 Fed. 911; 142 Fed. 169. | |
| Second; Lacombe, TOWNSEND, Coxe. | |
| Kirk <i>v.</i> United States, 163 U. S. 49; 41 L. Ed. 66; 16 S. Ct. 911.... | 126, |
| | 532, 756 |
| BROWN. | |
| Kisinger-Ison <i>v.</i> Bradford, 97 Fed. 502; 38 C. C. A. 300..... | 443, 447, 656 |
| Sixth; Taft, Lurton, Ricks. | |

[References are to sections. "App." refers to Appendix]

- Kisinger-Ison v. Bradford**, 123 Fed. 91; 59 C. C. A. 221.....277, 283, 299,
828, 833, 847, 890, 891
Sixth; LURTON, Severens, Richards.
- Kitchen v. Levison**, 188 Fed. 658; 110 C. C. A. 424.....App. 633, 873, 880
Ninth; GILBERT, Morrow, Wolverton.
- Kitselman v. Kokomo**, 108 Fed. 632; 47 C. C. A. 538.....506, 641
Rev. in 189 U. S. S.
Seventh; Woods, GROSSCUP, Seaman. Dissenting, Woods.
- Klein v. Russell**, 86 U. S. 433; 22 L. Ed. 116.....141, 260, 613, 734
SWAYNE. Dissenting Field, Hunt.
- Klein v. Seattle**, 77 Fed. 200; 23 C. C. A. 114.....129, 636, 655, 679
Affg. 63 Fed. 702.
Ninth; Gilbert, Ross, HAWLEY.
- Kleinart v. Stein**, 133 Fed. 228; 66 C. C. A. 282.....591
Affg. 125 Fed. 19.
Seventh; Jenkins, GROSSCUP, Baker.
- Knapp v. Morss**, 150 U. S. 221; 37 L. Ed. 1059; 14 S. Ct. 81....86, 202,
Revg. 37 Fed. 351. 207, 525, 605, 617, 651, 662, 663
JACKSON. Dissenting Brown, Shiras.
- Koenan v. Drake**, 101 Fed. 466; 41 C. C. A. 466.....334
First; COLT, Putnam, Webb.
- Kokomo v. Kitselman**, 189 U. S. S; 47 L. Ed. 689; 23 S. Ct. 521....197,
Revg. 108 Fed. 632. 207, 680
FULLER.
- Krajeuski v. Pharr**, 105 Fed. 514; 44 C. C. A. 572.....215, 219, 459, 622
Fifth; Pardee, SHELBY, Maxey. Dissenting PARDEE.
- Krementz v. Cottle**, 148 U. S. 556; 37 L. Ed. 558; 13 S. Ct. 719...622, 656
Revg. 39 Fed. 323.
SHIRAS.
- Kreplik v. Couch Patents**, 190 Fed. 565; 111 C. C. A. 381...App. 508, 577
First; Aldrich, Brown, HALE.
- Krupp v. Midvale**, 191 Fed. 588; 112 C. C. A. 194.....App. 129, 398,
488, 489, 519, 588, 596, 702, 741, 907
Third; BUFFINGTON, Lanning, Young.
- Kuehmsted v. Farbenfabriken**, 179 Fed. 701; 103 C. C. A. 243...App. 390,
Affg. 171 Fed. 887. 496, 633
Seventh; GROSSCUP, Baker, Kohlsaar.
- Kryptok v. Stead**, 190 Fed. 767; 111 C. C. A. 495....App. 371, 549, 579
Eighth; SANBORN, Marshall, Munger.
- Kuhlman v. General**, 147 Fed. 709; 78 C. C. A. 97.....598
Seventh; GROSSCUP, Baker, Seaman.
- Kuhn v. Lock-Stub**, 165 Fed. 445; 91 C. C. A. 389.....323, 696
Affg. 157 Fed. 235.
Second; Lacombe, COXE, Ward.
- Kurtz v. Straus**, 106 Fed. 414; 45 C. C. A. 366.....714
Affg. 100 Fed. 800.
Third; Dallas, GRAY, Bradford.
- Lackawanna v. Davis-Colby**, 131 Fed. 68; 65 C. C. A. 306.....937
Affg. 128 Fed. 453.
Third; Acheson, Dallas, GRAY.
- Lafferty v. Acme**, 138 Fed. 729; 71 C. C. A. 285.....696
Seventh; Jenkins, GROSSCUP, Baker.
- Lafferty v. Acme**, 143 Fed. 321; 74 C. C. A. 521.....891
Affg. 138 Fed. 729.
Seventh; GROSSCUP, Baker.

[References are to sections. "App." refers to Appendix]

- Lake Shore *v.* National, 110 U. S. 229; 28 L. Ed. 129; 4 S. Ct. 33 136,
BLATCHFORD. 230, 499
- Lalace *v.* Haberman, 59 Fed. 143; 8 C. C. A. 53. 224
Affg. 54 Fed. 517.
Second; Wallace, Lacombe, SHIPMAN.
- Lamb *v.* Lamb, 120 Fed. 267; 56 C. C. A. 247. . . . 136, 223, 344, 481, 634, 824
Sixth; Lurton, Day, SEVERENS.
- Lambert *v.* Lidgerwood, 154 Fed. 372; 83 C. C. A. 350. 380
Revg. and modifying 150 Fed. 364.
Third; Dallas, Gray, BUFFINGTON.
- Lamson *v.* Godehard, 59 Fed. 776; 8 C. C. A. 265. 212, 224
Eighth; Caldwell, THAYER.
- Lamson *v.* Hillman, 123 Fed. 416; 59 C. C. A. 510. 60, 190, 375, 668
Seventh; Jenkins, Grosseup, BAKER.
- Lane *v.* Lock, 150 U. S. 193; 37 L. Ed. 1049; 14 S. Ct. 78. . . . 366, 729,
732, 751, 758
Revg. 35 Fed. 289.
SHIRAS.
- Lane *v.* Welds, 99 Fed. 286; 39 C. C. A. 528. 386, 636
Sixth; Taft, LURTON, Day.
- Lange *v.* McGuin, 177 Fed. 219; 101 C. C. A. 389. App. 324, 807
Seventh; Grosseup, BAKER, Seaman.
- Lanyon *v.* Brown, 115 Fed. 150; 53 C. C. A. 354. 159, 579
Eighth; Caldwell, Sanborn, THAYER.
- Lanyon *v.* Brown, 129 Fed. 912; 64 C. C. A. 344. 226
Eighth; Sanborn, THAYER.
- Lattimore *v.* Hardsocg, 121 Fed. 986; 58 C. C. A. 287. 846
Eighth; CALDWELL, Sanborn, Thayer.
- Lauman *v.* Urschel, 136 Fed. 190; 69 C. C. A. 206. 819
Sixth; Lurton, Severens, Richards. Per Curiam.
- Lavigne *v.* McKenna, 194 Fed. 112; 114 C. C. A. 190. App. 91
Affg. 177 Fed. 709.
Seventh; Grosseup, BAKER, Humphrey.
- Lawther *v.* Hamilton, 124 U. S. 1; 31 L. Ed. 325; 8 S. Ct. 342. 194,
Revg. 21 Fed. 811. 636, 756, 819
BRADLEY.
- Lay *v.* Indianapolis, 120 Fed. 831; 57 C. C. A. 313. 5, 178
Seventh; Jenkins, Grosseup, BUNN.
- Leather Grille *v.* Christopherson, 182 Fed. 817; 105 C. C. A. 249. . App. 384
Ninth; Gilbert, Ross, VAN FLEET.
- Lee *v.* Penberthy, 109 Fed. 964; 48 C. C. A. 760. 274
Sixth; LURTON, Severens, Clark.
- Leeds *v.* Victor, 213 U. S. 301; 53 L. Ed. 805; 29 S. Ct. 495. . . . App. 248,
250, 421, 422, 561, 604, 770
Affg. 148 Fed. 1022, which affd. 146 Fed. 534; see 140 Fed. 860; 145
Fed. 350.
McKENNA.
- Leeds *v.* Victor, 213 U. S. 325; 53 L. Ed. 816; 29 S. Ct. 503. . . App. 474, 476
Affg. 154 Fed. 58 and 150 Fed. 147.
McKENNA.
- Leeds *v.* Victor, 154 Fed. 58; 83 C. C. A. 170. 476, 477, 523
Affd. 213 U. S. 325; see 146 Fed. 534; 148 Fed. 1022.
Second; Wallace, Coxe, HOUGH. Dissenting Wallace.
- Leggett *v.* Avery, 101 U. S. 256; 25 L. Ed. 865. 871
BRADLEY.

CASES EXCERPTED, WITH ANNOTATIONS lxvii

[References are to sections. "App." refers to Appendix]

- Leggett *v.* Standard, 149 U. S. 287; 37 L. Ed. 737; 13 S. Ct. 902....387,
 Affg. 38 Fed. 842. 522, 728, 729, 871, 889, 921
 JACKSON.
- Lehigh *v.* Kearney, 158 U. S. 461; 39 L. Ed. 1055; 15 S. Ct. 871.....207
 Revg. 32 Fed. 320.
 FULLER.
- Lehigh *v.* Mellon, 104 U. S. 112; 26 L. Ed. 639.....207, 399, 494
 WOODS.
- Lehnbeuter *v.* Holthaus, 105 U. S. 94; 26 L. Ed. 939.....629
 WOODS.
- Leicester *v.* Macon, 116 Fed. 196; 53 C. C. A. 621.....767
 Affg. 113 Fed. 844.
 Third; Acheson, DALLAS, Gray.
- Lein *v.* Myers, 105 Fed. 962; 45 C. C. A. 148.....76, 391
 Revg. 97 Fed. 607.
 Second; LACOMBE, Shipman.
- Lepper *v.* Randall, 113 Fed. 627; 51 C. C. A. 337.....374
 Revg. 105 Fed. 975.
 Third; Acheson, DALLAS, Gray.
- LeRoy *v.* Tatham, 14 How. 156; 14 L. Ed. 367....639, 683, 685, 689, 690
 McLEAN. Dissenting Wayne, Grier; opinion NELSON.
- LeRoy *v.* Tatham, 63 U. S. 132; 16 L. Ed. 366.....866
 See s. c. 14 How. 156.
 McLEAN.
- Leslie *v.* Standard, 98 Fed. 827; 39 C. C. A. 314.....132, 737
 Seventh; Woods, Bunn, Allen.
- Letson *v.* Alaska, 130 Fed. 129; 64 C. C. A. 463.....448, 642
 Modifying 119 Fed. 599.
 Ninth; GILBERT, Ross, Morrow.
- Lewis *v.* Pennsylvania, 59 Fed. 129; 8 C. C. A. 41.....202, 441
 Affg. 55 Fed. 877.
 Third; ACHESON, Butler, Green.
- Lewis *v.* Premium, 163 Fed. 950; 90 C. C. A. 310.....390, 484
 Eighth; VAN DEVANTER, Munger.
- Lewis *v.* Semple, 177 Fed. 407; 101 C. C. A. 411.....App. 672
 Revg. 177 Fed. 411.
 Ninth; GILBERT, Morrow, Hunt.
- Liberman *v.* Ruwell, 170 Fed. 590; 95 C. C. A. 134.....App. 376
 Affg. 165 Fed. 208.
 Third; GRAY, Buffington, Bradford.
- Library Bureau *v.* Macey, 148 Fed. 380; 78 C. C. A. 194.....698
 Revg. in part 134 Fed. 886.
 First; Putnam, Lowell, BROWN.
- Library Bureau *v.* Yawman, 147 Fed. 245; 77 C. C. A. 387.....120
 First; Colt, Putnam, Aldrich. Per Curiam.
- Lichtenstein *v.* Phipps, 168 Fed. 61; 93 C. C. A. 483.....App. 777
 Revg. 161 Fed. 578.
 Second; Lacombe, Ward, Noyes. Per Curiam.
- Lincoln *v.* McWhirter, 142 Fed. 967; 74 C. C. A. 229.....61, 88, 657
 Affg. 131 Fed. 860.
 Second; WALLACE, Townsend, Coxe.
- Littlefield *v.* Perry, 88 U. S. 205; 22 L. Ed. 577.....152, 153, 154, 160,
 WAITE. 164, 167, 171, 173, 284, 290, 511, 721, 722, 765, 846
- Livingston *v.* Woodworth, 15 How. 546; 14 L. Ed. 809.....282, 305, 372,
 DANIEL. 798, 837

lxviii CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

- Lobel *v.* Cossey, 157 Fed. 664; 85 C. C. A. 142.....585, 720
 Second; COXE, Ward, Noyes.
- Locklin *v.* Buck, 159 Fed. 434; 86 C. C. A. 414.....623
 Affg. 148 Fed. 715.
 Second; Lacombe, Ward, NOYES.
- Lockwood *v.* Wicks, 75 Fed. 118; 21 C. C. A. 257.116, 120, 550
 See 65 Fed. 610.
 Eighth; Caldwell, Sanborn, THAYER.
- Loew *v.* German-American, 107 Fed. 949; 47 C. C. A. 94....77, 476, 544, 546
 Affg. 103 Fed. 303.
 Sixth; Lurton, SEVERENS, Clark.
- Loew *v.* German-American, 164 Fed. 855; 90 C. C. A. 637.....390, 817
 Affg. in part 155 Fed. 124; see 41 Fed. 132; 53 Fed. 485; 98 Fed. 300.
 Sixth; LURTON, Severens, Richards.
- Loew *v.* Miller, 138 Fed. 886; 71 C. C. A. 266.....441, 648
 Seventh; Jenkins, Grosseup, BAKER.
- London *v.* Dunbar, 179 Fed. 506; 103 C. C. A. 130.....App. 777
 First; Colt, Lowell, BROWN.
- Long *v.* Pope, 75 Fed. 835; 21 C. C. A. 533.....212, 222, 601, 626
 Affg. 70 Fed. 855.
 First; Colt, PUTNAM, Nelson.
- Look *v.* Smith, 148 Fed. 12; 78 C. C. A. 180.....734
 Sixth; Lurton, Severens, RICHARDS.
- Loom Co. *v.* Higgins, 105 U. S. 580; 26 L. Ed. 1177230, 317, 322, 398,
 BRADLEY. 410, 595, 634, 635, 807, 809, 812, 905, 907
- Lorain *v.* N. Y. Switch, 184 Fed. 301; 106 C. C. A. 443.....App. 574, 777
 Affg. 124 Fed. 548; see 153 Fed. 205.
 Third; Gray, Buffington, LANNING.
- Lorain *v.* White, 184 Fed. 326; 106 C. C. A. 356.....App. 253
 Affg. 158 Fed. 413; see 119 Fed. 885; 170 Fed. 79.
 Second; Lacombe, COXE, Noyes.
- Los Alamitos *v.* Carroll, 173 Fed. 280; 97 C. C. A. 446.....App. 91
 Ninth; Gilbert, Ross, Hunt.
- Los Angeles *v.* Acolian, 143 Fed. 880; 75 C. C. A. 88.....197, 372, 501,
 629, 640
 Ninth; Gilbert, Morrow, HAWLEY.
- Lourie *v.* Lenhart, 130 Fed. 122; 64 C. C. A. 456.....373, 453, 459, 531
 Eighth; SANBORN, Thayer, Hook.
- Lovell *v.* Cary, 147 U. S. 623; 37 L. Ed. 307; 13 S. Ct. 472.....617, 635,
 654, 671, 818
 Revg. 37 Fed. 654.
 See same matter 24 Fed. 139; 24 Fed. 141; 27 Fed. 38; 31 Fed. 344.
 BLATCHFORD.
- Lovell *v.* Johnson, 91 Fed. 160; 33 C. C. A. 426.....207
 Affg. 82 Fed. 206.
 First; COLT, Webb, Aldrich.
- Lovell *v.* Seybold, 169 Fed. 288; 94 C. C. A. 578.....App. 195
 Affg. 159 Fed. 736.
 Second; COXE, Ward, Noyes.
- Lowden *v.* Janesville, 148 Fed. 686; 78 C. C. A. 548....211, 223, 229, 671
 Affg. 141 Fed. 975.
 Seventh; Grosseup, Baker, SEAMAN.
- Lowell *v.* Saco, 122 Fed. 632; 58 C. C. A. 324.....651
 Affg. 114 Fed. 497.
 First; COLT, Putnam, Aldrich.

CASES EXCERPTED, WITH ANNOTATIONS **Ixix**

[References are to sections. "App." refers to Appendix]

| | |
|--|-------------------------|
| <p>Lowry v. Allen, 203 U. S. 476; 51 L. Ed. 281; 27 S. Ct. 141.....</p> <p style="padding-left: 2em;">Affg. 26 App. D. C. 8.</p> <p style="padding-left: 2em;">McKENNA. Dissenting Peckham, Day.</p> | 583 |
| <p>Lubin v. Stewart, 77 Fed. 303; 23 C. C. A. 176.....</p> <p style="padding-left: 2em;">Revg. 75 Fed. 294.</p> <p style="padding-left: 2em;">Third; DALLAS, Butler, Wales.</p> | 89 |
| <p>Ludington v. Leonard, 127 Fed. 155; 62 C. C. A. 269.....</p> <p style="padding-left: 2em;">Affg. 119 Fed. 937. See 106 Fed. 168.</p> <p style="padding-left: 2em;">Second; Lacombe, COXE, Hazel.</p> | 827 |
| <p>Lyons v. Drucker, 106 Fed. 416; 45 C. C. A. 368.....</p> <p style="padding-left: 2em;">Second; Wallace, LACOMBE.</p> | 201, 327, 903 |
| <p>MacColl v. Crampton, 95 Fed. 987; 37 C. C. A. 351.....</p> <p style="padding-left: 2em;">Affg. 87 Fed. 731.</p> <p style="padding-left: 2em;">First; COLT, Webb, Aldrich.</p> | 507 |
| <p>MacColl v. Knowles, 95 Fed. 982; 37 C. C. A. 346.....</p> <p style="padding-left: 2em;">Affg. 87 Fed. 727.</p> <p style="padding-left: 2em;">First; COLT, Webb, Aldrich.</p> | 903 |
| <p>Macey v. Globe-Wernicke, 180 Fed. 401; 103 C. C. A. 547.....</p> <p style="padding-left: 2em;">Revg. 180 Fed. 408.</p> <p style="padding-left: 2em;">Seventh; Grosseup, Baker, SEAMAN.</p> | App. 384 |
| <p>Magic v. Economy, 97 Fed. 87; 38 C. C. A. 56.....</p> <p style="padding-left: 2em;">Seventh; Brown, Woods, Jenkins.</p> | 207, 377, 690 |
| <p>Maginn v. Standard, 150 Fed. 139; 80 C. C. A. 15.....</p> <p style="padding-left: 2em;">Seventh; BAKER, Seaman, Quarles.</p> | 176, 305 |
| <p>Magowan v. New York, 141 U. S. 332; 35 L. Ed. 781; 12 S. Ct. 62....</p> <p style="padding-left: 2em;">Affg. 27 Fed. 362.</p> <p style="padding-left: 2em;">BLATCHFORD.</p> | 614, 626 |
| <p>Mahler v. Animarium, 111 Fed. 530; 49 C. C. A. 431.....</p> <p style="padding-left: 2em;">Eighth; Sanborn, THAYER, Adams.</p> | 116, 425, 645 |
| <p>Mahn v. Harwood, 112 U. S. 354; 28 L. Ed. 665; 5 S. Ct. 174; 6 S. Ct. 451.....</p> <p style="padding-left: 2em;">BRADLEY. Dissenting opinion MILLER.</p> | 308, 310, 313, 871, 877 |
| <p>Mahoney v. Jenkins, 138 Fed. 404; 70 C. C. A. 662.....</p> <p style="padding-left: 2em;">Revg. 135 Fed. 550.</p> <p style="padding-left: 2em;">Third; Acheson, DALLAS, Gray.</p> | 468 |
| <p>Mahoney v. Malcom, 143 Fed. 124; 74 C. C. A. 318.....</p> <p style="padding-left: 2em;">Seventh; Grosseup, BAKER, Seaman.</p> | 614, 631 |
| <p>Maimen v. Union, 165 Fed. 440; 91 C. C. A. 384.....</p> <p style="padding-left: 2em;">Affg. 161 Fed. 748; see 185 Fed. 120; 187 Fed. 123.</p> <p style="padding-left: 2em;">Third; Gray, Buffington, Cross.</p> | 603, 777 |
| <p>Maimen v. Union, 187 Fed. 123; 109 C. C. A. 441.....</p> <p style="padding-left: 2em;">Affg. 185 Fed. 120; see 161 Fed. 748; 165 Fed. 440.</p> <p style="padding-left: 2em;">Third; GRAY, Buffington, Young.</p> | App. 125, 838 |
| <p>Maitland v. Goetz, 86 Fed. 124; 29 C. C. A. 607.....</p> <p style="padding-left: 2em;">Second; Wallace, Lacombe, SHIPMAN.</p> | 631, 875, 884 |
| <p>Mallon v. Gregg, 137 Fed. 68; 69 C. C. A. 48.....</p> <p style="padding-left: 2em;">Affg. 126 Fed. 377.</p> <p style="padding-left: 2em;">Eighth; SANBORN, Philips, Riner.</p> | 378, 441, 473, 671, 672 |
| <p>Mann v. Hoffman, 104 Fed. 245; 43 C. C. A. 514.....</p> <p style="padding-left: 2em;">Affg. 96 Fed. 237.</p> <p style="padding-left: 2em;">Seventh; Woods, Grosseup, SEAMAN.</p> | 441, 496, 527 |
| <p>Manning v. Cape Ann, 108 U. S. 462; 27 L. Ed. 793; 2 S. Ct. 860....</p> <p style="padding-left: 2em;">WOODS.</p> | 855, 857 |

LXX CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

| | |
|---|---|
| <p><i>Manville v. Excelsior</i>, 167 Fed. 538; 93 C. C. A. 216.....</p> <p style="padding-left: 2em;">Affg. 162 Fed. 486.</p> <p style="padding-left: 2em;">Second; Lacombe, COXE, Ward.</p> | 603 |
| <p><i>Marbury v. Madison</i>, 1 Cranch. 137; 2 L. Ed. 60.....</p> <p style="padding-left: 2em;">MARSHALL.</p> | 748 |
| <p><i>Marchand v. Enken</i>, 132 U. S. 195; 33 L. Ed. 332; 10 S. Ct. 65.....</p> <p style="padding-left: 2em;">Affg. 26 Fed. 629.</p> <p style="padding-left: 2em;">BLATCHFORD.</p> | 186, 682, 691 |
| <p><i>Marden v. Campbell</i>, 67 Fed. 809; 15 C. C. A. 26.....</p> <p style="padding-left: 2em;">See 64 Fed. 782.</p> <p style="padding-left: 2em;">First; Colt, PUTNAM, Nelson.</p> | 115, 116, 118, 138, 139, 545 |
| <p><i>Marden v. Campbell</i>, 79 Fed. 653; 25 C. C. A. 142.....</p> <p style="padding-left: 2em;">See 64 Fed. 782; revg. 70 Fed. 339.</p> <p style="padding-left: 2em;">First; COLT, Putnam, Nelson.</p> | 532, 579, 807 |
| <p><i>Market v. Rowley</i>, 155 U. S. 621; 39 L. Ed. 284; 15 S. Ct. 224.....</p> <p style="padding-left: 2em;">SHIRAS. Dissenting BROWN.</p> | 734 |
| <p><i>Marsh v. Nichols</i>, 128 U. S. 605; 32 L. Ed. 538; 9 S. Ct. 168..</p> <p style="padding-left: 2em;">FIELD.</p> | 159, 742, 827 |
| <p><i>Marsh v. Seymour</i>, 97 U. S. 348; 24 L. Ed. 963....</p> <p style="padding-left: 2em;">CLIFFORD.</p> | 282, 409, 411, 455, 883 |
| <p><i>Marshall v. Bryant</i>, 185 Fed. 499; 107 C. C. A. 599.....</p> <p style="padding-left: 2em;">Affg. 169 Fed. 426; see 153 Fed. 579; 164 Fed. 862.</p> <p style="padding-left: 2em;">First; Putnam, Aldrich, DODGE.</p> | App. 31, 893 |
| <p><i>Marshall v. Pettingill-Andrews</i>, 164 Fed. 862; 91 C. C. A. 8.....</p> <p style="padding-left: 2em;">Affg. 153 Fed. 579.</p> <p style="padding-left: 2em;">First; COLT, Putnam, Lowell.</p> | 201, 636 |
| <p><i>Martin v. Martin</i>, 67 Fed. 786; 14 C. C. A. 642.....</p> <p style="padding-left: 2em;">Affg. 62 Fed. 272.</p> <p style="padding-left: 2em;">First; COLT, Putnam, Nelson.</p> | 384, 394 |
| <p><i>Martin v. Martin</i>, 71 Fed. 519; 18 C. C. A. 234.....</p> <p style="padding-left: 2em;">Affg. and app. 62 Fed. 272; 67 Fed. 786.</p> <p style="padding-left: 2em;">First; Colt, Putnam, Nelson. Per Curiam.</p> | 789 |
| <p><i>Marvel v. Pearl</i>, 133 Fed. 160; 66 C. C. A. 226.....</p> <p style="padding-left: 2em;">Second; Wallace, TOWNSEND, COXE.</p> | 934 |
| <p><i>Mason v. Graham</i>, 90 U. S. 261; 23 L. Ed. 86.....</p> <p style="padding-left: 2em;">STRONG.</p> | 290, 296 |
| <p><i>Masseth v. Larkin</i>, 119 Fed. 171; 56 C. C. A. 167.....</p> <p style="padding-left: 2em;">Affg. 111 Fed. 409.</p> <p style="padding-left: 2em;">Third; ACHESON, Bradford.</p> | 490 |
| <p><i>Mast v. Dempster</i>, 82 Fed. 327; 27 C. C. A. 191.....</p> <p style="padding-left: 2em;">Discredited 177 U. S. 485; revg. 71 Fed. 701.</p> <p style="padding-left: 2em;">Eighth; Caldwell, SANBORN, Thayer. Dissenting THAYER.</p> | 2, 11, 18, 74, 190, 220, 316, 473, 629, 635, 655 |
| <p><i>Mast v. Iowa</i>, 76 Fed. 816; 22 C. C. A. 586.....</p> <p style="padding-left: 2em;">Affg. 68 Fed. 213.</p> <p style="padding-left: 2em;">Eighth; Caldwell, Sanborn, THAYER.</p> | 877 |
| <p><i>Mast v. Rude</i>, 53 Fed. 120; 3 C. C. A. 477.....</p> <p style="padding-left: 2em;">Seventh; Gresham, Jenkins, BLODGETT.</p> | 600 |
| <p><i>Mast v. Stover</i>, 177 U. S. 485; 44 L. Ed. 856; 20 S. Ct. 708.....</p> <p style="padding-left: 2em;">Affg. 89 Fed. 333.</p> <p style="padding-left: 2em;">Discrediting <i>Mast v. Dempster</i>, 82 Fed. 327.</p> <p style="padding-left: 2em;">BROWN.</p> | 95, 250, 256, 257, 544, 617 |
| <p><i>Mast v. Superior</i>, 154 Fed. 45; 83 C. C. A. 157.....</p> <p style="padding-left: 2em;">Affg. former opinions s. c. 115 Fed. 886</p> <p style="padding-left: 2em;">Sixth; Lurton, SEVERENS, Richards.</p> | 112, 126, 286, 289, 292, 295, 298, 842 |

[References are to sections. "App." refers to Appendix]

- Matheson v. Campbell*, 78 Fed. 910; 24 C. C. A. 284....238, 245, 519, 822,
 Revg. 69 Fed. 597; 77 Fed. 280. 904, 914
 Second; Wallace, LACOMBE, Shipman.
- Matthews v. Boston*, 105 U. S. 54; 26 L. Ed. 1022.....871, 872
 BRADLEY.
- Matthews v. Iron Clad*, 124 U. S. 347; 31 L. Ed. 477; 8 S. Ct. 639..872, 876
 Affg. 22 Blatchf. 427.
 GRAY.
- Maurer v. Dickerson*, 113 Fed. 870; 51 C. C. A. 494.....397, 821, 824, 903
 Affg. 108 Fed. 233.
 Third; ACHESON, Dallas, Gray.
- May v. Juncau*, 137 U. S. 408; 34 L. Ed. 729; 11 S. Ct. 102..213, 734, 799
 Affg. 30 Fed. 241.
 BLATCHFORD.
- Mayo v. Jenckes*, 133 Fed. 527; 66 C. C. A. 503.....54
 Affg. 121 Fed. 110.
 First; COLT, Putnam, Aldrich.
- Mayor v. American*, 60 Fed. 1016; 9 C. C. A. 336.....158
 Revg. 56 Fed. 149; see s. c. 70 Fed. 853, which reversed 68 Fed. 227.
 Revg. on question of evidence of title, *Brooks v. Jenkins*, 3 McLean,
 432; *Parker v. Haworth*, 4 McLean, 370; *Lee v. Blandy*, 1 Bond.
 361; *Dederick v. Agricultural*, 26 Fed. 763; *National v. American*,
 55 Fed. 488.
 Second; WALLACE, Lacombe, Shipman.
- Mayor v. American*, 70 Fed. 853; 17 C. C. A. 467.....672
 Revg. 56 Fed. 419; see 60 Fed. 1016; revg. 68 Fed. 227.
 Second; Wallace, Lacombe, SHIPMAN.
- Mayor v. Holmquist*, 145 Fed. 179; 76 C. C. A. 149.....436
 Seventh; BAKER, Seaman, Bethea.
- Mayor v. Ransom*, 64 U. S. 487; 16 L. Ed. 515.....280, 297
 GRIER.
- McAleer v. United States*, 150 U. S. 424; 37 L. Ed. 1130; 14 S. Ct. 160...756
 Affg. 25 Ct. Cl. 238.
 FULLER.
- McBride v. Kingman*, 97 Fed. 217; 38 C. C. A. 123.....9, 195, 376
 Affg. 72 Fed. 908.
 Eighth; Caldwell, SANBORN, Thayer.
- McCafferty v. Celluloid*, 104 Fed. 305; 43 C. C. A. 540...,.....121
 Second. Per Curiam.
- McCarty v. Lehigh*, 160 U. S. 110; 40 L. Ed. 358; 16 S. Ct. 240....195,
 BROWN. 206, 207, 383
- McClain v. Ortmyer*, 141 U. S. 419; 35 L. Ed. 800; 12 S. Ct. 76....12,
 228, 244, 614, 635, 656
 Affg. 33 Fed. 284.
 BROWN.
- McClurg v. Kingsland*, 1 How. 202; 11 L. Ed. 102....7, 166, 268, 368, 815
 BALDWIN.
- McCormick v. Aultman*, 69 Fed. 371; 16 C. C. A. 259....197, 221, 247,
 Revg. 58 Fed. 773. 375, 497, 754, 911
 Sixth; TAFT, Lurton, Severens.
- McCormick v. Aultman*, 169 U. S. 606; 42 L. Ed. 875; 18 S. Ct. 443....26,
 Revg. 58 Fed. 778. 848, 880, 883, 887
 BROWN.
- McCormick v. Talcott*, 61 U. S. 402; 15 L. Ed. 930.....395, 434, 473
 GRIER. Dissenting opinion DANIEL.

lxxii CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

| | |
|--|-------------------------|
| McCoy <i>v.</i> Nelson, 121 U. S. 484; 30 L. Ed. 1017; 7 S. Ct. 1000.... | 562, |
| BLATCHFORD. | 791, 807 |
| McCreary <i>v.</i> Pennsylvania, 141 U. S. 459; 35 L. Ed. 817; 12 S. Ct. 40 | |
| | 298, 356, 842, 845, 846 |
| Affg. 5 Fed. 367. | |
| BROWN. | |
| McCune <i>v.</i> Baltimore, 154 Fed. 63; 83 C. C. A. 175..... | 285 |
| Third; Dallas, Gray, BUFFINGTON. | |
| McDowell <i>v.</i> Ideal, 187 Fed. 814; 109 C. C. A. 574..... | App. 871, 901 |
| Seventh; Grosscup, BAKER, Scaman. | |
| McDowell <i>v.</i> Kurtz, 77 Fed. 206; 23 C. C. A. 119..... | 459, 562, 716 |
| Third; ACHESON, Dallas, Wales. | |
| McDuffee <i>v.</i> Hestonville, 162 Fed. 36; 89 C. C. A. 76..... | 154, 927 |
| Revg. 158 Fed. 827. | |
| Third; Dallas, Grey, BUFFINGTON. | |
| McKay <i>v.</i> Dizer, 61 Fed. 102; 9 C. C. A. 382..... | 380, 635 |
| Revg. 58 Fed. 353. | |
| First; Colt, NELSON, Webb. | |
| McMichael <i>v.</i> Ruth, 128 Fed. 706; 63 C. C. A. 304..... | 73, 469 |
| Revg. 123 Fed. 888. | |
| Third; Acheson, DALLAS, Gray. | |
| McMurray <i>v.</i> Mallory, 111 U. S. 97; 28 L. Ed. 365; 4 S. Ct. 375.... | 473, |
| WOODS. | 871, 882 |
| McNeely <i>v.</i> Williames, 96 Fed. 978; 37 C. C. A. 641.... | 59, 252, 292, 342, 727 |
| Affg. 64 Fed. 766; revg. 77 Fed. 894. | |
| Third; Acheson, Buffington, BRADFORD. | |
| McSherry <i>v.</i> Dowagiac, 163 Fed. 34; 89 C. C. A. 512..... | 837 |
| Rehearing of 160 Fed. 948. | |
| Sixth; COCHRAN. | |
| McSherry <i>v.</i> Dowagiac, 101 Fed. 716; 41 C. C. A. 627..... | 376 |
| Sixth; Taft, LURTON, Day. | |
| McSherry <i>v.</i> Dowagiac, 160 Fed. 948; 89 C. C. A. 26.... | 283, 481, 837, 843 |
| See 101 Fed. 716; 127 Fed. 143; 118 Fed. 136; 121 Fed. 988; 155 Fed. | |
| 524; 162 Fed. 472; 162 Fed. 479. | |
| Sixth; Lurton, Richards, COCHRAN, Dissenting, RICHARDS. | |
| Mellon <i>v.</i> D. L. & W. 154 U. S. 673; 26 L. Ed. 929; 14 S. Ct. 1194.... | 158, |
| WOODS. | 394 |
| Menasha <i>v.</i> Dodge, 85 Fed. 971; 29 C. C. A. 508..... | 564 |
| See Dodge <i>v.</i> Post, 76 Fed. 807. | |
| Seventh; Woods, Jenkins, SHOWALTER. | |
| Merrill <i>v.</i> Yeomans, 94 U. S. 568; 24 L. Ed. 235..... | 247, 772, 822, 905 |
| MILLER. Dissenting Clifford. | |
| Merrill-Soule <i>v.</i> Star, 159 Fed. 142; 86 C. C. A. 332..... | 672 |
| Affg. 153 Fed. 762. | |
| Second; Lacombe, Coxe, WARD. | |
| Metallic <i>v.</i> Brown, 104 Fed. 345; 43 C. C. A. 568..... | 118, 226 |
| Eighth; Caldwell, Sanborn, THAYER. | |
| Metallic <i>v.</i> Brown, 110 Fed. 664; 49 C. C. A. 147..... | 195, 273 |
| Eighth; Sanborn, THAYER. | |
| Metropolitan <i>v.</i> Providence, 87 U. S. 342; 22 L. Ed. 303..... | 668 |
| STRONG. | |
| Metzger <i>v.</i> Berlin, 194 Fed. 426; 114 C. C. A. 388..... | App. 133 |
| Second; Coxe, Ward, Noyes. Per Curiam. | |
| Mevs <i>v.</i> Conover, 131 U. S. cxlii, app; 23 L. Ed. 1008..... | 840, 887 |
| STRONG. | |

CASES EXCERPTED, WITH ANNOTATIONS lxxiii

[References are to sections. "App." refers to Appendix]

- Meyer v. Pritchard, 131 U. S. ccix, app.; 23 L. Ed. 961.....887
 WAITE.
- Mica Insulator v. Commercial, 166 Fed. 440; 92 C. C. A. 292.....821
 Revg. 157 Fed. 90; see 137 Fed. 928.
 Seventh; GROSSCUP, Baker, Seaman.
- Michigan v. Consolidated, 67 Fed. 121; 14 C. C. A. 232.....55, 809, 812, 903
 Sixth; Taft, Lurton, SEVERENS.
- Millard v. Chase, 108 Fed. 399; 47 C. C. A. 429.....207, 681, 705
 First; Colt, PUTNAM, Webb.
- Miller v. Brass Co. 104 U. S. 350; 26 L. Ed. 783....12, 873, 883, 884, 885
 BRADLEY.
- Miller v. Eagle, 151 U. S. 186; 38 L. Ed. 121; 14 S. Ct. 310....86, 348,
 Revg. 41 Fed. 351. 356, 378, 525, 528, 651, 680, 771
 JACKSON.
- Miller v. Foree, 116 U. S. 22; 29 L. Ed. 552; 6 S. Ct. 204.....676
 BRADLEY.
- Miller v. Mawhinney, 105 Fed. 523; 44 C. C. A. 581.....78, 908
 Affg. 96 Fed. 248.
 First; Colt, PUTNAM, Webb.
- Millheim v. Western, 95 Fed. 152; 37 C. C. A. 38.....438
 Affg. 88 Fed. 505.
 Third; Acheson, Dallas, KIRKPATRICK.
- Milligan v. Upton, 97 U. S. 3; 24 L. Ed. 985.....775
 FIELD.
- Milloy v. Thomson-Houston, 148 Fed. 843; 78 C. C. A. 533.....871, 876
 See 71 Fed. 192; 78 Fed. 363; 78 Fed. 139; 80 Fed. 712; 82 Fed. 461;
 101 Fed. 121; 135 Fed. 759.
 Sixth; Lurton, SEVERENS, Cochran.
- Mills v. Russell, 144 Fed. 700; 75 C. C. A. 516.....600
 Affg. 136 Fed. 874.
 Second; Lacombe, Coxe. Per Curiam.
- Mills v. Whitehurst, 72 Fed. 496; 19 C. C. A. 130.....166, 167
 Affg. 65 Fed. 996. See 56 Fed. 589.
 Sixth; TAFT, Lurton, Hammond.
- Milner v. Yesbera, 111 Fed. 386; 49 C. C. A. 397.....323
 Sixth; Lurton, Day, SEVERENS.
- Milner v. Yesbera, 133 Fed. 916; 67 C. C. A. 210.....459, 634
 See 111 Fed. 386.
 Sixth; Lurton, SEVERENS, Richards.
- Milwaukee v. Brunswick-Balke, 126 Fed. 171; 61 C. C. A. 175....68, 163,
 Seventh; Jenkins, Baker, SEAMAN. 468, 603, 680, 926
- Minnesota v. Dowagiac, 126 Fed. 747; 61 C. C. A. 352.....115, 538
 Eighth; SANBORN, Van Devanter.
- Mississippi v. Franzen, 143 Fed. 501; 74 C. C. A. 135.....365, 411, 682
 Revg. 138 Fed. 924.
 Third; ACHESON, Dallas, Gray.
- Mitchell v. Ewart, 81 Fed. 390; 26 C. C. A. 443.....454
 Affg. 78 Fed. 485.
 Third; Acheson, Butler, BUFFINGTON.
- Mitchell v. Hawley, 83 U. S. 544; 21 L. Ed. 322...418, 757, 769, 926, 927
 CLIFFORD.
- Mitchell v. Tilghman, 86 U. S. 287; 22 L. Ed. 125....222, 229, 230, 261,
 488, 489, 500, 501, 629, 641, 679, 702
 Revg. 9 Blatchf. 1; s. c. 4 Fish. P. C. 599; reversed on merits 102 U. S. 708.
 CLIFFORD. Dissenting Swayne, Strong, Bradley.

Ixxiv CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Model Bottling Mach. v. Anheuser-Busch*, 190 Fed. 573; 111 C. C. A. 389
App. 5, 9, 100, 101, 128, 351, 672, 881
 Eighth; Sanborn, Van Devanter, MUNGER.
- Moffitt v. Garr*, 66 U. S. 273; 17 L. Ed. 207.....887, 889
 NELSON.
- Moffitt v. Rogers*, 106 U. S. 423; 27 L. Ed. 76; 1 S. Ct. 70.....871
 WOODS.
- Moneyweight v. Toledo*, 187 Fed. 826; 109 C. C. A. 586....App. 208, 871,
 Affg. 178 Fed. 557. 885
 Seventh; Grosseup, BAKER, Seaman.
- Monroe v. Anderson*, 58 Fed. 398; 7 C. C. A. 272.....281, 330, 331
 Revg. 55 Fed. 398.
 Third; Shiras, Acheson, DALLAS.
- Moore v. Eggers*, 107 Fed. 491; 46 C. C. A. 425.....211, 241
 Sixth; Lurton, SEVERENS, Clark.
- Moore v. Marsh*, 74 U. S. 515; 19 L. Ed. 37.....164, 169, 796
 CLIFFORD.
- Mop Case* — see *Garretson v. Clark*, 111 U. S. 120.
- Morey v. Lockwood*, 75 U. S. 230; 19 L. Ed. 339.....459, 884
 NELSON.
- Morgan v. Albany*, 152 U. S. 425; 38 L. Ed. 500; 14 S. Ct. 627....207,
 Affg. 40 Fed. 577. 477, 515, 524, 769, 771, 871
 BROWN.
- Morgan v. Daniels*, 153 U. S. 120; 38 L. Ed. 657; 14 S. Ct. 772....584,
 Revg. 42 Fed. 451. 785, 810
 BREWER.
- Morgan v. Pennsylvania*, 126 Fed. 952; 62 C. C. A. 126.....207
 Third; Acheson, DALLAS, Gray.
- Morgan Engineering v. Alliance*, 176 Fed. 100; 100 C. C. A. 30..App. 77,
 344, 598, 631, 665
 Sixth; Lurton, Severens, WARRINGTON.
- Morley v. Lancaster*, 129 U. S. 263; 32 L. Ed. 715; 9 S. Ct. 299....230,
 Revg. 23 Fed.344. 373, 375, 436, 497, 506, 768, 815
 BLATCHFORD.
- Morrill v. Hardware*, 142 Fed. 756; 74 C. C. A. 18.....398
 Affg. 131 Fed. 882.
 Second; Lacombe, TOWNSEND, COXE.
- Morrin v. Lawler*, 99 Fed. 977; 40 C. C. A. 204.....356
 Modifying 90 Fed. 285.
 Second; Wallace, Lacombe, SHIPMAN.
- Morrin v. White*, 143 Fed. 519; 74 C. C. A. 466.....523, 524, 573
 Modifying 138 Fed. 68; see 90 Fed. 285; 99 Fed. 977.
 Second; Wallace, Townsend, COXE.
- Morris v. McMillin*, 112 U. S. 244; 28 L. Ed. 702; 5 S. Ct. 218.....596
 WOODS.
- Morse Chain v. Link Belt*, 164 Fed. 331; 90 C. C. A. 650.....358
 Seventh; Grosseup, Baker, Seaman.
- Morse Chain v. Link Belt*, 189 Fed. 584; 110 C. C. A. 564....App. 203,
 Affg. 182 Fed. 825; see 164 Fed. 331. 253, 871
 Second; Lacombe, COXE, Ward.
- Morton v. American*, 129 Fed. 916; 64 C. C. A. 367.....792
 Revg. 121 Fed. 132.
 Third; ACHESON, Dallas, Gray.
- Morton v. Llewellyn*, 164 Fed. 693; 90 C. C. A. 514.....626, 795
 Ninth; Gilbert, Ross, Morrow.

CASES EXCERPTED, WITH ANNOTATIONS lxxv

[References are to sections. "App." refers to Appendix]

- Morton Trust v. Standard, 177 Fed. 931; 101 C. C. A. 211....App. 322,
469, 496, 624
Revg. 171 Fed. 672.
Third; Gray, LANNING, McPherson.
- Mosher v. Joyce, 51 Fed. 441; 2 C. C. A. 322....290, 297, 298, 844, 846
Affg. 45 Fed. 205; 31 Fed. 557.
Sixth; Brown, JACKSON, Taft.
- Mosler v. Mosler, 127 U. S. 354; 32 L. Ed. 182; 8 S. Ct. 1148..601, 773, 822
Affg. 22 Fed. 901.
BLATCHFORD.
- Mossberg v. Nutter, 124 Fed. 966; 60 C. C. A. 98.....890
Affg. 118 Fed. 168.
First; Colt, PUTNAM, Aldrich.
- Mossberg v. Nutter, 135 Fed. 95; 68 C. C. A. 257.....223
Affg. 128 Fed. 55.
First; Colt, Putnam, Aldrich.
- Motsinger v. Hendricks, 149 Fed. 995; 79 C. C. A. 505.....442
Seventh; Grosscup, Baker, Seaman.
- Mott v. Standard, 53 Fed. 819; 4 C. C. A. 28.....207, 442, 595
Affg. 51 Fed. 81; see 48 Fed. 345.
Third; Dallas, Butler, WALES.
- Mott v. Standard, 159 Fed. 135; 86 C. C. A. 325.....631, 693
Affg. 152 Fed. 635.
Third; Dallas, Gray, BUFFINGTON.
- Mowry v. Whitney, 81 U. S. 434; 20 L. Ed. 858.....26
MILLER.
- Mowry v. Whitney, 81 U. S. 620; 20 L. Ed. 860....230, 284, 290, 298,
519, 683, 815, 847, 914, 915
STRONG.
- Moyer v. Metal Stamping, 178 Fed. 830; 102 C. C. A. 504.....App. 59
Revg. 169 Fed. 825.
Second; Lacombe, Ward, Noyes. Per Curiam.
- Mueller v. Glauber, 184 Fed. 609; 106 C. C. A. 613....App. 71, 195, 635
See 181 Fed. 1022.
Seventh; Baker, Seaman, KOHLSAAT.
- Muller v. Lodge, 77 Fed. 621; 23 C. C. A. 357....211, 245, 376, 525, 596,
598, 663, 674
Affg. 69 Fed. 738.
Sixth; Taft, LURTON, Hammond.
- Municipal v. National, 107 Fed. 284; 46 C. C. A. 270.....354
Revg. and affg. 97 Fed. 810; 99 Fed. 569.
Second; Wallace, LACOMBE, Shipman.
- Munson v. Mayor, 124 U. S. 601; 31 L. Ed. 586; 8 S. Ct. 622.....591
Revg. 18 Blatchf. 237; 21 Blatchf. 342.
GRAY.
- Murphy v. Excelsior, 76 Fed. 965; 22 C. C. A. 658...224, 376, 473, 517, 608
Affg. 70 Fed. 491.
Eighth; Caldwell, SANBORN, Thayer.
- Murray v. Continental, 149 Fed. 989; 79 C. C. A. 499.....159, 615
Revg. 126 Fed. 533.
Third; Dallas, Gray, CROSS.
- Murray v. Orr, 153 Fed. 369; 82 C. C. A. 445.....283, 805, 827
Seventh; Grosscup, Baker, Seaman. Per Curiam.
- Myers v. Fairbanks, 194 Fed. 971; 114 C. C. A. 546.....App. 672
Seventh; Baker, Seaman, ANDERSON.
- Myers v. Sternheim, 97 Fed. 625; 38 C. C. A. 345.....332
Ninth; Gilbert, Ross, Hawley,

Ixxvi **CASES EXCERPTED, WITH ANNOTATIONS**

[References are to sections. " App." refers to Appendix]

- Mygatt *v.* Schaffer-Flaum, 191 Fed. 836; 112 C. C. A. 350.....App. 334
 Revg. 186 Fed. 343.
 Second; Lacombe, COXE, Ward.
- Nassau *v.* Sprague, 95 Fed. 415; 37 C. C. A. 146.....537
 Affg. 91 Fed. 786.
 Second; Wallace, Shipman. Per Curiam.
- Nathan *v.* D. L. & W., 157 Fed. 685; 85 C. C. A. 453.....91
 Revg. 146 Fed. 252.
 Second; Lacombe, Ward, Noyes. Per Curiam.
- Nathan *v.* Howard, 143 Fed. 889; 75 C. C. A. 97.....460, 485
 Sixth; LURTON, Severens, Richards.
- Nat. Automatic *v.* Automatic, 105 Fed. 670; 44 C. C. A. 664.....542
 First; Colt, Putnam, Webb. Per Curiam.
- Nat. Cash Register *v.* American, 53 Fed. 367; 3 C. C. A. 559....252, 379,
 468, 608, 641
 Revg. 47 Fed. 212; disapproving 45 Fed. 481; approved in 70 Fed. 709.
 Third; DALLAS, Wales, Buffington.
- Nat. Cash Register *v.* American, 178 Fed. 79; 101 C. C. A. 569....App. 2,
 18, 856, 899
 Second; Lacombe, COXE, NOYES.
- Nat. Cash Register *v.* Boston, 156 U. S. 502, 39 L. Ed. 511; 15 S. Ct. 434
 BROWN.651, 671
- Nat. Cash Register *v.* Grobet, 153 Fed. 905; 82 C. C. A. 651.....478
 Revg. 148 Fed. 385.
 Second; Wallace, Lacombe, TOWNSEND.
- Nat. Cash Register *v.* Leland, 94 Fed. 502; 37 C. C. A. 372....132, 401,
 Revg. 77 Fed. 242.406, 481
 First; Putnam, Brown, LOWELL.
- Nat. Casket *v.* Stolts, 157 Fed. 392; 85 C. C. A. 300.....74
 Revg. 153 Fed. 765.
 Second; Lacombe, COXE, Ward.
- Nat. Casket *v.* Stolts, 135 Fed. 534; 68 C. C. A. 84.....480, 890
 Affg. 127 Fed. 158.
 Second; Wallace, LACOMBE, Townsend.
- Nat. Casket *v.* Stolts, 174 Fed. 413; 98 C. C. A. 617.....App. 327
 See 127 Fed. 158; 135 Fed. 534; 153 Fed. 765; 157 Fed. 392.
 Second; Lacombe, COXE, Ward.
- Nat. Chemical *v.* Swift, 104 Fed. 87; 43 C. C. A. 421.....92, 822, 824
 Affg. 100 Fed. 451.
 Seventh; Woods, Grosseup, SEAMAN.
- Nat. Company *v.* Belcher, 71 Fed. 876; 18 C. C. A. 375.....78, 398
 Modfg. 68 Fed. 665.
 Third; Acheson, BUTLER, Wales.
- Nat. Condit *v.* Roebing's, 158 Fed. 99; 85 C. C. A. 567.....207, 496
 Second; Lacombe, COXE, Noyes. Per Curiam.
- Nat. Dump Car *v.* Ralston, 172 Fed. 393; 97 C. C. A. 91.....App. 376
 Affg. 172 Fed. 399.
 Sixth; Lurton, SEVERENS, Warrington.
- Nat. Enameling, *Ex parte*, 201 U. S. 156; 50 L. Ed. 707; 26 S. Ct. 404
 BREWER.115, 116, 304, 540, 544
- Nat. Enameling *v.* New England, 153 Fed. 184; 82 C. C. A. 359....816
 Second; Wallace, COXE, HOLT.
- Nat. Enameling *v.* New England, 151 Fed. 19; 80 C. C. A. 485....195,
 Revg. 139 Fed. 643.227, 240, 631, 676, 775
 Second; Wallace, COXE, HOLT.

CASES EXCERPTED, WITH ANNOTATIONS **lxxvii**

[References are to sections. " App." refers to Appendix]

| | |
|---|---|
| <p>Nat. <i>Electric v. General</i>, 159 Fed. 934; 87 C. C. A. 462.....</p> <p style="padding-left: 2em;">Revg. 145 Fed. 193. Seventh; Baker, Kohlsaot, Anderson. Per Curiam.</p> <p>Nat. <i>Folding Box v. Elsas</i>, 86 Fed. 917; 30 C. C. A. 487.....</p> <p style="padding-left: 2em;">Affg. 65 Fed. 1001, and 81 Fed. 197. Second; Wallace, SHIPMAN.</p> <p>Nat. <i>Folding Box v. Robertson</i>, 104 Fed. 552; 44 C. C. A. 29.....</p> <p style="padding-left: 2em;">Dismissing app. from 99 Fed. 985. Second; Lacombe, Shipman. Per Curiam.</p> <p>Nat. <i>Folding Box v. Stecher</i>, 81 Fed. 395; 26 C. C. A. 448.....</p> <p style="padding-left: 2em;">Affg. 77 Fed. 828. Second; Wallace, Lacombe, SHIPMAN.</p> <p>Nat. <i>Harrow v. Hench</i>, 83 Fed. 36; 27 C. C. A. 349.....</p> <p style="padding-left: 2em;">Affg. 76 Fed. 667. Third; Dallas, BUTLER, Kirkpatrick.</p> <p>Nat. <i>Harrow v. Quick</i>, 74 Fed. 236; 20 C. C. A. 410.....</p> <p style="padding-left: 2em;">Affg. 67 Fed. 130; see 40 Fed. 882. Seventh; Woods, Jenkins, Showalter.</p> <p>Nat. <i>Hat Pouncing v. Hedden</i>, 148 U. S. 482; 37 L. Ed. 529; 13 S. Ct. 680</p> <p style="padding-left: 2em;">Affg. 36 Fed. 317.</p> <p style="padding-left: 2em;">BROWN.</p> <p>Nat. <i>Hollow Brake v. Interchangeable</i>, 106 Fed. 693; 45 C. C. A. 544.....</p> <p style="padding-left: 2em;">94, 207, 222, 228, 234, 374, 378, 426, 443, 459, 468, 473, 507, 602, 629, 631, 635, 636, 674, 741, 919 Revg. 99 Fed. 758; affg. 99 Fed. 777. Eighth; Caldwell, SANBORN, Thayer.</p> <p>Nat. <i>Machine v. Wheeler</i>, 79 Fed. 432; 24 C. C. A. 663.....</p> <p style="padding-left: 2em;">Revg. 72 Fed. 185. Second; Wallace, LACOMBE, Shipman.</p> <p>Nat. <i>Malleable Castings v. Buckeye</i>, 171 Fed. 847; 96 C. C. A. 515..App. 637</p> <p style="padding-left: 2em;">Affg. 171 Fed. 855. Sixth; LURTON, Severens, Warrington.</p> <p>Nat. <i>Mechan. Directory v. Polk</i>, 121 Fed. 742; 58 C. C. A. 24....</p> <p style="padding-left: 2em;">Ninth; GILBERT, Ross, Morrow.</p> <p>Nat. <i>Metal v. Bredin</i>, 186 Fed. 490; 108 C. C. A. 468....App. 288, 830,</p> <p style="padding-left: 2em;">837, 838, 846, 847</p> <p style="padding-left: 2em;">Modfg. 182 Fed. 654; see 147 Fed. 741; 157 Fed. 1003. Third; Buffington, LANNING, Young.</p> <p>Nat. <i>Newsboard v. Elkhart</i>, 123 Fed. 431; 59 C. C. A. 471.....</p> <p style="padding-left: 2em;">Revg. 115 Fed. 328. Seventh; Jenkins, GROSSCUP, Bunn.</p> <p>Nat. <i>Phonograph v. Lambert</i>, 142 Fed. 164; 73 C. C. A. 382.....</p> <p style="padding-left: 2em;">Affg. 125 Fed. 388. Seventh; Grosseup, Baker, SEAMAN.</p> <p>Nat. <i>Phonograph v. Schlegel</i>, 128 Fed. 733; 64 C. C. A. 594..513, 722, 899</p> <p style="padding-left: 2em;">Revg. 117 Fed. 624. Eighth; Sanborn, Thayer, VAN DEVANTER.</p> <p>Nat. <i>Regulator v. Powers</i>, 160 Fed. 460; 87 C. C. A. 444.....</p> <p style="padding-left: 2em;">Revg. 152 Fed. 984. Seventh; Grosseup, BAKER, Seaman.</p> <p>Nat. <i>Sewing Mach. v. Willcox</i>, 74 Fed. 557; 20 C. C. A. 654.....</p> <p style="padding-left: 2em;">Third; Acheson, Wales, GREEN.</p> <p>Nat. <i>Surface Guard v. Merrill</i>, 49 Fed. 157; 1 C. C. A. 214.....</p> <p style="padding-left: 2em;">Sixth; Brown, Jackson, SAGE.</p> | <p>622</p> <p>283, 674, 777, 830</p> <p>550</p> <p>344, 345</p> <p>744</p> <p>90, 256</p> <p>239, 606, 624, 635</p> <p>74, 94, 207, 222, 228, 234, 374, 378, 426, 443, 459, 468, 473, 507, 602, 629, 631, 635, 636, 674, 741, 919</p> <p>895</p> <p>496, 797</p> <p>App. 288, 830, 837, 838, 846, 847</p> <p>447</p> <p>851</p> <p>513, 722, 899</p> <p>596</p> <p>760</p> <p>696</p> |
|---|---|

lxxviii CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

- Nat. Tube v. Aikin*, 163 Fed. 254; 91 C. C. A. 114. 603, 624, 654, 673
 Affg. 157 Fed. 691 and 159 Fed. 1023.
 Sixth; LURTON, Severens, Richards.
- Nat. Wire Bound Box v. Healy*, 189 Fed. 49; 110 C. C. A. 613. App. 151,
 Seventh; GROSSCUP, Baker, SEAMAN. 160, 168, 371
- Naylor v. Alsop*, 168 Fed. 911; 94 C. C. A. 315. App. 68, 101, 102, 476
 Eighth; Sanborn, Van Devanter, AMIDON.
- Neenan v. Otis Elevator*, 194 Fed. 414; 114 C. C. A. 376. App. 174, 371
 Affg. 194 Fed. 415; see 180 Fed. 997.
 Second; Lacombe, COXE, Noyes.
- Nelson v. Farmer*, 95 Fed. 145; 37 C. C. A. 32. 357
 Modifying 91 Fed. 418.
 Second; Wallace, Lacombe, SHIPMAN.
- Neptune v. National*, 127 Fed. 563; 62 C. C. A. 345. 437, 676, 908
 Revg. 122 Fed. 75.
 Third; ACHESON, Gray, McPherson.
- Neureuther v. Mineral Point*, 179 Fed. 850; 103 C. C. A. 336. App. 599
 Seventh; Grosscup, Baker, SEAMAN.
- Newark v. Ryan*, 102 Fed. 693; 42 C. C. A. 594. 207, 360, 387, 592, 807
 Revg. 96 Fed. 100.
 Third; Acheson, Dallas, GRAY.
- New Departure v. Bevin*, 73 Fed. 469; 19 C. C. A. 534. 85, 672
 Revg. 64 Fed. 859; see 118 Fed. 41; 127 Fed. 152.
 Second; Wallace, LACOMBE, Shipman.
- New Departure v. Sargent*, 127 Fed. 152; 62 C. C. A. 266. 929
 Affg. 118 Fed. 41; see 73 Fed. 469.
 Second; LACOMBE, COXE, Holt.
- New England v. Sturtevant*, 150 Fed. 131; 80 C. C. A. 85. 65
 Revg. 140 Fed. 866.
 Second; LACOMBE, Townsend, COXE.
- New Marshall Engine Co. v. Marshall*, 223 U. S. 473; 56 L. Ed. 513; 32
 S. Ct. 238. App. 151, 714
 Affg. 199 Mass. 546.
 LAMAR.
- Newhall v. McCabe*, 125 Fed. 919; 60 C. C. A. 629. 567
 Revg. 117 Fed. 621.
 Second; Wallace, Lacombe, TOWNSEND.
- New Jersey Patent v. Schaefer*, 178 Fed. 276; 101 C. C. A. 540. App. 141
 Affg. 159 Fed. 171.
 Third; Gray, Buffington, LANNING.
- New Process v. Maus*, 122 U. S. 413; 30 L. Ed. 1193; 7 S. Ct. 1304. . . . 148,
 Revg. 20 Fed. 725. 626, 638, 819
 BLATCHFORD.
- Newton v. Buck*, 77 Fed. 614; 23 C. C. A. 355. 151
 Revg. 72 Fed. 777.
 Second; Lacombe, Shipman. Per Curiam.
- Newton v. Furst*, 119 U. S. 373; 30 L. Ed. 442; 7 S. Ct. 369. . . . 224, 375, 871
 Affg. 11 Biss. 405.
 BLATCHFORD.
- New York Belting v. New Jersey*, 137 U. S. 445; 34 L. Ed. 741; 11 S. Ct. 193
 Revg. 30 Fed. 785. 329, 707, 791
 BRADLEY.
- New York Belting v. New Jersey*, 53 Fed. 810; 4 C. C. A. 21. 331, 337
 Revg. 48 Fed. 556; see 30 Fed. 785; see *New York v. New Jersey*, 137
 U. S. 445.
 Second; LACOMBE, Shipman.

CASES EXCERPTED; WITH ANNOTATIONS lxxix

[References are to sections. "App." refers to Appendix]

- New York Belting v. Sierer*, 158 Fed. 819; 86 C. C. A. 79.....88, 636
 Affg. 149 Fed. 756.
 Second; Lacombe, Ward, NOYES.
- New York Filter v. Niagara*, 80 Fed. 924; 26 C. C. A. 252.....35
 Affg. 77 Fed. 900.
 Second; Wallace, Lacombe, SHIPMAN; dissenting, WALLACE.
- New York Paper Bag v. Hollingsworth*, 56 Fed. 224; 5 C. C. A. 490..574, 637
 Affg. 48 Fed. 562.
 First; COLT, Putnam, Webb.
- Ney v. Ney*, 69 Fed. 405; 16 C. C. A. 293.....680
 Sixth; TAFT, Lurton, Severens.
- Niagara v. Hibbard*, 179 Fed. 844; 103 C. C. A. 330.....App. 385, 758
 Seventh; Grosscup, BAKER, Seaman.
- Nicholson v. Jenkins*, 81 U. S. 452; 20 L. Ed. 777.....154, 173
 DAVIS.
- Noonan v. Chester*, 99 Fed. 90; 39 C. C. A. 426.....376, 385
 Sixth; Taft, LURTON, Day.
- North Jersey v. Brill*, 134 Fed. 580; 67 C. C. A. 380.....695, 812
 Revg. 124 Fed. 778; see 125 Fed. 526.
 Third; ACHESON, Dallas, Gray.
- Norton v. Jensen*, 49 Fed. 859; 1 C. C. A. 452....223, 374, 398, 459, 497,
 506, 643, 865
 See *Norton v. Can Co.* 45 Fed. 637; modified in *Wheaton v. Norton*,
 70 Fed. 833.
 Ninth; HANFORD, Hawley and Morrow.
- Norton v. Jensen*, 90 Fed. 415; 33 C. C. A. 141....207, 354, 375, 473, 893
 Affg. 81 Fed. 494.
 Ninth; Ross, MORROW, Hawley.
- Norton v. San Jose*, 79 Fed. 793; 25 C. C. A. 194.....532, 893
 See 70 Fed. 833.
 Ninth; Ross, Hawley, Morrow.
- Norton v. San Jose*, 83 Fed. 512; 27 C. C. A. 576.....31
 Ninth; Ross, Morrow, HAWLEY.
- Novelty v. Brookfield*, 172 Fed. 221; 97 C. C. A. 25.....App. 274, 342
 See 170 Fed. 946.
 Third; Gray, Buffington, ARCHBALD.
- Novelty v. Brookfield*, 170 Fed. 946; 95 C. C. A. 516....App. 290, 531,
 584, 604, 631, 838, 840, 841, 846
 Third; Gray, Buffington, ARCHBALD.
- Nu Bone v. Spirella*, 183 Fed. 984; 106 C. C. A. 324.....App. 195, 485
 Revg. 180 Fed. 470.
 Third; Gray, Buffington, LANNING.
- Nutter v. Brown*, 98 Fed. 892; 39 C. C. A. 332.....627, 904
 Affg. 96 Fed. 229.
 First; Colt, PUTNAM, Webb.
- O'Brien v. Foster*, 159 Fed. 710; 86 C. C. A. 464.....91, 253
 Affg. 153 Fed. 585.
 First; Colt, PUTNAM, Aldrich.
- Office v. Fenton*, 174 U. S. 492; 43 L. Ed. 1058; 19 S. Ct. 641....597, 710
 Affg. *Mfg. Co. v. Chose*, 73 Fed. 831; 84 Fed. 893.
 Revg. 12 App. D. C. 201.
 BROWN.
- Ohl v. Falstrom*, 175 Fed. 67; 99 C. C. A. 89.....App. 189, 469
 Affg. 166 Fed. 898.
 Third; Gray, Buffington, LANNING.

lxxx CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

- O'Leary *v.* Utica, 144 Fed. 399; 75 C. C. A. 377.....496, 700
 Modifying 139 Fed. 330.
 Second; Lacombe, TOWNSEND, Coxe.
- Olin *v.* Timkin, 155 U. S. 141; 39 L. Ed. 100; 15 S. Ct. 49.....871
 Revg. 37 Fed. 205.
 FULLER.
- Oliver *v.* Rumford, 109 U. S. 75; 27 L. Ed. 862; 3 S. Ct. 61....41, 165, 751
 BLATCHFORD.
- Olmsted *v.* Andrews, 77 Fed. 835; 23 C. C. A. 488....207, 601, 623, 624, 636
 Seventh; JENKINS, Bunn, Grosseup.
- Oregon *v.* Excelsior, 132 U. S. 215; 33 L. Ed. 344; 10 S. Ct. 54.....888
 BLATCHFORD.
- O'Reilly *v.* Morse, 15 How. 62; 14 L. Ed. 601....82, 88, 245, 342, 344, 423,
 424, 434, 439, 459, 639, 683, 690, 795, 811, 902, 915
 TANEY. Dissenting Wayne, Nelson, GRIER.
- O'Rourke *v.* McMullen, 160 Fed. 933; 88 C. C. A. 115....107, 190, 222,
 Revg. 150 Fed. 338. 635, 792
 Second; Lacombe, Coxe, Ward.
 Ward writing opinion on first hearing, affg. court below. Coxe
 writing opinion on rehearing, revg. court below.
- Orr *v.* Murray, 163 Fed. 54; 89 C. C. A. 492.....838
 Affg. 138 Fed. 564, and 153 Fed. 369.
 Seventh; GROSSCUP, Baker, Seaman.
- Osgood *v.* Metropolitan, 75 Fed. 670; 21 C. C. A. 491....398, 595, 638, 706
 Affg. 69 Fed. 620.
 First; Colt, PUTNAM, Nelson.
- Otis *v.* Portland, 127 Fed. 557; 62 C. C. A. 339.....357, 358, 361
 Affg. 119 Fed. 928.
 First; Colt, Aldrich, BROWN.
- Overweight *v.* Improved, 94 Fed. 155; 36 C. C. A. 125....12, 378, 397,
 Affg. 86 Fed. 338. 398, 406, 411, 473, 734
 Ninth; Gilbert, Ross, HAWLEY.
- Overweight *v.* Vogt, 102 Fed. 957; 43 C. C. A. 80.....675
 Sixth; Lurton, Day, SEVERENS.
- Owens *v.* Twin City, 168 Fed. 259; 93 C. C. A. 561....App. 68, 189, 208,
 Eighth; SANBORN, Hook, Adams. 223, 277, 459
- Ozan *v.* Union City, 207 U. S. 251; 52 L. Ed. 195; 28 S. Ct. 89..App. 920
 Revg. 145 Fed. 344; see 179 Fed. 710.
 PECKHAM.
- Pacific *v.* Alaska, 100 Fed. 462; 40 C. C. A. 494.....523, 532, 544, 556, 557
 Affg. 93 Fed. 672.
 Ninth; Gilbert, Ross, Hawley.
- Packard *v.* Lacing, 70 Fed. 66; 16 C. C. A. 639....20, 67, 629, 636, 782
 Mod. 67 Fed. 115.
 First; Colt, PUTNAM, Nelson.
- Packet *v.* Sickels, 65 U. S. 333; 16 L. Ed. 650.....315, 893, 894
 CAMPBELL.
- Packet *v.* Sickels, 72 U. S. 580; 18 L. Ed. 550.....921
 NELSON. Dissenting, MILLER.
- Packet *v.* Sickels, 86 U. S. 611; 22 L. Ed. 203.....283, 287, 292
 MILLER.
- Packing Company Cases, 105 U. S. 566; 26 L. Ed. 1172.....667
 WOODS.
- Page *v.* Dow, 168 Fed. 703; 94 C. C. A. 209.....App. 344
 Affg. 166 Fed. 473.
 Second; Lacombe, Coxe, Ward. Per Curiam.

CASES EXCERPTED, WITH ANNOTATIONS lxxxii

[References are to sections. "App." refers to Appendix]

- Paine v. Snowden*, 50 Fed. 776; 1 C. C. A. 122.....334
 Affg. 46 Fed. 189.
 Third; ACHESON, Wales, Green.
- Paine v. Trask*, 56 Fed. 233; 5 C. C. A. 497.....396
 Affg. 56 Fed. 231.
 First; PUTNAM, Nelson, Webb.
- Palmer v. Brown*, 92 Fed. 925; 35 C. C. A. 86.....353, 354
 Revg. 84 Fed. 454.
 First; Colt, BROWN, Lowell.
- Palmer v. Corning*, 156 U. S. 342; 39 L. Ed. 445; 15 S. Ct. 381, ... 608, 629
 WAITE.
- Palmer v. Lozier*, 90 Fed. 732; 33 C. C. A. 255.....353, 355, 587
 Revg. 84 Fed. 659; see 69 Fed. 346.
 Sixth; Taft, SEVERENS, Clark.
- Palmer v. McDermaid*, 54 Fed. 509; 4 C. C. A. 489646
 Seventh; Gresham, Woods, Bunn. Per Curiam.
- Panzl v. Battle Island*, 138 Fed. 48; 70 C. C. A. 474....398, 484, 892, 905,
 Revg. in part 132 Fed. 607. 909, 914
 Second; Wallace, TOWNSEND, COXE.
- Paper Bag Cases*, 105 U. S. 766; 26 L. Ed. 959.....273, 418, 764, 765, 796
 WAITE.
- Pardy v. Hooker*, 148 Fed. 631; 78 C. C. A. 403.....369
 Ninth; Gilbert, Ross, DeHaven.
- Park v. Hartman*, 153 Fed. 24; 82 C. C. A. 158.....714, 744, 767, 898
 Revg. 145 Fed. 358.
 Sixth; LURTON, Severens, Richards.
- Parker v. Stebler*, 177 Fed. 210; 101 C. C. A. 380.....App. 74, 77, 391
 Ninth; GILBERT, Ross, Hunt.
- Parker v. Yale*, 123 U. S. 87; 31 L. Ed. 100; 8 S. Ct. 38....871, 878, 886
 Affg. 21 Blatchf. 485.
 BLATCHFORD.
- Parks v. Booth*, 102 U. S. 96; 26 L. Ed. 54....245, 276, 284, 484, 576,
 CLIFFORD. 611, 629, 855, 917
- Parlin v. Moline*, 89 Fed. 329; 32 C. C. A. 221.....77, 103
 Revg. 84 Fed. 349.
 Seventh; Woods, Showalter, BUNN.
- Parramore v. Siegel-Cooper*, 143 Fed. 516; 74 C. C. A. 386.....86, 398, 460
 See 114 Fed. 97; 186 U. S. 484; 116 Fed. 1022; 133 Fed. 230;
 196 U. S. 641.
 Second; Wallace, COXE, Holt.
- Parramore v. Taylor*, 114 Fed. 97; 52 C. C. A. 45.....638
 Revg. 105 Fed. 965.
 Second; Wallace, Lacombe, SHIPMAN.
- Parsons v. New Home*, 134 Fed. 394; 67 C. C. A. 392.....277
 Affg. 125 Fed. 386.
 Seventh; Jenkins, Grosscup, BAKER.
- Parsons v. Seelye*, 100 Fed. 452; 40 C. C. A. 484.....320, 389, 709, 789
 See 92 Fed. 1005.
 First; Colt, PUTNAM, Aldrich.
- Parsons v. Seelye*, 100 Fed. 455; 40 C. C. A. 486.....246, 598, 635
 Revg. 92 Fed. 1005.
 First; Colt, Putnam, ALDRICH.
- Patent v. Glover*, 141 U. S. 560; 35 L. Ed. 858; 12 S. Ct. 79.....592
 Affg. 31 Fed. 816.
 BREWER.

lxxxii CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

- Pattee v. Kingman*, 129 U. S. 294; 32 L. Ed. 700; 9 S. Ct. 389....665, 871
 See 9 Fed. 821.
 FULLER.
- Patterson v. Commonwealth*, 97 U. S. 501; 24 L. Ed. 1115.....920
 HARLAN.
- Patterson v. United States*, 181 Fed. 970; 104 C. C. A. 434.....App. 779
 Revg. 172 Fed. 241.
 Ninth; Gilbert, Ross, Morrow.
- Paulus v. Buck*, 129 Fed. 594; 64 C. C. A. 162.....150, 167, 764
 Eighth; SANBORN, Thayer, Hook.
- Pearce v. Mulford*, 102 U. S. 112; 26 L. Ed. 93.....647
 STRONG.
- Peck v. Collins*, 103 U. S. 660; 26 L. Ed. 512.....887
 BRADLEY.
- Peerless v. White*, 118 Fed. 827; 55 C. C. A. 502.....470, 525
 Revg. 111 Fed. 190.
 Third; Acheson, Gray, BRADFORD. Dissent. ACHESON.
- Peifer v. Brown*, 112 Fed. 435; 50 C. C. A. 331.....207
 Affg. 106 Fed. 938.
 Third; Dallas, Gray, KIRKPATRICK.
- Pelouze v. American*, 102 Fed. 916; 43 C. C. A. 52.....329
 Seventh; Woods, GROSSCUP, Seaman.
- Pelton v. Doble*, 190 Fed. 760; 111 C. C. A. 488.....App. 603, 604
 Affg. 186 Fed. 526.
 Ninth; GILBERT, Morrow, Hanford.
- Pelzer v. Binghamton*, 95 Fed. 823; 37 C. C. A. 288.....510, 547
 Second; Wallace, Lacombe, SHIPMAN.
- Penfield v. Chambers*, 92 Fed. 630; 34 C. C. A. 579.....378, 454, 506, 701
 Sixth; TAFT, Lurton, Clark.
- Penfield v. Potts*, 126 Fed. 475; 61 C. C. A. 371.....195, 257, 298, 305, 386
 Revg. in part 109 Fed. 323.
 See 155 U. S. 597; 97 Fed. 78; 108 Fed. 379.
 Sixth; LURTON, Severens, Richards.
- Penn v. Columbia*, 132 Fed. 808; 66 C. C. A. 127.....124
 Third; ACHESON, Gray, Kirkpatrick.
- Penn v. Conroy*, 159 Fed. 943; 87 C. C. A. 149.....414, 417, 819, 850
 Third; Dallas, Gray, Cross.
- Penn v. Conroy*, 185 Fed. 511; 107 C. C. A. 611.....App. 37, 883
 Revg. 181 Fed. 697; see 155 Fed. 421; 159 Fed. 943.
 Third; Gray, BUFFINGTON, Lanning.
- Pennock v. Dialogue*, 2 Pet. 1; 7 L. Ed. 327.....2, 16, 135, 853
 STORY.
- Pennsylvania v. Locomotive*, 110 U. S. 490; 28 L. Ed. 222;
 4 S. Ct. 220.....671, 676
 Revg. 1 Bann. & A. 470; 6 Fish. P. C. 187; 10 Blatchf. 292.
 GRAY.
- Peoria v. Cleveland*, 58 Fed. 227; 7 C. C. A. 197.....873, 885
 Affg. 47 Fed. 728.
 Sixth; TAFT, Barr, Sage.
- Perry v. Chicago*, 178 Fed. 449; 101 C. C. A. 433.....App. 803
 Revg. 170 Fed. 968.
 Seventh; Grosscup, BAKER, Anderson.
- Peters v. Active*, 129 U. S. 530; 32 L. Ed. 738; 9 S. Ct. 389.....87, 671
 Affg. 21 Fed. 319.
 BLATCHFORD.

CASES EXCERPTED, WITH ANNOTATIONS lxxxiii

[References are to sections. "App." refers to Appendix]

- Peters v. Hanger*, 127 Fed. 820; 62 C. C. A. 498.....322
 Fourth; Goff, SIMONTON, McDowell.
- Peters v. Hanger*, 134 Fed. 586; 67 C. C. A. 386.....532, 807
 See 127 Fed. 820.
 Fourth; Brawley, Purnell, McDOWELL.
- Peters v. Hanson*, 129 U. S. 541; 32 L. Ed. 742; 9 S. Ct. 393.....592, 671
 BLATCHFORD.
- Philadelphia Novelty v. Weeks*, 61 Fed. 405; 9 C. C. A. 555.....606
 Affg. 52 Fed. 816.
 Second; Wallace, LACOMBE, Shipman.
- Philadelphia Trust v. Edison*, 65 Fed. 551; 13 C. C. A. 40....299, 562, 579
 Affg. 60 Fed. 397.
 See suits on same patent, 47 Fed. 454; 52 Fed. 300; 53 Fed. 592;
 54 Fed. 678; 56 Fed. 496; 57 Fed. 616; 61 Fed. 834.
 Third; Dallas, Butler, WALES.
- Philip v. Nock*, 80 U. S. 185; 20 L. Ed. 567.....725
 CHASE.
- Philip v. Nock*, 84 U. S. 460; 21 L. Ed. 679....280, 290, 294, 297, 298, 299
 SWAYNE.
- Phillips v. Detroit*, 111 U. S. 604; 28 L. Ed. 532; 4 S. Ct. 580....656,
 WOODS. 657, 667, 707
- Phillips v. Page*, 65 U. S. 164; 16 L. Ed. 639.....230, 672, 795
 NELSON.
- Phoenix v. Lanier*, 95 U. S. 171; 24 L. Ed. 383.....126
 STRONG.
- Phoenix v. Spiegel*, 133 U. S. 360; 33 L. Ed. 663; 10 S. Ct. 409.....207
 Affg. 26 Fed. 272.
 BLATCHFORD.
- Phoenix Knitting Wks. v. Hygienic*, 194 Fed. 696; — C. C. A. —...App. 335
 Affg. 194 Fed. 717.
 Third; GRAY, Buffington, Lanning.
- Piaget v. Headley*, 108 Fed. 870; 48 C. C. A. 116.....385, 451
 Affg. 107 Fed. 134.
 Second; Wallace, LACOMBE, Shipman.
- Pickering v. McCullough*, 104 U. S. 310; 26 L. Ed. 749.....47, 320, 596
 MATTHEWS.
- Pieper v. Electro-Dental*, 160 Fed. 930; 88 C. C. A. 112.....654, 668
 Affg. 156 Fed. 672.
 Second; LACOMBE, Coxe, Ward.
- Pittsburg v. Pittsburg*, 109 Fed. 644; 48 C. C. A. 580.....195, 473, 490,
 Third; ACHESON, Dallas, Gray. 528, 644
- Pittsburg v. Roberts*, 71 Fed. 706; 18 C. C. A. 302.....691, 891
 Affg. 69 Fed. 624, applying *Loom Co. v. Higgins*, 105 U. S. 591.
 Third; Dallas, Butler, WALES.
- Platt v. Fire Extinguisher*, 59 Fed. 897; 8 C. C. A. 357....153, 385, 513, 755
 See *Northwestern v. Philadelphia*, 1 Ban. & A. 177.
 Third; Dallas, WALES, Green.
- Plotts v. Central*, 143 Fed. 901; 75 C. C. A. 7.....513
 Ninth; Gilbert, Ross, Morrow.
- Plummer v. Sargent*, 120 U. S. 442; 30 L. Ed. 737; 7 S. Ct. 640....380,
 502, 821, 822, 881
 Affg. *Tucker v. Sargent*, 19 Blatchf. 538. See same
 patent *Tucker v. Tucker*, 4 Cliff. 397; *Tucker v.*
Burditt, 5 Fed. 808; *Tucker v. Dana*, 7 Fed. 213.
 MATTHEWS.

LXXXIV CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Pohl v. Anchor*, 134 U. S. 381; 33 L. Ed. 953; 10 S. Ct. 577.... 420, 421, 422
 Revg. 39 Fed. 782.
 Construing 129 U. S. 151.
 BLATCHFORD.
- Pope v. Gormully*, 144 U. S. 238; 36 L. Ed. 420; 12 S. Ct. 637....150,
 Affg. 34 Fed. 885. 164, 169, 216, 499, 680, 752
 BROWN.
- Pope v. Gormully*, 144 U. S. 248; 36 L. Ed. 423; 12 S. Ct. 641.....214
 Affg. 34 Fed. 893.
 BROWN.
- Pope v. Gormully*, 144 U. S. 254; 36 L. Ed. 426; 12 S. Ct. 643.....684
 Affg. 34 Fed. 896.
 BROWN.
- Portland v. Hermann*, 160 Fed. 91; 87 C. C. A. 247....47, 285, 378, 456, 525
 Eighth; Sanborn, Van Devanter, PHILIPS.
- Potthoff v. Hansen*, 174 Fed. 983; 98 C. C. A. 595.....App. 871
 Affg. 163 Fed. 56.
 Third; GRAY, Buffington, Lanning.
- Potts, In re*, 166 U. S. 263; 41 L. Ed. 994; 17 S. Ct. 520.....897
 Revg. 77 Fed. 454; see 71 Fed. 574.
 GRAY.
- Potts v. Creager*, 97 Fed. 78; 38 C. C. A. 47.....64, 96, 868
 Sixth; TART, Lurton, Thompson.
- Potts v. Creager*, 155 U. S. 597; 39 L. Ed. 275; 15 S. Ct. 194..617, 671, 696
 Revg. 44 Fed. 680.
 BROWN.
- Powder v. Powder*, 98 U. S. 126; 25 L. Ed. 77.....327, 821, 871, 883
 BRADLEY.
- Pratt v. Paris*, 168 U. S. 255; 42 L. Ed. 458; 18 S. Ct. 62.....724
 Affg. 40 N. E. 1032.
 BROWN.
- Press v. Westinghouse*, 135 Fed. 767; 68 C. C. A. 469305
 Revg. 127 Fed. 822.
 Third; Acheson, Dallas, GRAY.
- Pressed Steel v. Hanson*, 137 Fed. 403; 71 C. C. A. 207.....129, 151, 368
 Affg. 128 Fed. 444.
 Third; Acheson, Dallas, GRAY. Dissenting, ACHESON.
- Preston v. Manard*, 116 U. S. 661; 29 L. Ed. 763; 6 S. Ct. 695.....669
 GRAY.
- Prieth v. Campbell*, 80 Fed. 539; 35 C. C. A. 624.....570
 Revg. 77 Fed. 976.
 Third; ACHESON, Dallas, Buffington.
- Price v. Kelly*, 154 U. S. 669; 26 L. Ed. 634; 14 S. Ct. 1208.....399, 488
 WAITE.
- Propfe v. Coddington*, 108 Fed. 86; 47 C. C. A. 218.....463
 Affg. 105 Fed. 951.
 Third; ACHESON, Dallas, Gray.
- Prouty v. Ruggles*, 16 Pet. 336; 10 L. Ed. 985.....473
 Revg. 1 Story, 568.
 TANEY.
- Providence v. Goodyear*, 76 U. S. 805; 19 L. Ed. 828.....891
 SWAYNE.
- Prudential v. Westinghouse*, 158 Fed. 985; 86 C. C. A. 189.....674
 Affg. 155 Fed. 749.
 Third; Dallas, Gray, BUFFINGTON.

CASES EXCERPTED, WITH ANNOTATIONS LXXXV

[References are to sections. "App." refers to Appendix]

- Quincy *v.* Krause, 151 Fed. 1012; 81 C. C. A. 290.....704
 Sixth; LURTON, Severens, Richards.
- Rahley *v.* Columbia, 122 Fed. 623; 58 C. C. A. 639.....543, 714
 Fourth; Goff, SIMONTON, McDowell.
- Railroad *v.* Dubois, 79 U. S. 47; 20 L. Ed. 265....317, 320, 387, 611, 770, 937
 STRONG.
- Railroad *v.* Stimpson, 14 Pet. 448; 10 L. Ed. 535260, 261, 614, 629,
 STORY. 638, 740, 795
- Railroad *v.* Trimble, 77 U. S. 367; 19 L. Ed. 949.....154, 176
 SWAYNE.
- Railroad *v.* Turrill, 94 U. S. 695; 24 L. Ed. 238.....290, 532
 (Cawood Patent.)
 STRONG. Dissenting, Field, Swayne.
- Railroad *v.* Turrill, 101 U. S. 836; 25 L. Ed. 1009.....284, 712
 WAITE.
- Railroad *v.* Turrill, 110 U. S. 301; 28 L. Ed. 154; 4 S. Ct. 5...22, 835, 842
 WAITE.
- Railroad *v.* Winans, 58 U. S. 31; 15 L. Ed. 27.....271, 482
 CAMPBELL.
- Railway *v.* Monroe, 147 Fed. 241; 77 C. C. A. 383.....312
 Affg. 145 Fed. 646.
 Seventh; Baker, Seaman, QUARLES.
- Rainear *v.* Western, 159 Fed. 431; 86 C. C. A. 411.....697
 Affg. 156 Fed. 49.
 Third; Dallas, BUFFINGTON, Cross.
- Rajah *v.* Crossman, 188 Fed. 73; 110 C. C. A. 143.....App. 634
 Affg. 188 Fed. 74.
 Second; COXE, Ward, Noyes.
- Rand, McNally *v.* Exchange, 187 Fed. 984; 110 C. C. A. 322.....App. 698
 Seventh; GROSSCUP, Seaman, Carpenter; dissenting, CARPENTER.
- Ransome *v.* Hyatt, 69 Fed. 148; 16 C. C. A. 185.....680
 Reversing Blanchard *v.* Putnam, 8 Wall. 420, which overruled.
 Corning *v.* Burden, 15 How. 265.
- Revg. Norton *v.* Can Co. 59 Fed. 137.
 Ninth; GILBERT, Knowles, Bellinger.
- Ransome *v.* United Concrete, 177 Fed. 413; 101 C. C. A. 217....App. 672
 Revg. 165 Fed. 914.
 Second; Lacombe, Ward, NOYES.
- Rawson *v.* Hunt, 147 Fed. 239; 77 C. C. A. 381.....874
 Revg. 140 Fed. 716.
 Second; Wallace, Lacombe, TOWNSEND.
- Rawson *v.* Western, 118 Fed. 575; 55 C. C. A. 403.....31
 See 81 Fed. 198; 83 Fed. 706; 86 Fed. 779; 171 U. S. 687.
 Seventh; Jenkins, Grosscup, BAKER.
- Raymond *v.* Keystone, 134 Fed. 866; 67 C. C. A. 492.....495
 Affg. 132 Fed. 30.
 Third; ACHESON, Dallas, Gray.
 Seventh; Woods, JENKINS, Showalter.
- Reckendorfer *v.* Faber, 92 U. S. 347; 23 L. Ed. 719....104, 261, 313, 596,
 617, 629, 656, 674
 HUNT. Dissenting, Strong, Davis, Bradley.
- Red Jacket *v.* Davis, 82 Fed. 432; 27 C. C. A. 204.....397, 411, 476, 903
 Seventh; Woods, JENKINS, Showalter.
- Reece *v.* Fenwick, 140 Fed. 287; 72 C. C. A. 39.....160, 163
 First; Colt, PUTNAM, Aldrich.

LXXXVI CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

- Reece *v.* Globe, 61 Fed. 958; 10 C. C. A. 194...54, 214, 215, 222, 223, 375, 598
 Revg. 54 Fed. 884. Following *Winans v. Denmead*, 15 How. 330.
 First; Colt, PUTNAM, Nelson.
- Reed *v.* Frew, 162 Fed. 887; 89 C. C. A. 577.....176, 928
 Modifying 158 Fed. 552.
 Second; Lacombe, Coxe, NOYES.
- Reed *v.* Smith, 107 Fed. 719; 46 C. C. A. 601.....566, 567, 570
 Revg. 103 Fed. 796.
 Second; LACOMBE, Shipman.
- Reed *v.* Smith, 123 Fed. 878; 59 C. C. A. 366.....208
 Affg. 117 Fed. 322; see 103 Fed. 796; 107 Fed. 719.
 Second; Wallace, LACOMBE, Coxe.
- Reedy *v.* Scott, 90 U. S. 352; 23 L. Ed. 109.....145, 411, 887, 889
 CLIFFORD.
- Reedy *v.* Western, 83 Fed. 709; 28 C. C. A. 27.....717, 720
 Affg. 66 Fed. 163.
 Sixth; Taft, Lurton, CLARK.
- Rees *v.* Gould, 82 U. S. 187; 21 L. Ed. 39.....468, 473
 CLIFFORD.
- Regan *v.* Pacific, 49 Fed. 68; 1 C. C. A. 169.....160, 161, 163, 172
 Revg. 47 Fed. 511.
 Ninth; DEADY, Hanford, Morrow.
- Regensburg *v.* Portuondo, 142 Fed. 160; 73 C. C. A. 378.....593
 Affg. 136 Fed. 866.
 Third; Acheson, Dallas, GRAY.
- Regent *v.* Penn, 121 Fed. 80; 57 C. C. A. 334....208, 385, 579, 604, 635, 693
 Eighth; Jenkins, BAKER, Seaman.
- Reineke *v.* Dixon-Woods, 102 Fed. 349; 42 C. C. A. 388.....207, 246
 Third; ACHESON, Dallas, Gray.
- Reizenstein *v.* Koopman, 178 Fed. 546; 101 C. C. A. 462.....App. 760
 Affg. 176 Fed. 922; see 152 Fed. 173.
 Second; LACOMBE, Ward, Noyes.
- Reliable *v.* Stahl, 105 Fed. 663; 44 C. C. A. 657.....App. 714
 Seventh; Woods, Grosseup, Bunn.
- Reynolds *v.* Buzzell, 96 Fed. 997; 37 C. C. A. 656.....673
 First; Colt, Putnam, Webb.
- Reynolds *v.* Standard, 68 Fed. 483; 15 C. C. A. 516.....358
 Affg. 43 Fed. 304; revg. 65 Fed. 509.
 Third; ACHESON, Wales, Buffington.
- Rich *v.* Baldwin, 133 Fed. 920; 66 C. C. A. 464.....378, 507, 695
 Sixth; Lurton, SEVERENS, Richards.
- Richards *v.* Chase, 158 U. S. 299; 39 L. Ed. 991; 15 S. Ct. 831...313, 323, 325, 594, 669, 708
 Affg. 40 Fed. 165.
 BR.
- Richards *v.* .. 159 U. S. 477; 40 L. Ed. 225; 16 S. Ct. 53....240, 672, 678
 Affg. : 299.
 BR.
- Richardson *v.* .. orne, 93 Fed. 828; 36 C. C. A. 610.....732
 Affg. 82 .. 95.
 Second; Wallace, Lacombe, SHIPMAN.
- Richmond *v.* Atwood, 48 Fed. 910; 1 C. C. A. 144.....630
 Revg. 47 Fed. 219.
 First; Colt, Carpenter, Aldrich.

CASES EXCERPTED, WITH ANNOTATIONS LXXXvii

[References are to sections. "App." refers to Appendix]

- Richmond v. Atwood, 52 Fed. 10; 2 C. C. A. 596....118, 139, 141, 303,
 Rehearing s. c. 48 Fed. 910. 304, 371, 545
 Revg. 47 Fed. 219; followed in 72 Fed. 545; explained
 61 Fed. 208; see 75 Fed. 118, disapproving in part,
 Jones v. Munger, 50 Fed. 785.
 First; Colt, Carpenter, ALDRICH.
- Rickard v. DuBon, 103 Fed. 868; 43 C. C. A. 360.....702
 Affg. 97 Fed. 96.
 Second; WALLACE, Lacombe, Shipman.
- Ries v. Barth, 136 Fed. 850; 69 C. C. A. 528.....506, 507, 674, 690
 Seventh; Jenkins, Grosscup, BAKER.
- Risdon v. Medart, 158 U. S. 68; 39 L. Ed. 899; 15 S. Ct. 745.....431, 649,
 BROWN. 688, 690, 770, 775, 819
- Ritchie v. Obdyke, 65 Fed. 224; 12 C. C. A. 583.....635
 Affg. 65 Fed. 222.
 Third; Acheson, BUTLER, Wales.
- Robbins v. Illinois, 81 Fed. 957; 27 C. C. A. 21.....842, 844
 Affg. 78 Fed. 124.
 Seventh; Woods, Jenkins.
- Roberts v. Bennett, 136 Fed. 193; 69 C. C. A. 533.....335, 712
 Second; Wallace, Lacombe, TOWNSEND.
- Roberts v. Ryer, 91 U. S. 150; 23 L. Ed. 267.....598, 599, 672
 WAITE.
- Robertson v. Blake, 94 U. S. 728; 24 L. Ed. 245.....297, 298, 506
 SWAYNE.
- Robins v. American, 145 Fed. 923; 76 C. C. A. 461.....93, 223, 453, 635
 Affg. 142 Fed. 221.
 Third; Dallas, Gray, Cross.
- Robinson v. American, 135 Fed. 693; 68 C. C. A. 331.....312, 802, 803
 Affg. 132 Fed. 165.
 Seventh; JENKINS, Grosscup, Baker.
- Robinson v. American, 150 Fed. 331; 80 C. C. A. 127.....893, 894
 Revg. 142 Fed. 170.
 Seventh; Grosscup, BAKER, Seaman.
- Robinson v. American, 159 Fed. 131; 86 C. C. A. 321.....89
 See 150 Fed. 331.
 Seventh; Grosscup, Baker, SEAMAN.
- Robinson v. Chicago, 118 Fed. 438; 55 C. C. A. 254.....12, 305
 Seventh; Jenkins, Grosscup. Per Curiam.
- Rodwell v. Tuchfarber, 127 Fed. 138; 62 C. C. A. 252.....408
 Sixth; LURTON, Severens, Richards.
- Roehr v. Bliss, 102 Fed. 692; 42 C. C. A. 593.....615
 Affg. 82 Fed. 98 and 98 Fed. 120.
 Second; Wallace, Lacombe. Per Curiam.
- Roemer v. Neumann, 132 U. S. 103; 33 L. Ed. 277; 10 S. Ct. 12..345, 868
 Affg. 26 Fed. 102.
 GRAY.
- Roemer v. Peddie, 78 Fed. 117; 24 C. C. A. 39.....217, 378
 Affg. 71 Fed. 407.
 Third; Dallas, Butler, WALES.
- Roemer v. Peddie, 81 Fed. 380; 26 C. C. A. 440.....51
 Third; Acheson, DALLAS, Buffington.
- Roemer v. Peddie, 132 U. S. 313; 33 L. Ed. 382; 10 S. Ct. 98.....207
 Affg. 27 Fed. 702.
 BLATCHFORD.

Ixxxviii CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. " App." refers to Appendix]

- Roemer *v.* Simon, 95 U. S. 214; 24 L. Ed. 384. .77, 321, 667, 789, 795, 852
 CLIFFORD.
- Rogers *v.* Fitch, 81 Fed. 959; 27 C. C. A. 23.....65, 616, 630
 Revg. 77 Fed. 885.
 Second; Wallace, LACOMBE, Shipman.
- Rogers *v.* Mergenthaler, 64 Fed. 799; 12 C. C. A. 422.....459, 482, 607
 Affg. 57 Fed. 502; see 58 Fed. 693.
 Third; ACHESON, Dallas, Butler.
- Root *v.* Railway, 105 U. S. 189; 26 L. Ed. 975....283, 290, 291, 296, 371,
 MATTHEWS. 576, 718, 839
- Root *v.* Third Avenue, 146 U. S. 210; 36 L. Ed. 946; 13 S. Ct. 100....416,
 Affg. 37 Fed. 673. 851, 853, 856, 857
 BLATCHFORD.
- Rose *v.* Hirsch, 77 Fed. 469; 23 C. C. A. 246.....453, 531, 634, 679
 Revg. 71 Fed. 881.
 Third; Acheson, BUTLER, Wales. Dissenting, ACHESON.
- Rose *v.* Hirsh, 94 Fed. 177; 36 C. C. A. 132.....288
 Revg. 91 Fed. 149.
 Third; Acheson, Kirkpatrick, BUFFINGTON.
- Ross *v.* Dowden, 157 Fed. 681; 85 C. C. A. 449.....214, 591
 Eighth; Van Devanter, Adams, RINER.
- Ross *v.* Fort Wayne, 63 Fed. 466; 11 C. C. A. 288.....717, 720
 Revg. 58 Fed. 404.
 Seventh; Woods, Jenkins, Seaman.
- Ross-Moyer *v.* Randall, 104 Fed. 355; 43 C. C. A. 578.....221, 905
 Sixth; Lurton, DAY, Severens.
- Roth *v.* Harris, 168 Fed. 279; 93 C. C. A. 581.....App. 72, 277, 390, 625
 Modfg. 162 Fed. 160.
 Second; Lacombe, COXE, Noyes.
- Rousseau *v.* Peck, 78 Fed. 113; 24 C. C. A. 7.....229
 Affg. 66 Fed. 759.
 Second; Lacombe, SHIPMAN.
- Rowe *v.* Blodgett, 112 Fed. 61; 50 C. C. A. 120.....337, 928
 Affg. 103 Fed. 873.
 Second; Wallace, Lacombe. Per Curiam.
- Rowell *v.* Lindsay, 113 U. S. 97; 28 L. Ed. 906; 5 S. Ct. 507...468, 573, 609
 Affg. 6 Fed. 290.
 Woods.
- Rowland *v.* Biesecker, 185 Fed. 515; 107 C. C. A. 615.....App. 755, 762
 Affg. 181 Fed. 128.
 Second; LACOMBE, Coxе, Ward.
- Royer *v.* Coupe, 146 U. S. 524; 36 L. Ed. 1073; 13 S. Ct. 166.....297,
 Affg. 38 Fed. 113. 497, 520, 685, 814
 BLATCHFORD.
- Royer *v.* Roth, 132 U. S. 201; 33 L. Ed. 322; 10 S. Ct. 58.....609, 672
 BLATCHFORD.
- Royer *v.* Schultz, 135 U. S. 319; 34 L. Ed. 214; 10 S. Ct. 833.....492
 Revg. 28 Fed. 850; 29 Fed. 281.
 BLATCHFORD.
- Rubber *v.* Goodyear, 76 U. S. 788; 19 L. Ed. 566....26, 41, 222, 770, 789,
 SWAYNE. 807, 823, 830, 832, 833, 834, 839, 843, 847, 873
- Rubber *v.* Welling, 97 U. S. 7; 24 L. Ed. 942.....47
 HUNT.
- Rubber Tip *v.* Howard, 87 U. S. 498; 22 L. Ed. 410....649, 672, 683, 775
 WAITE.

CASES EXCERPTED, WITH ANNOTATIONS Ixxxix

[References are to sections. "App." refers to Appendix]

- Rubber Tire v. Goodyear*, 183 Fed. 978; 106 C. C. A. 318. App. 31, 576
 See 164 Fed. 869; 116 Fed. 363; 151 Fed. 237; 157 Fed. 677.
 Sixth; Severens, WARRINGTON, Knappen.
- Rubber Tire v. Milwaukee*, 154 Fed. 358; 83 C. C. A. 336. 29, 744, 745,
 764, 920
 Affd. as to pat. 220 U. S. 428; revg. 142 Fed. 531.
 Seventh; Grosseup, BAKER, Kohlsaet.
- Rubber Tire v. Victor*, 123 Fed. 85; 59 C. C. A. 215. 31
 Revd. as to validity of pat. 220 U. S. 428.
 Sixth; LURTON, Severens, Richards.
- Rubens v. Wheatfield*, 93 Fed. 677; 35 C. C. A. 537. 540
 Seventh; Woods, Jenkins, Showalter.
- Rude v. Westcott*, 130 U. S. 152; 32 L. Ed. 888; 9 S. Ct. 463. . 153, 292, 295
 FIELD.
- Rumford v. Hygienic*, 159 Fed. 436; 86 C. C. A. 416. 474, 711, 894
 Revd. 215 U. S. 156.
 Second; Lacombe, COXE, Noyes.
- Rumford v. Hygienic*, 215 U. S. 156; 54 L. Ed. 137; 30 S. Ct. 45. . App. 37,
 Affg. 154 Fed. 65; revg. 159 Fed. 436. 386
 HOLMES.
- Rumford v. New York*, 134 Fed. 385; 67 C. C. A. 367. 314, 700
 Revg. in part 125 Fed. 231.
 Second; Wallace, Townsend, COXE.
- Rupp v. Elliott*, 131 Fed. 730; 65 C. C. A. 544. 474, 477, 559, 714
 Sixth; LURTON, Severens, Richards.
- Russell v. Dodge*, 93 U. S. 460; 23 L. Ed. 973. 260, 871
 FIELD.
- Russell v. Kern*, 69 Fed. 94; 16 C. C. A. 154. 111, 356, 717, 719, 810
 Affg. 64 Fed. 581.
 Seventh; Woods, Jenkins, Showalter.
- Ryan v. Hard*, 145 U. S. 241; 36 L. Ed. 691; 12 S. Ct. 919. 696
 Affg. 35 Fed. 831.
 BLATCHFORD.
- Ryan v. Metropolitan*, 144 Fed. 697; 75 C. C. A. 513. 219
 Affg. 139 Fed. 579.
 Second; Townsend, COXE.
- Ryan v. Runyon*, 93 Fed. 970; 36 C. C. A. 36. 213
 Third; ACHESON, Dallas, Buffington.
- Ryder v. Schlichter*, 126 Fed. 487; 61 C. C. A. 469. 219, 223, 506
 Revg. 121 Fed. 98.
 Third; Acheson, Gray, McPHERSON.
- St. Claire v. Union Jack*, 184 Fed. 989; 106 C. C. A. 667. App. 927
 Seventh; Grosseup, Baker, Seaman. Per Curiam.
- St. Germain v. Brunswick*, 135 U. S. 227; 34 L. Ed. 122; 10 S. Ct. 822. . 671
 FULLER.
- St. Louis v. American*, 156 Fed. 574; 84 C. C. A. 340. 68, 207, 433, 525,
 Eighth; Sanborn, Hook, ADAMS. 635, 673
- St. Louis v. National*, 87 Fed. 885; 31 C. C. A. 265. 216, 376, 473, 610, 680
 Affg. 81 Fed. 706.
 Sixth; LURTON, Severens, Clark.
- St. Louis v. Sanitary*, 161 Fed. 725; 88 C. C. A. 585. 384, 552, 571, 714
 Eighth; Hook, ADAMS, Carland.
- St. Louis v. Sanitary*, 178 Fed. 923; 103 C. C. A. 565. App. 205, 635,
 759, 761, 764 .
 Eighth; Adams, RINER, Munger.

XC CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- St. Paul *v.* Starling, 140 U. S. 184; 35 L. Ed. 404; 11 S. Ct. 803.....131,
392, 399, 638, 735, 762, 763, 809
Affg. 29 Fed. 790; 32 Fed. 290.
BLATCHFORD.
- Safety Car Heating *v.* Consolidated, 174 Fed. 658; 98 C. C. A. 412..App. 95,
728
Affg. 160 Fed. 476.
Second; Lacombe, Coxe, Ward. Per Curiam.
- Sampson *v.* Donaldson, 69 Fed. 621; 16 C. C. A. 342.....657
Affg. 62 Fed. 275.
Eighth; Caldwell, SANBORN, Thayer.
- Sander *v.* Rose, 121 Fed. 835; 58 C. C. A. 171.....442
Eighth; Caldwell, Sanborn, THAYER.
- Sanders *v.* Hancock, 128 Fed. 424; 63 C. C. A. 166...95, 603, 631, 634, 937
Sixth; Lurton, SEVERENS, Richards.
- San Francisco *v.* Keating, 68 Fed. 351; 15 C. C. A. 476.....603
Ninth; Gilbert, Hanford, HAWLEY.
- Sanitary *v.* Sprickerhoff, 139 Fed. 801; 71 C. C. A. 565.....919
Revg. 131 Fed. 868.
Second; Wallace, Lacombe, COXE. Dissenting, WALLACE.
- Sanitas *v.* Voigt, 139 Fed. 551; 71 C. C. A. 535.....821, 823
Sixth; LURTON, Severens, Evans.
- Santa Clara *v.* Prescott, 102 Fed. 501; 42 C. C. A. 477.....195
Ninth; GILBERT, Ross, Hawley.
- Sargent *v.* Hall, 114 U. S. 63; 29 L. Ed. 67; 5 S. Ct. 1021.....207
BLATCHFORD.
- Saunders *v.* Allen, 60 Fed. 610; 9 C. C. A. 157.....75, 636
Affg. 53 Fed. 109.
Second; Wallace, LACOMBE, Shipman.
- Sawyer *v.* Carpenter, 143 Fed. 976; 75 C. C. A. 162.....420
Affg. 133 Fed. 238.
First; Colt, Putnam, LOWELL.
- Sayre *v.* Scott, 55 Fed. 971; 5 C. C. A. 366.....503, 635, 828, 837
Third; ACHESON, Butler, Wales.
- Schenck *v.* Diamond, 77 Fed. 208; 23 C. C. A. 122.....78, 634
Affg. 71 Fed. 521.
Third; Acheson, BUTLER, Wales.
- Schenck *v.* Diamond, 73 Fed. 22; 19 C. C. A. 352.....App. 144
Third; ACHESON, Wales, Green.
- Schenck *v.* Singer, 77 Fed. 841; 23 C. C. A. 494.....246, 606, 626
Affg. 68 Fed. 191.
Second; WALLACE, Lacombe, Shipman.
- Schillinger *v.* United States, 155 U. S. 163; 39 L. Ed. 108; 15 S. Ct. 85
....429, 498
Affg. 24 Ct. Cl. 278.
BREWER; dissenting opinion HARLAN, Shiras.
- Schmitt *v.* Nelson, 125 Fed. 754; 60 C. C. A. 522.....176
Affg. 121 Fed. 93.
Third; Acheson, Gray, McPHERSON. Dissenting, ACHESON.
- Schock *v.* Olsen, 147 Fed. 229; 77 C. C. A. 371.....207
Affg. 145 Fed. 633.
Seventh; Grosscup, Baker, SEAMAN.
- Schreiber *v.* Adams, 117 Fed. 830; 54 C. C. A. 128.....203
Revg. 111 Fed. 182.
Eighth; Sanborn, Thayer, LOCHREN.

[References are to sections. "App." refers to Appendix]

Schreiber *v.* Grimm, 72 Fed. 671; 19 C. C. A. 67.....363, 672
 Affg. 65 Fed. 220; distinguishing Potts *v.* Creager, 155 U. S. 597;
 Electric *v.* LaRue, 139 U. S. 601.
 Sixth; Taft, Lurton, SEVERENS.

Schumacher *v.* Cornell, 96 U. S. 549; 24 L. Ed. 676.....473, 604
 SWAYNE.

Schuyler *v.* Electric, 66 Fed. 313; 13 C. C. A. 491.....212
 Affg. 62 Fed. 588.
 Second; Wallace, LACOMBE.

Schwarzalder *v.* New York, 66 Fed. 152; 13 C. C. A. 380.....200, 341, 822
 Affg. 61 Fed. 840; see 62 Fed. 582.
 Second; WALLACE, Lacombe, Coxe.

Schwab *v.* Apstein, 178 Fed. 91; 101 C. C. A. 455.....App. 74
 Affg. 172 Fed. 149.
 Second; Lacombe, Coxe, Ward, Per Curiam.

Schweichler *v.* Levison, 147 Fed. 704; 78 C. C. A. 92.....207
 Seventh; GROSSCUP, Baker, Seaman.

Scofield *v.* Browne, 158 Fed. 305; 85 C. C. A. 556.....331
 Third; DALLAS, Gray, Buffington.

Scott *v.* Fisher, 145 Fed. 915; 76 C. C. A. 447...241, 481, 631, 644, 782, 911
 Revg. 139 Fed. 137.
 Second; Lacombe, Townsend, Coxe. Per Curiam.

Scott *v.* Hoe, 70 Fed. 781; 17 C. C. A. 410.....503
 Affg. 65 Fed. 606.
 Third; DALLAS, Butler, Wales.

Scott *v.* Lazell, 160 Fed. 472; 87 C. C. A. 456.....389, 496
 Second; Lacombe, COXE, Ward.

Scott *v.* Laas, 150 Fed. 764; 80 C. C. A. 500.....561, 895
 Seventh; Grosscup, Baker, SEAMAN.

Seabury *v.* Am Ende, 152 U. S. 561; 38 L. Ed. 553; 14 S. Ct. 683.....816,
 Affg. 43 Fed. 672. 832, 833, 917
 SHIRAS.

Seal *v.* Bookkeeper, 130 Fed. 449; 64 C. C. A. 651.....762
 Sixth; Lurton, Severens, RICHARDS.

Seattle *v.* McNamara, 81 Fed. 863; 26 C. C. A. 652.....287
 Ninth; GILBERT, Ross, Hawley.

Sechler *v.* Deere, 113 Fed. 285; 51 C. C. A. 242.....164, 165, 798
 Seventh; JENKINS, Grosscup, Bunn.

Seiler *v.* Fuller, 102 Fed. 344; 42 C. C. A. 386.....546, 557, 579
 Ninth; GILBERT, Ross, Hawley. Dissenting, Ross.

Seiler *v.* Fuller, 121 Fed. 85; 57 C. C. A. 339.....223, 616, 679
 Seventh; Jenkins, Grosscup, BAKER.

Seiden Patent, see Columbia *v.* Duerr, 184 Fed. 893.

Sessions *v.* Gould, 63 Fed. 1001; 11 C. C. A. 550.....537
 Affg. 49 Fed. 855; 60 Fed. 753.
 Second; Brown, Wallace, Shipman. Per Curiam.

Sessions *v.* Romadka, 145 U. S. 29; 36 L. Ed. 609; 12 S. Ct. 799....183,
 197, 290, 344, 532, 626, 777, 846, 927
 Revg. 21 Fed. 124.
 BROWN.

Sewall *v.* Jones, 91 U. S. 171; 23 L. Ed. 275....459, 499, 503, 529, 667,
 HUNT. Dissenting, CLIFFORD. 904, 906, 910

Seymour *v.* McCormick, 16 How. 480; 14 L. Ed. 1024...280, 290, 292, 298
 Revg. 2 Blatchf. 240.
 GRIER.

[References are to sections. "App." refers to Appendix]

- Seymour *v.* McCormick, 60 U. S. 96; 15 L. Ed. 557.....105
 NELSON. Dissenting, Grier.
- Seymour *v.* Osborne, 78 U. S. 516; 20 L. Ed. 33....11, 198, 230, 263, 317,
 320, 374, 416, 433, 440, 472, 494, 526, 674, 745, 746, 748, 779,
 CLIFFORD. 795, 804, 807, 811, 862, 871, 880, 888, 889, 937
- Sharp *v.* Reissner, 119 U. S. 631; 30 L. Ed. 507; 7 S. Ct. 417.....230
 Affg. 15 Fed. 919.
 BLATCHFORD.
- Shaw *v.* American, 108 Fed. 842; 48 C. C. A. 68.....723, 807
 Fifth; Pardee, McCormick, SHELBY.
- Shaw *v.* Cooper, 7 Pet. 292; 8 L. Ed. 689.....16, 744, 858, 889
 McLEAN.
- Shaw *v.* Shriver, 86 Fed. 466; 30 C. C. A. 196.....696
 See 77 Fed. 992.
 Second; Wallace, Lacombe, Shipman. Per Curiam.
- Sheffield *v.* D'Arcey, 194 Fed. 686; — C. C. A. —....App. 65, 539, 615, 675
 Sixth; Warrington, McCall, SANFORD.
- Shepard *v.* Carrigan, 116 U. S. 593; 29 L. Ed. 723; 6 S. Ct. 493207
 WOODS.
- Shepard *v.* Kinnear, 86 Fed. 638; 30 C. C. A. 315.....752
 Second; WALLACE, Lacombe, Shipman.
- Sheridan *v.* Law, 172 Fed. 223; 97 C. C. A. 27.....App. 371
 Seventh; GROSSCUP, Baker, Seaman.
- Shickle *v.* St. Louis, 77 Fed. 739; 23 C. C. A. 433.....476, 524
 Revg. 70 Fed. 783.
 Eighth; Caldwell, Sanborn, THAYER.
- Shoemaker *v.* Merrow, 61 Fed. 945; 10 C. C. A. 181.....14, 207, 584, 810
 Revg. 59 Fed. 120.
 Third; Acheson, BUTLER, Wales.
- Shute *v.* Morley, 64 Fed. 368; 12 C. C. A. 356.....305
 Modifying 62 Fed. 291; as to scope of decree entered, only.
 First; Putnam, Nelson, Webb. Per Curiam.
- Siemens *v.* Sellers, 123 U. S. 276; 31 L. Ed. 153; 3 S. Ct. 117.....423
 BRADLEY.
- Siemens-Halske *v.* Duncan, 142 Fed. 157; 73 C. C. A. 375.....213, 451,
 797, 935
 Seventh; GROSSCUP, BAKER, Seaman.
- Sigafus *v.* Porter, 85 Fed. 689; 29 C. C. A. 391.....143
 Second; Lacombe, Shipman. Per Curiam.
- Silsby *v.* Foote, 14 How. 218; 14 L. Ed. 394.....411, 492, 734, 737, 795
 CURTIS. Dissenting, McLean.
- Silsby *v.* Foote, 61 U. S. 378; 15 L. Ed. 953.....274, 284
 NELSON. Dissenting, GRIER, Daniel.
- Simonds *v.* Hathorn, 93 Fed. 958; 36 C. C. A. 24.....59, 214, 797
 Modifying 90 Fed. 201.
 First; COLT, Webb, Aldrich.
- Simplex *v.* Wands, 115 Fed. 517; 53 C. C. A. 171587
 Eighth; Caldwell, Sanborn, THAYER.
- Simplex Railway *v.* Pressed Steel, 189 Fed. 70; 110 C. C. A. 634...App. 222,
 Affg. 177 Fed. 426. 341, 487
 Second; Lacombe, COXE, Ward.
- Simpson *v.* Wilson, 4 How. 709; 11 L. Ed. 1169.....175
 NELSON.
- Singer *v.* Brill, 54 Fed. 380; 4 C. C. A. 374.....131, 404, 471, 629, 635
 Ninth; McKenna, GILBERT, Knowles.

CASES EXCERPTED, WITH ANNOTATIONS **xciii**

[References are to sections. "App." refers to Appendix]

- Singer v. Kramer*, 192 U. S. 265; 48 L. Ed. 437; 24 S. Ct. 291....207, 214,
 Revg. 109 Fed. 652. 496, 938
 WHITE.
- Singer v. Cramer*, 109 Fed. 652; 48 C. C. A. 588.....55, 295, 435, 894
 Rev. in 192 U. S. 265.
 Ninth; GILBERT, Ross, Hawley.
- Singer v. June*, 163 U. S. 169; 41 L. Ed. 118; 16 S. Ct. 1002.....928
 Revg. 41 Fed. 208. (See grounds stated and form of decree ordered.)
 WHITE.
- Sipp v. Atwood-Morrison*, 142 Fed. 149; 73 C. C. A. 367.....74
 Revg. 136 Fed. 859.
 Third; Acheson, Dallas, GRAY.
- Sizer v. Many*, 16 How. 98; 14 L. Ed. 861.....130, 140, 276
 TANEY.
- Slawson v. Grand*, 107 U. S. 649; 27 L. Ed. 576; 2 S. Ct. 663....653, 708
 WOODS.
- Sloan v. Portland*, 139 Fed. 23; 71 C. C. A. 460.....380, 437
 Eighth; Sanborn, Hook, Lochren.
- Sly v. Russell*, 189 Fed. 61; 110 C. C. A. 625.....App. 2, 207, 228, 229,
 Sixth; KNAPPEN, McCall, Sater. 378, 379, 603
- Smead v. Fuller*, 57 Fed. 626; 6 C. C. A. 481.....222
 See same patent 44 Fed. 614.
 Second; Lacombe, SHIPMAN.
- Smeeth v. Perkins*, 125 Fed. 285; 60 C. C. A. 199.....223
 Third; ACHESON, Dallas, Kirkpatrick.
- Smidth v. Bonneville*, 114 Fed. 262; 52 C. C. A. 148.....630
 Affg. 106 Fed. 930.
 Third; Acheson, Dallas, GRAY.
- Smith v. Ely*, 15 How. 137; 12 L. Ed. 634.....807
 Referred back on authority of *O'Reilly v. Morse*, 15 How. 62.
 TANEY.
- Smith v. Goodyear*, 93 U. S. 486; 23 L. Ed. 952.....6, 626, 629, 667,
677, 889
 STRONG; dissenting BRADLEY; also Miller and Field.
- Smith v. Macbeth*, 67 Fed. 137; 14 C. C. A. 241.....67, 207
 Revg. 64 Fed. 797.
 Second; Wallace, Lacombe, SHIPMAN.
- Smith v. Nichols*, 88 U. S. 112; 22 L. Ed. 566...343, 431, 440, 506, 614, 867
 SWAYNE.
- Smith v. Ridgley*, 103 Fed. 875; 43 C. C. A. 365.....198, 384, 663, 765
 Sixth; Lurton, Day, SEVERENS.
- Smith v. Sprague*, 123 U. S. 249; 31 L. Ed. 141; 8 S. Ct. 122..416, 851, 863
 Revg. 12 Fed. 721.
 MATTHEWS.
- Smith v. Whitman*, 148 U. S. 674; 37 L. Ed. 606; 13 S. Ct. 768.....332,
334, 337, 635
 Revg. 38 Fed. 414. Discriminating 81 U. S. 511.
 FULLER.
- Smith & Davis v. Mellon*, 58 Fed. 705; 7 C. C. A. 439.....18, 321
 Affg. 52 Fed. 149.
 Eighth; BREWER, Sanborn.
- Smyth v. Sheridan*, 149 Fed. 208; 79 C. C. A. 166.....397, 591
 Second; Lacombe, Townsend, Coxe. Per Curiam.
- Snead v. Scheble*, 175 Fed. 570; 99 C. C. A. 578.....App. 806
 Sixth; Lurton, Severens, WARRINGTON.

xciv CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

| | |
|--|---------------------|
| Snow <i>v.</i> Railway, 121 U. S. 617; 30 L. Ed. 1004; 7 S. Ct. 1343 | 212, 223 |
| Affg. 18 Fed. 602. | |
| MATTHEW'S. | |
| Societe <i>v.</i> Allen, 90 Fed. 815; 33 C. C. A. 282 | 544, 555 |
| Affg. 84 Fed. 812. | |
| Sixth; TAFT, Lurton, Clark. | |
| Societe <i>v.</i> Lueders, 142 Fed. 753; 74 C. C. A. 15 | 341, 505 |
| Affg. 135 Fed. 102. | |
| Second; Lacombe, Townsend, Coxe. Per Curiam. | |
| Soehner <i>v.</i> Favorite, 84 Fed. 182; 28 C. C. A. 317 | 223, 331, 335, 337, |
| Sixth; Taft, Lurton, SEVERENS. 646, 649 | |
| Solomons <i>v.</i> United States, 137 U. S. 342; 34 L. Ed. 667; 11 S. Ct. 88 | 366, |
| Affg. 21 Ct. Cl. 479. 429 | |
| BREWER. | |
| Solvay <i>v.</i> Michigan, 90 Fed. 818; 33 C. C. A. 285 | 661, 672 |
| Sixth; TAFT, Lurton, Clark. | |
| Southern <i>v.</i> Earl, 82 Fed. 690; 27 C. C. A. 185 | 544, 549, 561, 579 |
| Affg. 75 Fed. 609. | |
| Ninth; Gilbert, Hawley, DEHAVEN. | |
| Spear <i>v.</i> Kelsey, 158 Fed. 622; 85 C. C. A. 444 | 48, 606 |
| Revg. 155 Fed. 976. | |
| Third; Dallas, GRAY, Buffington. | |
| Sprague <i>v.</i> Nassau, 95 Fed. 821; 37 C. C. A. 286 | 570 |
| Second; Wallace, Shipman. Per Curiam. | |
| Sprague <i>v.</i> Nassau, 102 Fed. 761; 42 C. C. A. 612 | 195 |
| Affg. 97 Fed. 609; see 88 Fed. 82; 77 Fed. 432; 95 Fed. 821; 88 Fed. 82. | |
| Second; Wallace, Lacombe, SHIPMAN. | |
| Sproull <i>v.</i> Pratt & Whitney, 108 Fed. 963; 48 C. C. A. 167 | 305, 760 |
| Affg. 101 Fed. 265. | |
| Second; Lacombe, SHIPMAN. | |
| Standard Cartridge <i>v.</i> Peters, 77 Fed. 630; 23 C. C. A. 367 | 72, 582, |
| Affg. 69 Fed. 408. 682, 811 | |
| Sixth; Taft, LURTON, Hammond. | |
| Standard Caster <i>v.</i> Caster, 113 Fed. 162; 51 C. C. A. 109 | 461, 615, 672 |
| Sixth; LURTON, Day, Severens. | |
| Standard Computing <i>v.</i> Computing, 126 Fed. 639; 61 C. C. A. 541 | 437, |
| 475, 591, 704 | |
| Sixth; Lurton, SEVERENS, Cochran. | |
| Standard Computing <i>v.</i> Computing, 145 Fed. 627; 76 C. C. A. 384 | 137 |
| Sixth; Per Curiam. | |
| Standard Elevator <i>v.</i> Crane, 76 Fed. 767; 22 C. C. A. 549 | 111, 116, 117, |
| 158, 301, 327, 827 | |
| Seventh; Woods, SHOWALTER, Bunn. Dissenting WOODS. | |
| Standard Elevator <i>v.</i> Crane, 56 Fed. 718; 6 C. C. A. 100 | 398, 562, 565 |
| Seventh; Gresham, Woods, JENKINS. | |
| Standard Elevator <i>v.</i> Ramsey, 143 Fed. 972; 75 C. C. A. 158 | 86, 507 |
| Affg. 139 Fed. 28. | |
| Third; ACHESON, Dallas, Gray. | |
| Standard Folding Bed <i>v.</i> Osgood, 58 Fed. 583; 7 C. C. A. 382 | 468 |
| Revg. 51 Fed. 675. | |
| First; COLT, Webb, Carpenter. | |
| Standard Machine <i>v.</i> Rambo, 188 Fed. 323; 110 C. C. A. 301 | App. 646 |
| Affg. 181 Fed. 157. | |
| Third; Gray, LANNING, McPherson. | |

[References are to sections. "App." refers to Appendix]

- Standard Oil *v.* Southern, 54 Fed. 521; 4 C. C. A. 491....479, 595, 596, 798
 Affg. 48 Fed. 109; 42 Fed. 295.
 Ninth; McKenna, Gilbert, MORROW.
- Standard Sanitary *v.* Arrott, 135 Fed. 750; 68 C. C. A. 388....381, 382,
 Affg. 131 Fed. 457. 387, 752, 764, 807
 Third; Dallas, GRAY, Bradford.
- Standard Scales *v.* Fairbanks, 125 Fed. 4; 60 C. C. A. 91.....628
 Third; Acheson, Dallas, KIRKPATRICK.
- Standard Sewing Mach. *v.* Leslie, 78 Fed. 325; 24 C. C. A. 107....753, 761
 Seventh; Woods, JENKINS, Showalter.
- Standard Typewriter *v.* Standard, 181 Fed. 500; 104 C. C. A. 248
 Second; Ward, NOYES, Hand. App. 554, 555
- Staples *v.* Lord, 148 Fed. 15; 78 C. C. A. 106.....544
 First; Colt, Putnam, Aldrich. Per Curiam.
- Star *v.* Crescent, 179 Fed. 856; 103 C. C. A. 342.....App. 10
 Seventh; Grosscup, Baker, SEAMAN.
- Star *v.* General, 111 Fed. 398; 49 C. C. A. 409.....631, 635
 Sixth; Lurton, DAY, Severens.
- Star *v.* General, 129 Fed. 102; 63 C. C. A. 604.....545
 See 109 Fed. 950.
 Sixth; LURTON, Severens, Richards.
- Starrett *v.* Stevens, 100 Fed. 93; 40 C. C. A. 289.....217
 Affg. 96 Fed. 244.
 First; Putnam, Webb, ALDRICH.
- State Bank *v.* Hillmans, 180 Fed. 732; 104 C. C. A. 98.....App. 212
 Affg. 180 Fed. 737.
 Seventh; GROSSCUP, Baker, Seaman.
- Stearns *v.* Russell, 85 Fed. 218; 29 C. C. A. 121.....216, 672, 770
 Sixth; TAFT, Lurton, Severens.
- Stearns-Roger *v.* Brown, 114 Fed. 939; 52 C. C. A. 559539, 542, 543,
 Eighth; Caldwell, SANBORN, Thayer. 544, 551, 568
- Steiner *v.* Adrian, 59 Fed. 132; 8 C. C. A. 44672
 Affg. 52 Fed. 731.
 Sixth; Brown, TAFT, Severens.
- Steinmetz *v.* Allen, 192 U. S. 543; 48 L. Ed. 555; 24 S. Ct. 416....348,
 McKENNA. 383, 770, 784, 786
- Stephens *v.* Cady, 14 How. 528; 14 L. Ed. 528.....157
 See Stevens *v.* Gladding, 58 U. S. 447.
 NELSON.
- Stephenson *v.* Brooklyn, 114 U. S. 149; 29 L. Ed. 58; 5 S. Ct. 777....607,
 WOODS. 654, 672
- Stevens *v.* Gladding, 58 U. S. 447; 15 L. Ed. 155.....829
 See Stephens *v.* Cady, 14 How. 528.
 CURTIS.
- Stevens *v.* Rodgers, 186 Fed. 631; 108 C. C. A. 495.....App. 616, 795
 Sixth; Severens, Cochran, SATER.
- Stevenson *v.* McFassell, 90 Fed. 707; 33 C. C. A. 249.....635
 Revg. 88 Fed. 278.
 Third; ACHESON, Butler, Kirkpatrick.
- Steward *v.* American, 215 U. S. 161; 54 L. Ed. 139; 30 S. Ct. 46..App. 398,
 Affg. 155 Fed. 731 and 740; revg. 128 Fed. 599. 780
 HOLMES.
- Stewart *v.* Smith, 58 Fed. 580; 7 C. C. A. 380.....334
 Affg. 55 Fed. 481.
 Third; Acheson, DALLAS, Wales.

[References are to sections: "App." refers to Appendix]

Stillwell-Bierce *v.* Eufaula, 117 Fed. 410; 54 C. C. A. 584....223, 666, 673,
911
Sixth; Lurton, DAY, Severens.

Stilwell *v.* McPherson, 183 Fed. 586; 106 C. C. A. 354.....App. 325
Revg. 172 Fed. 151; see 183 Fed. 426.
Second; LACOMBE, Coxe, Ward.

Stimpson *v.* Railroad, 4 How. 380; 11 L. Ed. 1020.....522
McLEAN.

Stimpson *v.* Railroad, 10 How. 329; 13 L. Ed. 441... ..136, 473
DANIEL.

Stimpson *v.* Stimpson, 104 Fed. 893; 44 C. C. A. 241...385, 746, 764, 928
Sixth; Lurton, Day, SEVERENS.

Stimpson *v.* Woodman, 77 U. S. 117; 19 L. Ed. 866...597, 661, 672, 675
NELSON. Dissenting, CLIFFORD.

Stirrat *v.* Excelsior, 61 Fed. 980; 10 C. C. A. 216.....211, 216, 224, 380
Affg. 60 Fed. 607.
Eighth; Caldwell, SANBORN.

Stohlmann *v.* Parker, 53 Fed. 925; 4 C. C. A. 109.....440
Second; Wallace, Lacombe, SHIPMAN.

Stokes *v.* Heller, 101 Fed. 266; 41 C. C. A. 335.....211
Affg. 96 Fed. 104.
Third; ACHESON, Dallas, Gray.

Stover *v.* Mast, 89 Fed. 333; 32 C. C. A. 231.....539, 633
Revg. 85 Fed. 782.
Seventh; Woods, Showalter, Bunn.

Stow *v.* Chicago, 104 U. S. 547; 26 L. Ed. 816.....188, 197
WOODS.

Streator *v.* Wire Glass, 97 Fed. 950; 38 C. C. A. 573....85, 496, 629, 632,
635, 819
Seventh; BROWN, Woods, Jenkins, dissenting WOODS.

Streit *v.* Kaiper, 143 Fed. 981; 75 C. C. A. 167.....665
Sixth; Lurton, SEVERENS, Richards.

Strom *v.* Weir, 83 Fed. 170; 27 C. C. A. 502.....326, 696, 774
Affg. 75 Fed. 279.
Sixth; Taft, Lurton, SEVERENS.

Stromberg-Carlson *v.* American, 127 Fed. 704; 62 C. C. A. 460.....548
Seventh; Jenkins, Grosseup, BAKER.

Stuart *v.* Auger, 149 Fed. 748; 79 C. C. A. 60.....79
Affg. 139 Fed. 935.
Third; Dallas, Gray, BRADFORD.

Suffolk *v.* Hayden, 70 U. S. 315; 18 L. Ed. 76.....5, 287, 356
NELSON.

Sullivan *v.* Railroad, 94 U. S. 806; 24 L. Ed. 324.....719, 793
SWAYNE.

Sutter *v.* Robinson, 119 U. S. 530; 30 L. Ed. 492; 7 S. Ct. 376....207, 216
Revg. 8 Fed. 828; 11 Fed. 798.
MATTHEWS.

Swain *v.* Holyoke, 109 Fed. 154; 48 C. C. A. 265.....851, 853, 856
Affg. 102 Fed. 910.
First; COLT, Putnam, Webb.

Swain *v.* Holyoke, 111 Fed. 408; 49 C. C. A. 419.....74
See 109 Fed. 154.
First; Colt, PUTNAM, Webb.

Swain *v.* Ladd, 102 U. S. 408; 26 L. Ed. 184.....871
BRADLEY.

CASES EXCERPTED, WITH ANNOTATIONS xcvii

[References are to sections. "App." refers to Appendix]

- Tabor Co. v. Mumford Co.** 191 Fed. 166; 111 C. C. A. 644.....App. 207
 Affg. 190 Fed. 179.
 Third; Gray, Buffington, LANNING.
- Talbot v. Fear**, 89 Fed. 197; 32 C. C. A. 186.....639
 Seventh; Woods, Showalter, BUNN.
- Tannage v. Zahn**, 70 Fed. 1003; 17 C. C. A. 552.....618
 Revg. 66 Fed. 986. Following *Potts v. Creager*, 155 U. S. 606.
 Third; Acheson, DALLAS, Butler.
- Taylor v. Sawyer**, 75 Fed. 301; 22 C. C. A. 203.....245, 568, 673
 Affg. 69 Fed. 837.
 Third; Acheson, WALES, Green.
- Tayntor v. Goetchius**, 183 Fed. 130; 105 C. C. A. 420.....App. 684
 Affg. 171 Fed. 108.
 Second; Lacombe, COXE, Noyes.
- Teese v. Huntington**, 23 How. 2; 16 L. Ed. 479.....795
 CLIFFORD.
- Telephone Cases**, 126 U. S. 1; 31 L. Ed. 863; 8 S. Ct. 778....59, 147, 148,
 347, 424, 589, 639, 643, 811, 819, 865, 906
 Affg. 15 Fed. 448; 17 Fed. 604; affg. in part, 32 Fed. 214; affg. 22 Fed.
 309; 25 Fed. 725; see 31 Fed. 729; 27 Fed. 663.
 WAITE; dissenting BRADLEY, Field, Harlan.
- Temple v. Goss**, 58 Fed. 196; 7 C. C. A. 174.....207, 211, 598
 Seventh; Woods, Jenkins, Baker.
- Terhune v. Phillips**, 99 U. S. 592; 25 L. Ed. 293.....696, 710
 FIELD.
- Thatcher v. Burtis**, 121 U. S. 286; 30 L. Ed. 942; 7 S. Ct. 1034.....596
 Affg. 12 Fed. 569.
 MATTHEWS.
- The Fair v. Dover**, 166 Fed. 117; 92 C. C. A. 43.....744
 Seventh; Grosscup, BAKER, Seaman.
- Thibodeau v. Hildreth**, 124 Fed. 892; 60 C. C. A. 78.....368
 Affg. 117 Fed. 146.
 First; Putnam, Brown, LOWELL.
- Thomas v. Rucker**, 77 Fed. 420; 23 C. C. A. 211.....207, 209, 224, 592
 Revg. 68 Fed. 196.
 Sixth; TAFT, Lurton, Hammond.
- Thomas v. St. Louis**, 149 Fed. 753; 79 C. C. A. 89.....325
 Sixth; Lurton, Severens, RICHARDS.
- Thomasson v. Bumpass**, 78 Fed. 491; 24 C. C. A. 180.....202, 592
 Affg. 74 Fed. 243.
 Fourth; Simonton, MORRIS, Brawley.
- Thompson v. Boisselier**, 114 U. S. 1; 29 L. Ed. 76; 5 S. Ct. 1042.....679
 Revg. 19 Blatchf. 73.
 BLATCHFORD.
- Thompson v. Bushnell**, 96 Fed. 238; 37 C. C. A. 456...340, 344, 508, 701
 Affg. in part 88 Fed. 81; see 66 Fed. 57.
 Second; Wallace, LACOMBE, Shipman. Dissenting WALLACE.
- Thompson v. Chestnut**, 127 Fed. 698; 62 C. C. A. 454.....44, 411
 Affg. 119 Fed. 359.
 Third; Acheson, Dallas, GRAY.
- Thompson v. Second Ave.** 93 Fed. 824; 35 C. C. A. 620229, 459
 Revg. 8^o Fed. 321.
 Third; ACHESON, Dallas, McPherson.
- Thomson v. Bank**, 53 Fed. 250; 3 C. C. A. 518.....608, 624, 631, 756
 Eighth; Caldwell, SANBORN, Shiras.

xcviii CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Thomson *v.* National, 65 Fed. 427; 12 C. C. A. 671.....499, 598, 674
 Third; Acheson, Butler, WALES.
- Thomson *v.* Wooster, 114 U. S. 104; 29 L. Ed. 105; 5 S. Ct. 788.....296,
 BRADLEY. 305, 322, 790, 807, 844
- Thomson-Houston *v.* Black River, 135 Fed. 759; 65 C. C. A. 461.....9,
 225, 263, 611, 889
 Revg. 124 Fed. 495; see 86 Fed. 636; 101 Fed. 121.
 Second; WALLACE, Wheeler, Hazel.
- Thomson-Houston *v.* Elmira, 71 Fed. 396; 18 C. C. A. 145....12, 222, 348,
 356, 631, 768
 Revg. and affg. in part 69 Fed. 257.
 Second; WALLACE, Lacombe, Shipman.
- Thomson-Houston *v.* Hoosick, 82 Fed. 461; 27 C. C. A. 419....236, 357,
 360, 544, 561
 Second; WALLACE, Lacombe, Shipman.
- Thomson-Houston *v.* Illinois, 152 Fed. 631; 81 C. C. A. 473.....756
 Affg. 143 Fed. 534.
 Seventh; GROSSCUP, Baker, Seaman.
- Thomson-Houston *v.* Jeffrey, 101 Fed. 121; 41 C. C. A. 247.....360
 Sixth; TAFT, Lurton, Day.
- Thomson-Houston *v.* Kelsey, 75 Fed. 1005; 22 C. C. A. 1....476, 523, 524
 Modifying 72 Fed. 1016. Following *Wilson v. Simpson*, 9 How.
 109; distg. *Davis v. Edison*, 60 Fed. 276; see 71 Fed. 192.
 Second; WALLACE, Lacombe, SHIPMAN.
- Thomson-Houston *v.* Lorain, 107 Fed. 711; 46 C. C. A. 593.....213
 Revg. 103 Fed. 641.
 Second; WALLACE, Lacombe.
- Thomson-Houston *v.* Lorain, 117 Fed. 249; 54 C. C. A. 281.....437, 851
 Affg. 110 Fed. 654.
 Second; WALLACE, TOWNSEND.
- Thomson-Houston *v.* McLean, 153 Fed. 883; 82 C. C. A. 629.....421
 First; PUTNAM, Aldrich, Hale.
- Thomson-Houston *v.* Nassau, 107 Fed. 277; 46 C. C. A. 263.....616, 691
 Affg. 98 Fed. 105; revg. 101 Fed. 587.
 Second; WALLACE, Lacombe, SHIPMAN.
- Thomson-Houston *v.* National, 65 Fed. 427; 12 C. C. A. 671..499, 598, 674
 Third; Acheson, Butler, WALES.
- Thomson-Houston *v.* Ohio, 80 Fed. 712; 26 C. C. A. 107....252, 350, 475,
 Affg. 78 Fed. 139. 476, 477, 506, 544, 561
 Sixth; TAFT, Lurton, Clark.
- Thomson-Houston *v.* Union, 86 Fed. 636; 30 C. C. A. 313.....195, 236
 Revg. 78 Fed. 363.
 Second; WALLACE, Shipman. Per Curiam.
- Thomson-Houston *v.* Western, 70 Fed. 69; 16 C. C. A. 642.....496, 683
 Affg. 65 Fed. 615.
 Seventh; WOODS, Jenkins, Showalter.
- Thomson-Houston *v.* Western, 72 Fed. 530; 19 C. C. A. 1....222, 503, 614
 Affg. 70 Fed. 69, which affirmed 65 Fed. 615.
 Seventh; WOODS, Jenkins, Showalter.
- Thomson-Houston *v.* Western, 158 Fed. 813; 86 C. C. A. 73....360, 361,
 Second; COXE, Ward, Noyes. Per Curiam. 544, 798
- Thomson-Houston *v.* Western, 158 Fed. 813; 86 C. C. A. 73 (2nd case)
 Second; COXE, Ward, Noyes.541, 872, 876
- Thorn *v.* Washburn, 159 U. S. 423; 40 L. Ed. 205; 16 S. Ct. 94.....897
 SHIRAS.

[References are to sections. "App." refers to Appendix]

Tiemann v. Kraatz, 85 Fed. 437; 29 C. C. A. 257.....212, 444, 614
 Revg. 79 Fed. 322.
 Eighth; Sanborn, Thayer, PHILIPS.

Tilesen v. Vaughan, 149 Fed. 999; 79 C. C. A. 509.....652
 Seventh; Grosscup, BAKER, Seaman.

Tilghman v. Proctor, 102 U. S. 707; 26 L. Ed. 279107, 197, 510, 520,
 765, 802, 815, 819, 822
 Overruling *Mitchell v. Tilghman*, 86 U. S. 287.
 BRADLEY.

Tilghman v. Proctor, 125 U. S. 136; 31 L. Ed. 664; 8 S. Ct. 894282,
 292, 836, 837, 839, 847
 GRAY. Dissenting, Waite.

Timolat v. Franklin, 122 Fed. 69; 58 C. C. A. 405.....568
 Second; Wallace, LACOMBE.

Timoney v. Buck, 84 Fed. 887; 28 C. C. A. 561.....754
 Affg. 78 Fed. 487.
 Second; Wallace, Lacombe, Shipman. Per Curiam.

Tompkins v. International, 183 Fed. 773; 106 C. C. A. 529.....App. 717
 Second; LACOMBE, Ward, Noyes.

Tompkins v. New York, 159 Fed. 133; 86 C. C. A. 323.....337
 Revg. 154 Fed. 669.
 Second; Lacombe, COXE, Noyes.

Topliff v. Topliff, 145 U. S. 156; 36 L. Ed. 658; 12 S. Ct. 825....91, 125,
 BROWN. 283, 619, 626, 836, 877, 883

Torrent v. Rodgers, 112 U. S. 659; 28 L. Ed. 842; 5 S. Ct. 501.....877
 WOODS.

Torrey v. Hancock, 184 Fed. 61; 107 C. C. A. 79.....App. 65, 88, 253, 591,
 Revg. 170 Fed. 600; see 128 Fed. 424. 601, 623
 Eighth; Hook, ADAMS, Reed.

Tower v. Eagle, 94 Fed. 361; 36 C. C. A. 294.....436
 Revg. 90 Fed. 662.
 Second; WALLACE, Lacombe, Shipman.

Transit Development Co. v. Cheatham, 194 Fed. 963; 114 C. C. A. 599
 See 190 Fed. 202.App. 129, 288, 404
 Second; LACOMBE, Coxé, Ward.

Tremaine v. Hitchcock, 90 U. S. 518; 23 L. Ed. 97.....289, 789, 831
 STRONG.

Tremolo Patent — see *Tremaine v. Hitchcock*, 90 U. S. 518.

Trent v. Risdon, 102 Fed. 635; 42 C. C. A. 529.....478, 674
 Modifying 92 Fed. 375.
 Ninth; GILBERT, Ross, Hawley.

Trethaway v. Berteles, 180 Fed. 730; 104 C. C. A. 96.....App. 629, 702
 Revg. 175 Fed. 971.
 Third; Lanning, BRADFORD, McPherson.

Troy v. Adams, 73 Fed. 301; 19 C. C. A. 505.....207
 Approving *Troy v. Sharp*, 54 Fed. 712.
 Second; Wallace, Lacombe, Shipman. Per Curiam.

Troy v. Corning, 14 How. 193; 14 L. Ed. 383.....160, 165
 Wayne; dissenting, Taney, Nelson.

Troy v. Odiorne, 58 U. S. 73; 15 L. Ed. 37.....514, 867
 CATRON.

Truman v. Holmes, 87 Fed. 742; 31 C. C. A. 215.....207, 719
 Ninth; Gilbert, Ross, HAWLEY.

Tucker v. Spalding, 80 U. S. 453; 20 L. Ed. 515.....404, 617
 MILLER.

C CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Turner *v.* Dover, 111 U. S. 319; 28 L. Ed. 442; 4 S. Ct. 401.....871
 MATTHEWS.
- Turrill *v.* Railroad, 68 U. S. 491; 17 L. Ed. 668.....223, 228, 404
 CLIFFORD.
- Tuttle *v.* Claflin, 76 Fed. 227; 22 C. C. A. 138...282, 289, 290, 298, 435, 777
 Affg. 19 Fed. 599. Approving Elm City *v.* Wooster, Fed. Cas. 4,415.
 Second; Peckham, Lacombe, SHIPMAN.
- Tuttle *v.* Claflin, 82 Fed. 744; 27 C. C. A. 255.....116
 Second; Wallace, Lacombe, SHIPMAN.
- Twentieth Century *v.* Taplin, 181 Fed. 96; 104 C. C. A. 156....App. 193,
 207, 214, 487
 Sixth; Severens, WARRINGTON, Knappen.
- Tyler *v.* Boston, 74 U. S. 327; 19 L. Ed. 93373, 404, 914
 GRIER.
- Tyssovski *v.* Thayer, 174 Fed. 43; 98 C. C. A. 29.....App. 596
 Affg. 159 Fed. 165.
 Seventh; Grossep, Baker, ANDERSON.
- Underwood *v.* Gerber, 149 U. S. 224; 37 L. Ed. 710; 13 S. Ct. 854....12,
 Affg. 37 Fed. 682. 266, 773
 BLATCHFORD.
- Underwood *v.* Typewriter, 180 Fed. 726; 104 C. C. A. 92.....App. 207
 Second; Lacombe, COXE, Ward.
- Union Biscuit *v.* Peters, 125 Fed. 601; 60 C. C. A. 337.....636
 Revg. 120 Fed. 679.
 Eighth; Sanborn, THAYER, Van Devanter.
- Union Carbide *v.* Am. Carbide, 181 Fed. 104; 104 C. C. A. 522....App. 59,
 78, 635, 649, 774
 Revg. 172 Fed. 120.
 Second; Lacombe, COXE, NOYES.
- Union County *v.* Ozan, 179 Fed. 710; 103 C. C. A. 584.....App. 920
 See 127 Fed. 206; 145 Fed. 344; 207 U. S. 251.
 Eighth; Hook, ADAMS, Carland; dissenting, Hook.
- Union Edge Setter *v.* Keith, 139 U. S. 530; 35 L. Ed. 261; 11 S. Ct. 621..426,
 Affg. 31 Fed. 46, which reversed 28 id. 715. 596, 911
 BROWN.
- Union Iron Works *v.* Smith, 69 Fed. 827; 16 C. C. A. 451.....652
 Revg. 64 Fed. 583.
 Eighth; Caldwell, SANBORN, Thayer.
- Union Match *v.* Diamond, 162 Fed. 148; 89 C. C. A. 172....202, 378, 426,
 456, 680, 936
 Eighth; Hook, ADAMS, Philips.
- Union Metallic Cartridge *v.* United States, 112 U. S. 624; 28 L. Ed. 828;
 5 S. Ct. 475.....344, 889
 Revg. 7 Fed. 344.
 BLATCHFORD.
- Union Paper Bag *v.* Advance, 194 Fed. 126; 114 C. C. A. 204...App. 456,
 Affg. 194 Fed. 126. 468
 Sixth; WARRINGTON, Knappen, Denison.
- Union Paper Bag *v.* Murphy, 97 U. S. 120; 24 L. Ed. 935.....379, 526
 CLIFFORD.
- Union Paper Collar *v.* VanDeusen, 90 U. S. 530; 23 L. Ed. 128....367, 775,
 Affg. 10 Blatchf. 119. 874, 880
 CLIFFORD.
- Union Steam Pump *v.* Battle Creek, 104 Fed. 337; 43 C. C. A. 560....195,
 Sixth; Lurton, Day, SEVERENS. 382, 459, 651

[References are to sections. "App." refers to Appendix]

- Union Switch *v.* Johnson, 61 Fed. 940; 10 C. C. A. 176...171, 753, 764, 897
 See 43 Fed. 331; 51 Fed. 85; affg. 59 Fed. 20.
 Third; Dallas, BUTLER, Green.
- Union Typewriter *v.* Smith, 181 Fed. 936; 104 C. C. A. 430....App. 358
 Affg. 173 Fed. 288.
 Third; LANNING, Bradford, McPherson.
- Union Water Meter *v.* Desper, 101 U. S. 332; 25 L. Ed. 1024.....219, 473
 BRADLEY.
- United Blue Flame *v.* Silver, 128 Fed. 925; 63 C. C. A. 110.....544
 Second; Lacombe, Townsend, Coxe. Per Curiam.
- United Shirt & Collar *v.* Beattie, 149 Fed. 736; 79 C. C. A. 442....72, 408,
 Affg. 138 Fed. 136. 603, 699, 704
 Second; Wallace, Lacombe, COXE.
- United Shoe Mach. *v.* Duplessis, 155 Fed. 842; 84 C. C. A. 76.....411,
 Affg. 148 Fed. 31. 424, 923
 First; Colt, PUTNAM, Brown.
- United Shoe Mach. *v.* Greenman, 146 Fed. 759; 77 C. C. A. 22.....207
 First; Colt, Putnam, BROWN.
- United Shoe Mach. *v.* Greenman, 153 Fed. 283; 82 C. C. A. 581.....60
 Affg. 145 Fed. 538.
 First; COLT, Putnam, Aldrich.
- United States *v.* Am. Bell, 128 U. S. 315; 32 L. Ed. 450; 9 S. Ct. 90....26,
 Revg. 32 Fed. 591. 31, 317, 425, 745, 748, 804, 807, 894
 MILLER.
- United States *v.* Am. Bell, 159 U. S. 548; 40 L. Ed. 255; 16 S. Ct. 69..725
 See 68 Fed. 542 revg. 65 Fed. 86.
 FULLER.
- United States *v.* Am. Bell, 167 U. S. 224; 42 L. Ed. 144; 17 S. Ct. 809..26,
 Affg. 68 Fed. 542. 143, 703, 727, 740, 745, 787
 BREWER; dis. HARLAN.
- United States *v.* Berdan, 156 U. S. 552; 39 L. Ed. 530; 15 S. Ct. 420..464,
 BREWER. 715, 812, 840, 842, 847, 921
- United States *v.* Burns, 79 U. S. 246; 20 L. Ed. 388.....498
 FIELD.
- United States *v.* Goodyear, 76 U. S. 811; 19 L. Ed. 786.....26
 CHASE.
- United States *v.* Harvey, 196 U. S. 310; 49 L. Ed. 492; 25 S. Ct. 240...385,
 Affg. 38 Ct. Cl. 662. 754, 762
 HOLMES.
- United States *v.* Palmer, 128 U. S. 262; 32 L. Ed. 442; 9 S. Ct. 104....714,
 Affg. 20 Ct. Cl. 432. 715
 BRADLEY.
- United States *v.* Seymour, 153 U. S. 353; 38 L. Ed. 742; 14 S. Ct. 849..725
 GRAY.
- United States *v.* Société Anonyme &c. 224 U. S. 309; 56 L. Ed. 224; 32 S. Ct.
 479.....App. 137, 191, 468, 715
 Affg. 43 Ct. Cl. 25.
 MCKENNA.
- U. S. Consolidated *v.* Chaddock, 173 Fed. 577; 97 C. C. A. 527...App. 144
 Ninth; GILBERT, Morrow, Hunt.
- U. S. Cons. *v.* Griffin, 126 Fed. 364; 61 C. C. A. 334.....744, 753, 920
 Ninth; GILBERT, Ross, Hawley.
- U. S. Credit *v.* American, 59 Fed. 139; 8 C. C. A. 49.....225, 687, 698
 Affg. 53 Fed. 818.
 Second; Wallace, LACOMBE, Shipman.

[References are to sections. "App." refers to Appendix]

- U. S. Envelope *v.* Sherman, 122 Fed. 464; 58 C. C. A. 624.....507, 529
 Affg. 116 Fed. 200.
 First; Putnam, Aldrich, BROWN.
- U. S. Fastener *v.* Bradley, 149 Fed. 222; 79 C. C. A. 180.....314, 692
 Affg. 143 Fed. 523.
 Second; Lacombe, Townsend, COXE.
- U. S. Glass *v.* Atlas, 90 Fed. 724; 33 C. C. A. 254.....519
 Affg. 88 Fed. 493.
 Third; Acheson, DALLAS, Butler.
- U. S. Gramophone *v.* Seaman, 113 Fed. 745; 51 C. C. A. 419.....535, 543
 Fourth; SIMONTON, Purnell, Waddill.
- U. S. Hog *v.* North, 158 Fed. 818; 86 C. C. A. 78.....380
 First; Colt, PUTNAM, Aldrich.
- U. S. Mineral *v.* Manville, 125 Fed. 770; 60 C. C. A. 288.....854
 Affg. 101 Fed. 145.
 Seventh; Jenkins, Grosscup, BAKER.
- U. S. Mitis *v.* Detroit, 122 Fed. 863; 59 C. C. A. 589.....717, 729, 792
 Sixth; Lurton, Severens, RICHARDS.
- U. S. Peg-Wood *v.* Sturtevant, 125 Fed. 378; 60 C. C. A. 244..661, 694, 919
 Affg. 122 Fed. 470.
 First; Colt, PUTNAM, Aldrich.
- U. S. Peg-Wood *v.* Sturtevant, 125 Fed. 382; 60 C. C. A. 248..194, 207, 210
 Affg. 122 Fed. 476.
 First; Colt, PUTNAM, Aldrich.
- U. S. Repair *v.* Assyrian, 100 Fed. 965; 41 C. C. A. 123.....100, 195, 207
 Affg. 96 Fed. 235; see 87 Fed. 339; 95 Fed. 137.
 Seventh; Woods, Jenkins, Bunn.
- U. S. Repair *v.* Standard, 95 Fed. 137; 37 C. C. A. 28.....77, 218, 819
 Affg. 87 Fed. 339.
 Second; Wallace, Lacombe, SHIPMAN.
- U. S. Rifle *v.* Whitney, 118 U. S. 22; 30 L. Ed. 53; 6 S. Ct. 950.....3, 8,
 Affg. 14 Blatch. 94. GRAY. 13, 261
- Universal *v.* Comptograph, 146 Fed. 981; 77 C. C. A. 227.....57
 Revg. 142 Fed. 539.
 Seventh; GROSSCUP, Baker, Seaman.
- Universal *v.* Sonn, 154 Fed. 665; 83 C. C. A. 422.....219, 431, 456
 Revg. 146 Fed. 517.
 Second; Lacombe, Townsend, COXE.
- Untermeyer *v.* Freund, 58 Fed. 205; 7 C. C. A. 183..65, 74, 281, 335, 336,
 Affg. 50 Fed. 77. 827, 838, 846
- Second; Wallace, Lacombe, SHIPMAN.
- Vance *v.* Campbell, 66 U. S. 427; 17 L. Ed. 168....237, 389, 405, 466, 473,
 NELSON. 604
- VanEpps *v.* United, 143 Fed. 869; 75 C. C. A. 77.....92, 207, 431, 916
 Revg. 137 Fed. 418.
 Second; Wallace, Lacombe, TOWNSEND.
- Varley *v.* Ostheimer, 186 Fed. 171; 108 C. C. A. 303.....App. 395
 See 159 Fed. 655.
 Second; LACOMBE, COXE, Ward.
- Vermont *v.* Gibson, 56 Fed. 143; 5 C. C. A. 451.....393, 513
 Affg. 46 Fed. 488; 50 Fed. 423.
 Second; Wallace, Lacombe, SHIPMAN.
- Victor *v.* American, 145 Fed. 350; 76 C. C. A. 180.....9, 349, 350
 Affg. 140 Fed. 866.
 Second; Lacombe, Townsend, COXE. Per Curiam.

[References are to sections. "App." refers to Appendix]

- Victor *v.* Hawthorne, 178 Fed. 455; 101 C. C. A. 439....App. 323, 615, 623
 Affg. 168 Fed. 554; see 173 Fed. 617.
 Third; GRAY, Buffington, Lanning.
- Victor *v.* The Fair, 123 Fed. 424; 61 C. C. A. 58.....714, 761
 Revg. 118 Fed. 609.
 Seventh; Jenkins, Grosscup, BAKER.
- Victor *v.* Hoschke, 188 Fed. 326; 110 C. C. A. 304.....App. 144, 251
 Revg. 188 Fed. 330; see 213 U. S. 301; 213 U. S. 325; 140 Fed. 860;
 145 Fed. 350; 146 Fed. 534; 148 Fed. 1022.
 Second; LACOMBE, Ward, Noyes.
- Vinton *v.* Hamilton, 104 U. S. 485; 26 L. Ed. 807.....666
 Woods.
- Virtue *v.* Creamery, 179 Fed. 115; 102 C. C. A. 413.....App. 744, 924
 Eighth; Sanborn, Adams, RINER.
- Voightmann *v.* Perkinson, 138 Fed. 56; 70 C. C. A. 482.....616, 683
 Affg. 133 Fed. 934.
 Seventh; Jenkins, GROSSCUP, Baker.
- Volkmann *v.* Dohnhoff, 77 Fed. 978; 23 C. C. A. 599.....224
 Second; Lacombe, SHIPMAN.
- Von Schmidt *v.* Bowers, 80 Fed. 121; 25 C. C. A. 323....76, 108, 375,
 Affg. 63 Fed. 572. 497, 603, 782
 Ninth; Gilbert, Ross.
- Voss *v.* Fisher, 113 U. S. 213; 28 L. Ed. 975; 5 S. Ct. 511.....473
 Woods.
- Vrooman *v.* Penhollow, 179 Fed. 296; 102 C. C. A. 484....App. 204, 208,
 See 186 Fed. 495. 435, 481, 704, 804
 Sixth; SEVERENS, Warrington, Knappen.
- Vrooman *v.* Penhollow, 186 Fed. 495; 108 C. C. A. 502.....App. 277
 Rehearing of 179 Fed. 296.
 Sixth; SEVERENS, Knappen, Sanford.
- Vulcan *v.* Smith, 62 Fed. 444; 10 C. C. A. 493.....380, 462, 592, 624
 Revg. 57 Fed. 934.
 Ninth; GILBERT, Knowles, Hawley.
- Wade *v.* Lawder, 165 U. S. 624; 41 L. Ed. 851; 17 S. Ct. 425....App. 724
 FULLER.
- Wade *v.* Metcalf, 129 U. S. 202; 32 L. Ed. 661; 9 S. Ct. 271....270, 509,
 Affg. 16 Fed. 130. 756, 757, 932
 GRAY.
- Wagner *v.* Wyckoff, 151 Fed. 585; 81 C. C. A. 129....222, 435, 510, 644
 Affg. and revg. in part 138 Fed. 108.
 Second; Lacombe, Townsend, COXE.
- Wales *v.* Waterbury, 101 Fed. 126; 41 C. C. A. 250...841, 843, 845, 846
 Modifying 87 Fed. 920.
 Second; WALLACE, Lacombe, Shipman.
- Wall *v.* Leck, 66 Fed. 552; 13 C. C. A. 630.....639, 683
 Affg. 61 Fed. 291.
 Ninth; McKenna, Gilbert, HAWLEY.
- Walker *v.* Collins, 102 Fed. 689; 42 C. C. A. 591.....207
 Third; Dallas, Gray, BRADFORD.
- Wanamaker *v.* Enterprise, 53 Fed. 791; 3 C. C. A. 672.....251, 252
 Affg. 46 Fed. 854. Approving Enterprise *v.* Sargent, 28 Fed. 185; 34
 Fed. 134.
 Third; DALLAS, Wales, Buffington.
- Warner *v.* Stewart, 185 Fed. 507; 107 C. C. A. 607.....App. 594, 672
 Seventh; Grosscup, Seaman, CARPENTER.

[References are to sections. "App." refers to Appendix]

| | |
|---|---|
| Webber v. Virginia, 103 U. S. 344; 26 L. Ed. 565..... | 920 |
| FIELD. | |
| Webster v. General, 115 Fed. 497; 53 C. C. A. 229..... | 214 |
| Affg. 113 Fed. 756. | |
| First; COLT, Putnam, Aldrich. | |
| Weierman v. Shaw, 157 Fed. 928; 85 C. C. A. 222..... | 640 |
| Revg. 154 Fed. 67. | |
| Third; DALLAS, Gray, Buffington. | |
| Weissenthanner v. Dodge, 161 Fed. 915; 88 C. C. A. 388..... | 787 |
| Affg. 156 Fed. 365. | |
| Third; Dallas, Gray, BUFFINGTON. | |
| Weld v. Johnson, 147 Fed. 234; 77 C. C. A. 376..... | 435 |
| First; Colt, Putnam, BROWN. | |
| Wells v. Curtis, 66 Fed. 318; 13 C. C. A. 494.... | 86, 200, 245, 374, 375, 468, 598, 605, 606, 654, 908 |
| Sixth; Lurton, Barr, SEVERENS. | |
| Wells v. Henderson, 67 Fed. 930; 15 C. C. A. 84..... | 3, 817 |
| Seventh; Woods, Bunn, Seaman. | |
| Welsbach v. American, 98 Fed. 613; 39 C. C. A. 185..... | S2 |
| Second; Wallace, SHIPMAN. | |
| Welsbach v. Apollo, 96 Fed. 332; 37 C. C. A. 508..... | 520 |
| See 94 Fed. 1005. | |
| Second; Wallace, SHIPMAN. | |
| Welsbach v. Cosmopolitan, 104 Fed. 83; 43 C. C. A. 418.... | 250, 544, 704 |
| Affg. 100 Fed. 648. | |
| Seventh; Woods, Grosscup, Bunn. | |
| Welsbach v. Union, 101 Fed. 131; 41 C. C. A. 255..... | 521 |
| Second; Wallace, Shipman. Per Curiam. | |
| Werner v. King, 96 U. S. 218; 24 L. Ed. 613..... | 503, 602 |
| MILLER. | |
| Wessel v. United, 139 Fed. 11; 71 C. C. A. 423..... | 112, 441 |
| Sixth; Lurton, SEVERENS, Wanty. | |
| West v. Frank, 149 Fed. 423; 79 C. C. A. 359..... | 332 |
| Affg. 146 Fed. 388. | |
| Second; Lacombe, Townsend, Coxe. Per Curiam. | |
| Western Electric v. Ansonia, 114 U. S. 447; 29 L. Ed. 210; 5 S. Ct. 447.. | 218, 676, 822 |
| WOODS. | |
| Western Electric v. Fowler, 177 Fed. 224; 101 C. C. A. 394.... | App. 30 |
| See 144 Fed. 684. | |
| Seventh; GROSSCUP, Baker, Seaman. | |
| Western Electric v. Galesburg, 144 Fed. 684; 75 C. C. A. 500..... | 659 |
| Seventh; GROSSCUP, Baker, Landis. | |
| Western Electric v. LaRue, 139 U. S. 601; 35 L. Ed. 294; 11 S. Ct. 670 | |
| Affg. 28 Fed. 85; 31 Fed. 80.616, 634 | |
| BROWN. | |
| Western Electric v. North, 135 Fed. 79; 67 C. C. A. 553...277, 308, 481, 624, | |
| Sixth; Lurton, SEVERENS, Richards. 700, 748, 800 | |
| Western Electric v. Robertson, 142 Fed. 471; 73 C. C. A. 587.... | 496, 510, |
| Second; Wallace, Lacombe, TOWNSEND. 641, 761, 767 | |
| Western Electric v. Rochester, 145 Fed. 41; 75 C. C. A. 313.... | 398, 698 |
| Affg. 132 Fed. 814. | |
| Second; Wallace, Lacombe, Townsend. Per Curiam. | |
| Western Electric v. Sperry, 58 Fed. 186; 7 C. C. A. 164.... | 3, 19, 20, 54, 606 |
| Rehearing denied 59 Fed. 295. | |
| Seventh; Fuller, Woods, Jenkins. | |

[References are to sections. "App." refers to Appendix]

- Western Electric *v.* Sperry, 59 Fed. 295; 8 C. C. A. 129.....361
 Rehearing s. c. 58 Fed. 186 approved; disapproving Roll Paper Co. *v.*
 Kopp, 44 Fed. 609.
 Seventh; Fuller, Woods, Jenkins.
- Western Electric *v.* Standard, 84 Fed. 654; 28 C. C. A. 512.....531, 602
 Affg. 81 Fed. 192.
 Seventh; Woods, Jenkins, Bunn.
- Western Electric *v.* Williams-Abbott. 108 Fed. 952; 48 C. C. A. 159....116,
 352, 353, 542
 Revg. 83 Fed. 842.
 Sixth; Lurton, Day, SEVERENS.
- Western Glass *v.* Schmertz, 185 Fed. 738; 109 C. C. A. 1....App. 2, 4, 26,
 61, 817
 Affg. one case and revg. one case 178 Fed. 977; see 97 Fed. 950; 144
 Fed. 117; 168 Fed. 73; 178 Fed. 945; 178 Fed. 949.
 Seventh; Grosscup, BAKER, Seaman.
- Western Telephone *v.* American, 131 Fed. 75; 65 C. C. A. 313.....363, 452
 Seventh; Jenkins, Grosscup, BAKER.
- Western Telephone *v.* Swedish, 194 Fed. 104; 114 C. C. A. 182..App. 452
 Affg. 163 Fed. 308; see 131 Fed. 75.
 Seventh; Grosscup, BAKER, Seaman.
- Western Union *v.* Am. Bell, 125 Fed. 342; 60 C. C. A. 220.....897
 Revg. 105 Fed. 684.
 First; PUTNAM, Aldrich, Brown.
- Westinghouse *v.* Allis-Chalmers, 176 Fed. 362; 100 C. C. A. 408...App. 271,
 631, 690
 Revg. 168 Fed. 91.
 Third; Gray, BUFFINGTON, McPherson.
- Westinghouse *v.* Boyden, 170 U. S. 537, 42 L. Ed. 1136; 18 S. Ct. 707
207, 229, 380, 426, 496, 503, 532, 641, 644, 686, 817
 Revg. and modifying 66 Fed. 997; Affg. 70 Fed. 816; see 77 Fed. 616.
 BROWN; dissenting SHIRAS, Brewer, Gray, McKenna.
- Westinghouse *v.* Burton, 77 Fed. 301; 23 C. C. A. 174.....App. 546
 See 63 Fed. 962.
 First; COLT, Nelson, Webb.
- Westinghouse *v.* Catskill, 121 Fed. 831; 58 C. C. A. 167.....74, 76
 Revg. 110 Fed. 377.
 Second; Wallace, TOWNSEND, Coxe.
- Westinghouse *v.* Christensen, 104 Fed. 622; 44 C. C. A. 92.....542
 Second; Lacombe, Shipman. Per Curiam.
- Westinghouse *v.* Christensen, 128 Fed. 437; 63 C. C. A. 179.....93
 Revg. in part 123 Fed. 306; see 113 Fed. 594.
 Second; Wallace, TOWNSEND, Coxe.
- Westinghouse *v.* Condit, 194 Fed. 427; 114 C. C. A. 389.....App. 208
 Affg. 194 Fed. 430; see 167 Fed. 546; 143 Fed. 966; 169 Fed. 634.
 Second; Lacombe, Coxe, NOYES.
- Westinghouse *v.* Condit, 167 Fed. 546; 93 C. C. A. 224.....App. 253
 Affg. 159 Fed. 144 and 154.
 Second; Lacombe, Coxe, NOYES.
- Westinghouse *v.* Edison, 63 Fed. 588; 11 C. C. A. 342....229, 244, 361,
 Revg. 55 Fed. 490. 610, 638, 659
 Third; ACHESON, Dallas, Butler.
- Westinghouse *v.* Electric, 170 Fed. 430; 95 C. C. A. 600.....App. 371
 Revg. 165 Fed. 992.
 Third; Gray, BUFFINGTON, Bradford.

[References are to sections. "App." refers to Appendix]

Westinghouse v. Great Northern, 88 Fed. 258; 31 C. C. A. 525....94, 555,
 Affg. 86 Fed. 132. 723
 Second; Wallace, SHIPMAN.

Westinghouse v. Hien, 159 Fed. 936; 87 C. C. A. 142.....584
 Seventh; Baker, Seaman; SANBORN.

Westinghouse v. Montgomery, 139 Fed. 868; 71 C. C. A. 582.....564
 Revg. 131 Fed. 86.
 Second; Wallace, Townsend. Per Curiam.

Westinghouse v. Montgomery, 153 Fed. 890; 82 C. C. A. 636.....691
 See decisions on same patent, 131 Fed. 86, reversed in 139 Fed. 868;
 108 Fed. 221; 113 Fed. 884; 117 Fed. 309; 119 Fed. 365.
 Second; Wallace, TOWNSEND, Holt.

Westinghouse v. New England, 110 Fed. 753; 49 C. C. A. 151.....87, 88
 Affg. 103 Fed. 951.
 Second; Wallace, Lacombe, SHIPMAN.

Westinghouse v. New York, 63 Fed. 962; 11 C. C. A. 528....197, 217, 361,
 Affg. in part 59 Fed. 581. 375, 380, 440, 606
 Second; Wallace, Lacombe, SHIPMAN.

Westinghouse v. New York, 96 Fed. 991; 37 C. C. A. 649.....55
 Affg. 87 Fed. 882.
 Second; Lacombe, SHIPMAN, Thomas.

Westinghouse v. New York, 119 Fed. 874; 56 C. C. A. 404.....223, 502
 Revg. 112 Fed. 424; see 59 Fed. 581; 63 Fed. 962.
 Second; Wallace, Lacombe, TOWNSEND.

Westinghouse v. New York, 140 Fed. 545; 72 C. C. A. 61.....845
 See 115 Fed. 645; 131 Fed. 607.
 Second; WALLACE, Lacombe, Townsend.

Westinghouse v. Prudential, 158 Fed. 987; 86 C. C. A. 434.....456
 Affg. 155 Fed. 749. Third; Dallas, Gray, BUFFINGTON.

Westinghouse v. Saranac, 113 Fed. 884; 51 C. C. A. 514.....235, 650, 851
 Affg. 108 Fed. 221.
 Second; Wallace, LACOMBE, Townsend.

Westinghouse v. Stanley, 133 Fed. 167; 68 C. C. A. 523....76, 257, 407,
 Revg. 129 Fed. 140. 598, 620, 641, 691, 937
 See 106 Fed. 724; 118 Fed. 562; 110 Fed. 377; 129 Fed. 213; 125
 Fed. 6; 133 Fed. 396; 128 Fed. 751.
 First; PUTNAM, Aldrich, Brown.

Westinghouse v. Stanley, 138 Fed. 823; 71 C. C. A. 189....257, 421, 790
 See 133 Fed. 167.
 First; PUTNAM, Aldrich, Brown.

Westinghouse v. Toledo, 172 Fed. 371; 97 C. C. A. 69.....App. 322, 668
 Sixth; Lurton, Severens, COCHRAN.

Westinghouse v. Triumph, 97 Fed. 99; 38 C. C. A. 65.....332, 337
 Sixth; TAFT, Lurton, Severens.

Westinghouse v. Union, 117 Fed. 495; 55 C. C. A. 230.....622 .
 Affg. and revg. 112 Fed. 417.
 Second; Wallace, Lacombe, TOWNSEND.

Westinghouse v. Wagner, 225 U. S. 604; 56 L. Ed. —; 32 S. Ct. 691
App. 495, 841, 845
 Revg. 173 Fed. 373, and 129 Fed. 604; see 112 Fed. 417; 117 Fed. 495;
 121 Fed. 560; 129 Fed. 604; 130 Fed. 554.
 LAMAR.

Westmoreland v. Hogan, 167 Fed. 327; 93 C. C. A. 31.....598, 926
 Affg. 163 Fed. 289.
 Third; Dallas, Gray, BUFFINGTON.

viii **CASES EXCERPTED, WITH ANNOTATIONS**

[References are to sections. " App." refers to Appendix]

- Weston *v.* Empire, 136 Fed. 599; 69 C. C. A. 329.....15, 308
 Affg. 131 Fed. 90.
 Second; Lacombe, Townsend, Coxe. Per Curiam.
- Weston *v.* Empire, 177 Fed. 1006; 100 C. C. A. 670.....App. 481
 Affg. 166 Fed. 867.
 Second; Lacombe, Ward, Noyes. Per Curiam.
- Weston *v.* Stevens, 134 Fed. 574; 67 C. C. A. 374.....871
 Revg. 119 Fed. 181.
 Second; Wallace, Lacombe, TOWNSEND.
- Westrumite *v.* Commissioners, 174 Fed. 144; 98 C. C. A. 178....App. 905
 Revg. 164 Fed. 989.
 Seventh; Grosscup, BAKER, Anderson.
- Wheaton *v.* Norton, 70 Fed. 833; 17 C. C. A. 447.....207, 456
 Revg. 57 Fed. 927. Modifying Norton *v.* Jensen, 49 Fed. 859.
 Ninth; Ross, Hawley, Morrow.
- Whippany *v.* United, 87 Fed. 215; 30 C. C. A. 615.....564
 Revg. 83 Fed. 485.
 Third; Acheson, BUTLER, Bradford.
- Whitaker *v.* Huntington, 95 Fed. 471; 37 C. C. A. 151.....691
 Third; Acheson, DALLAS, Buffington.
- White *v.* Dunbar, 119 U. S. 47; 30 L. Ed. 303; 7 S. Ct. 72....217, 223,
 679, 871
- BRADLEY.
- Whiteley *v.* Swayne, 74 U. S. 685; 19 L. Ed. 199.....20, 811, 866
 NELSON.
- Whitin *v.* Houghton, 178 Fed. 444; 101 C. C. A. 344....App. 68, 378, 697
 See 161 Fed. 58; 153 Fed. 740.
 First; COLT, Putnam, Aldrich.
- Whitley *v.* Winsor, 127 Fed. 338; 62 C. C. A. 220.....195
 Affg. 117 Fed. 851.
 First; COLT, Putnam, Aldrich.
- Whittemore *v.* Reinhardt, 159 Fed. 707; 86 C. C. A. 461.....201
 Second; LACOMBE, Coxe, Ward.
- Wicke *v.* Ostrum, 103 U. S. 461; 26 L. Ed. 409.....466, 468, 607
 WAITE.
- Wickelman *v.* Dick, 88 Fed. 264; 31 C. C. A. 530.....107, 697
 Affg. 74 Fed. 799; also 80 Fed. 519.
 Second; WALLACE, Lacombe, Shipman.
- Wilcox *v.* Sherborne, 123 Fed. 875; 59 C. C. A. 363.....216, 896
 Affg. 119 Fed. 371.
 Third; Acheson, BUFFINGTON, Kirkpatrick. Dissenting in part
 Kirkpatrick.
- Wilfley *v.* New Standard, 164 Fed. 421; 90 C. C. A. 543.....752, 755
 Ninth; GILBERT, Ross, Morrow.
- Wilgus *v.* Germain, 72 Fed. 773; 19 C. C. A. 188.....App. 64, 386, 629
 See 56 Fed. 587.
 Ninth; McKenna, GILBERT, Hawley.
- Willcox *v.* Merrow, 93 Fed. 206; 35 C. C. A. 269.....245, 624
 Revg. 83 Fed. 179.
 Second; Wallace, LACOMBE, Shipman.
- Williams *v.* American, 86 Fed. 641; 30 C. C. A. 318.....64
 Revg. on rehearing 84 Fed. 197 and 81 Fed. 200.
 Seventh; Woods, Jenkins, Showalter.
- Williams *v.* Breitling, 77 Fed. 285; 23 C. C. A. 171.....551, 567, 579
 Seventh; Woods, JENKINS, Showalter.

[References are to sections. "App." refers to Appendix]

Williams *v.* Goodyear, 54 Fed. 498; 4 C. C. A. 485.....601
 Affg. 49 Fed. 245.
 Second; Wallace, Lacombe. Per Curiam.

Williams *v.* Kemmerer, 145 Fed. 928; 76 C. C. A. 466.....207, 333
 Affg. 136 Fed. 210.
 Third; Dallas, Gray, Cross.

Williams *v.* Wrapper Co. 84 Fed. 197; 28 C. C. A. 325.....672
 Revd. 86 Fed. 641; see 81 Fed. 200.
 Seventh; Woods, Jenkins, Showalter.

Willis *v.* Miller, 121 Fed. 985; 58 C. C. A. 286.....404
 Second; Wallace, COXE.

Wills *v.* Scranton, 153 Fed. 181; 82 C. C. A. 355.....323, 672
 Affg. 147 Fed. 525.
 Third; GRAY, Buffington, Lanning.

Wilson *v.* Am. Circular Loom, 187 Fed. 840; 109 C. C. A. 600....App. 366
 First; COLT, Putnam, Aldrich.

Wilson *v.* Ansonia, 54 Fed. 495; 4 C. C. A. 484.....596
 Revg. 48 Fed. 681.
 Second; Wallace, Lacombe, Shipman. Per Curiam.

Wilson *v.* Barnum, 8 How. 258; 12 L. Ed. 1070.....113
 TANEY.

Wilson *v.* Calculagraph, 144 Fed. 91; 75 C. C. A. 249.....195, 217
 Revg. 132 Fed. 20.
 First; COLT, Putnam, Aldrich.

Wilson *v.* Consolidated, 88 Fed. 286; 31 C. C. A. 533....551, 554, 561, 563,
 Revg. 83 Fed. 201. 575, 579
 First; PUTNAM, Brown, Lowell.

Wilson *v.* McCormick, 92 Fed. 167; 34 C. C. A. 280.....195
 Seventh; Woods, Jenkins, Showalter.

Wilson *v.* Rousseau, 4 How. 646; 11 L. Ed. 1141.....175, 418
 NELSON; dissenting McLEAN, Wayne, WOODBURY.

Wilson *v.* Sanford, 10 How. 99; 13 L. Ed. 344.....714
 TANEY.

Wilson *v.* Simpson, 9 How. 109; 13 L. Ed. 66.....524
 WAYNE.

Wilson *v.* Townley, 125 Fed. 491; 60 C. C. A. 327.....65, 442, 612
 Eighth; Sanborn, THAYER, Van Devanter.

Winans *v.* Denmead, 15 How. 330; 14 L. Ed. 717....222, 229, 459, 530,
 601, 602, 655, 679, 903
 CURTIS; dissenting Tancy, Catron, Daniel, CAMPBELL.

Winans *v.* N. Y. & Erie, 21 How. 88; 16 L. Ed. 68.....398
 GRIER.

Winchester *v.* Peters, 184 Fed. 333; 106 C. C. A. 363.....App. 207
 Affg. 173 Fed. 86.
 Second; COXE, Ward, Noyes.

Wing *v.* Anthony, 106 U. S. 142; 27 L. Ed. 110; 1 S. Ct. 93.....871
 WOODS.

Winston *v.* Croton Falls, 194 Fed. 123; 114 C. C. A. 201.....App. 653
 Second; LACOMBE, Coxé, Ward.

Wisconsin *v.* American, 125 Fed. 761; 60 C. C. A. 529.....593
 Seventh; Jenkins, Grosseup, BAKER.

Wise *v.* Allis, 76 U. S. 737; 19 L. Ed. 784.....795
 MILLER.

Withington *v.* Kinney, 68 Fed. 500; 15 C. C. A. 531.....366, 367, 756
 Sixth; Taft, LURTON, Severens.

CX CASES EXCERPTED, WITH ANNOTATIONS

[References are to sections. "App." refers to Appendix]

- Wold *v.* Thayer, 148 Fed. 227; 78 C. C. A. 350.....108, 385
 Affg. 142 Fed. 776.
 Seventh; Grosseup, Seaman, BAKER.
- Wolff *v.* Du Pont, 134 Fed. 862; 67 C. C. A. 488.....620, 917
 Affg. 122 Fed. 944.
 Third; Acheson, Dallas, LANNING.
- Wollensak *v.* Reiher, 115 U. S. 87; 29 L. Ed. 355; 5 S. Ct. 1132...213, 729
 MATTHEWS.
- Wollensak *v.* Reiher, 115 U. S. 96; 29 L. Ed. 350; 5 S. Ct. 1137....876,
 MATTHEWS. 877, 879
- Wollensak *v.* Sargent, 151 U. S. 221; 38 L. Ed. 137; 14 S. Ct. 291....195,
 Affg. 33 Fed. 840; 41 Fed. 53. 239, 651, 731, 877
 FULLER.
- Wood *v.* Underhill, 5 How. 1; 12 L. Ed. 23.....266, 914, 917
 TANEY.
- Woodbury *v.* Keith, 101 U. S. 479; 25 L. Ed. 939....7, 11, 13, 270, 316,
 STRONG. 380, 407, 413, 592, 729, 795
- Woodmansee *v.* Williams, 68 Fed. 489; 15 C. C. A. 520....271, 719, 729,
 Sixth; Taft, LURTON, Hammond. 732, 793
- Woods *v.* Carl, 203 U. S. 358; 51 L. Ed. 219; 27 S. Ct. 99.....920
 Affg. 75 Ark. 328.
 PECKHAM; dissenting Day.
- Woodward *v.* Boston, 60 Fed. 283; 8 C. C. A. 622....451, 506
 Affg. 53 Fed. 481; rehearing denied 63 Fed. 609.
 First; Colt, Putnam, Nelson.
- Woodward *v.* Boston, 63 Fed. 609; 11 C. C. A. 353.....387, 790, 807
 Denying rehearing on 60 Fed. 283.
 First; Colt, Putnam, Nelson. Per Curiam.
- Woodworth *v.* Wilson, 4 How. 712; 11 L. Ed. 1171.....798
 NELSON.
- Worden *v.* Searles, 121 U. S. 14; 30 L. Ed. 853; 7 S. Ct. 814....578, 725, 871
 Revg. 13 Fed. 716; 11 Fed. 501.
 BLATCHFORD.
- Worley *v.* Loker, 104 U. S. 340; 26 L. Ed. 821.....369, 857, 858
 WOODS.
- Wright *v.* Clinton, 67 Fed. 790; 14 C. C. A. 646.....215, 673
 Revg. 65 Fed. 425.
 First; Colt, Nelson, ALDRICH.
- Wright *v.* Fitz, 133 Fed. 394; 66 C. C. A. 456.....473
 First; Putnam, ALDRICH, Brown.
- Wright *v.* Herring-Curtis, 180 Fed. 110; 103 C. C. A. 31.....App. 564
 Revg. 177 Fed. 257.
 Second; Lacombe, Coxe, Noyes. Per Curiam.
- Wright *v.* Paulhan, 180 Fed. 112; 103 C. C. A. 32.....App. 566
 Second; Lacombe, Ward, Noyes. Per Curiam.
- Wright *v.* Yuengling, 155 U. S. 47; 39 L. Ed. 64; 15 S. Ct. 1..201, 202, 596
 BROWN.
- Writing Machine *v.* Elliott, 108 Fed. 628; 47 C. C. A. 536.....442
 Affg. 106 Fed. 507.
 Second; Wallace, SHIPMAN.
- Yale *v.* Berkshire, 135 U. S. 342; 34 L. Ed. 168; 10 S. Ct. 884....273, 469,
 473, 869, 871, 875
 Affg. in part 17 Fed. 531; revg. in part 26 Fed. 104. Referring to 38
 Fed. 917; 32 Fed. 167; 6 Fed. 377.
 BLATCHFORD.

[References are to sections. "App." refers to Appendix]

- Yale *v.* Greenleaf, 117 U. S. 554; 29 L. Ed. 952; 6 S. Ct. 846....223, 657, 666
WOODS.
- Yale *v.* James, 125 U. S. 447; 31 L. Ed. 807; 8 S. Ct. 967....870, 871, 885
Affg. 22 Blatchf. 294.
BLATCHFORD.
- Yale *v.* Sargent, 117 U. S. 373; 29 L. Ed. 950; 6 S. Ct. 931.....473
MATTHEWS.
- Yale *v.* Sargent, 117 U. S. 536; 29 L. Ed. 954; 6 S. Ct. 934....270, 284,
Affg. 17 Blatchf. 244; except as to costs. 287, 288, 342, 883
BLATCHFORD.
- Yawman *v.* Library, 147 Fed. 246; 77 C. C. A. 388.....194
First; Colt, Putnam, ALDRICH.
- Yawman *v.* Vetter, 159 Fed. 443; 86 C. C. A. 473.....612, 632
Second; Lacombe, COXE, Ward.
- Yesbera *v.* Hardesty, 166 Fed. 120; 92 C. C. A. 46.....283, 841, 845
See 111 Fed. 386; 133 Fed. 916.
Sixth; Lurton, SEVERENS, Richards.
- Yost *v.* Perkins, 179 Fed. 511; 103 C. C. A. 116.....App. 543, 599, 675
Sixth; SEVERENS, Warrington, Knappen.
- Young *v.* Wolfe, 130 Fed. 891; 65 C. C. A. 199.....107
Affg. 120 Fed. 956.
Second; Wallace, Lacombe, TOWNSEND.
- Zane *v.* Soffe, 110 U. S. 200; 28 L. Ed. 119; 3 S. Ct. 562.....389, 391
Affg. 2 Fed. 229.
BRADLEY.
- Zinn *v.* Auto Strop, 175 Fed. 78; 99 C. C. A. 100.....App. 212, 701
Affg. 170 Fed. 197.
Second; LACOMBE, Coxe, Noyes.
- Zinnser *v.* Krueger, 48 Fed. 296; 1 C. C. A. 73.....687
Affg. 45 Fed. 572. Revg. 39 Fed. 111.
Third; Acheson, WALES.

TABLE OF CASES CITED

With volume and page in standard American reports

[References are to sections. "App." refers to Appendix]

| | |
|---|--|
| Abbott <i>v.</i> Bonn, 51 Fed. 223 | App. 701 |
| Accident <i>v.</i> Crandal, 120 U. S. 527; 30 L. Ed. 740; 7 S. Ct. 685..... | 407 |
| Accumulator <i>v.</i> Consolidated, 53 Fed. 793 | 577 |
| Acker, <i>In re</i> , 66 Fed. 290 | 536, 577 |
| Ackerman, <i>Ex parte</i> , C. D. 1869, 75 | 775 |
| Acme <i>v.</i> Cary, 96 Fed. 344 | 180 |
| Adams <i>v.</i> Adams, 91 N. Y. 381 | 164 |
| Adams <i>v.</i> Bellaire, 141 U. S. 539; 35 L. Ed. 849; 12 S. Ct. 66.... | 380, 600, 603, 608, 635, 636, 672, 827, App. 636 |
| Adams <i>v.</i> Bellaire, 28 Fed. 360 | 827 |
| Adams <i>v.</i> Bellaire, 25 Fed. 270 | 219, 718 |
| Adams <i>v.</i> Bridgewater, 26 Fed. 324 | 219, 718 |
| Adams <i>v.</i> Burks, 84 U. S. 453; 21 L. Ed. 700..... | 418, 450, 505, 512, 523, 524, 576, 757, 763, 899 |
| Adams, <i>Ex parte</i> , 3 O. G. 150 | 775 |
| Adams <i>v.</i> Howard, 22 Fed. 656 | 751 |
| Adams <i>v.</i> Jones, 12 Pet. 207; 9 L. Ed. 205 | 113 |
| Adams <i>v.</i> Jones, Fed. Cas. 57 | 2, 7, 18 |
| Adams <i>v.</i> Lindell, 77 Fed. 432; 23 C. C. A. 223 | 12, 195, 212, 214, 376, 378, 437, 441, 468, 473, 507, 671, 937, App. 503, 671 |
| Adams <i>v.</i> Mcyrose, 7 Fed. 208 | App. 714 |
| Adams <i>v.</i> Tannage, 81 Fed. 178; 26 C. C. A. 326 | 561 |
| Adams <i>v.</i> Woods, 6 U. S. 336; 2 L. Ed. 334 | 921 |
| Adee <i>v.</i> Thomas, 41 Fed. 342 | 213 |
| Adriance <i>v.</i> McCormick, 55 Fed. 287 | 505, 765 |
| Adriance <i>v.</i> National, 98 Fed. 118 | 924 |
| Aeolian <i>v.</i> Juelg, 155 Fed. 119; 86 C. C. A. 205 | App. 476 |
| Aetna <i>v.</i> Ward, 140 U. S. 76; 35 L. Ed. 371; 11 S. Ct. 720 | 131 |
| Agawam <i>v.</i> Jordan, 74 U. S. 583..... | 2, 18 261, 367, 629, 682, 704, 795, 811, 856, 860 |
| Ager <i>v.</i> Murray, 105 U. S. 126; 26 L. Ed. 942 | 151, 921 |
| Ah Know <i>v.</i> Nunan, Fed. Cas. 6546 | 667, 707, 708 |
| Aikin <i>v.</i> Dolan, 3 Fish. 197; Fed. Cas. 110 | 103, 343, 413, 600 |
| Aikin <i>v.</i> Manchester, 2 Cliff. 435; Fed. Cas. 113 | 523, 524 |
| Ajax <i>v.</i> Pettibone, 125 Fed. 748; 60 C. C. A. 516 | 490 |
| Alabastine <i>v.</i> Payne, 27 Fed. 559 | 476, 555 |
| Albany <i>v.</i> Felthousen, 20 Fed. 633 | 273 |
| Albright <i>v.</i> Celluloid, 2 B. & A. 629; Fed. Cas. 147 | 629 |
| Albright <i>v.</i> Teas, 106 U. S. 613; 27 L. Ed. 295; 1 S. Ct. 550 | 714, 724, App. 718 |
| Alden <i>v.</i> Dewey, 1 Story, 336; Fed. Cas. 153..... | 368, 503 |
| Allen <i>v.</i> Baltimore, 114 U. S. 311; 29 L. Ed. 200; 5 S. Ct. 925 | 553 |

[References are to sections. "App." refers to Appendix]

| | |
|--|--|
| Allen v. Blunt, 3 Story, 742; Fed. Cas. 216 | 880 |
| Allen v. Culp, 166 U. S. 501; 41 L. Ed. 1093; 17 S. Ct. 644 | 883 |
| Allen v. Deacon, 21 Fed. 122 | 777 |
| Allen v. Hall, 1 A. K. Marsh, 425 | 386 |
| Allen v. Riley, 203 U. S. 347; 51 L. Ed. 216; 27 S. Ct. 95 | 920 |
| Allen v. Rawson, 1 M. G. & S. 574 | 368 |
| Allington v. Booth, 78 Fed. 878; 24 C. C. A. 378 | 551 |
| Allington v. Globe, 89 Fed. 865 | 351 |
| Alvin v. Scharling, 100 Fed. 87 | 213, 384, 797 |
| Alywin v. Bray, Y. & J. 518 | 798 |
| American v. Ament, 74 Fed. 789 | 756 |
| American v. American, 4 Fish. 284; Fed. Cas. 302 | 856, 857 |
| American v. Brown, 58 Fed. 409 | 717 |
| American v. Buckskin, 72 Fed. 508; 18 C. C. A. 662..... | 323, 325, 326, 709, 817 |
| American v. Bullard, 17 Blatch. 160; Fed. Cas. 294 | 295, 899 |
| American v. Chicago, 41 Fed. 522 | 568, 717, 730, App. 717 |
| American v. Cleveland, 158 Fed. 978; 86 C. C. A. 182 | App. 207 |
| American v. Crossman, 57 Fed. 1021 | 510 |
| American v. Crossman, 61 Fed. 888; 10 C. C. A. 146..... | 510 |
| American v. Elizabeth, 4 Fish. 189; Fed. Cas. 312 ... | 567, 629, 680, App. 629 |
| American v. Fiber, 90 U. S. 566; 23 L. Ed. 31 | 310, 649, 774, 823, 871, 877 |
| American v. Garrett, 110 U. S. 288; 28 L. Ed. 149; 4 S. Ct. 90 | 183 |
| American v. Helmstetter, 142 Fed. 978; 74 C. C. A. 240 | 47 |
| American v. Kitsell, 35 Fed. 521 | 338, 764 |
| American v. Knopp, 44 Fed. 609 | 361 |
| American v. Laroway, 28 Fed. 141 | 213, 384 |
| American v. Leeds, 87 Fed. 873 | 626 |
| American v. Ligowski, 31 Fed. 466 | 587 |
| American v. McKeesport, 57 Fed. 661 | 254 |
| American v. Mills, 162 Fed. 440; 89 C. C. A. 171 | 777 |
| American v. National, 51 Fed. 229; 2 C. C. A. 165 | 120, 535, 539, App. 253, 535, 541, 544, 561 |
| American v. National, 90 Fed. 824 | 568 |
| American v. Newton, 82 Fed. 732 | 228 |
| American v. Pennock, 164 U. S. 26; 41 L. Ed. 337; 17 S. Ct. 1 | 600 |
| American v. Phoenix, 113 Fed. 629; 51 C. C. A..... | App. 381 |
| American v. Sample, 130 Fed. 145; 64 C. C. A. 497 | App. 668 |
| American v. Sexton, 139 Fed. 564; 71 C. C. A. 543 | 817 |
| American v. Simmons, 106 U. S. 89; 27 L. Ed. 79; 1 S. Ct. 52 | 476, 523, 524, 717, 899 |
| American v. Southern, 34 Fed. 795 | 568, 801 |
| American v. Streat, 83 Fed. 700; 28 C. C. A. 18 | 525, App. 468 |
| American v. Vail, 15 Blatch. 315; Fed. Cas. 308 | 550 |
| American v. Western, 58 Fed. 410 | 717 |
| American v. Weston, 59 Fed. 147; 8 C. C. A. 56 | 74, 80, 408 |
| American v. Wilson, 198 Mass. 182..... | App. 160 |
| American v. Wyeth, 139 Fed. 389; 71 C. C. A. 485 | 599 |
| Am. Bank Protection v. Electric, 181 Fed. 350 | App. 74 |
| Am. Bell Tel. v. Dolbear, 15 Fed. 488..... | 688, 770 |
| Am. Bell Tel. v. Peoples, 22 Fed. 309..... | 61 |
| Am. Bell Tel. v. Spencer, 8 Fed. 509..... | 375 |
| Am. Bell Tel. v. United States, 68 Fed. 542; 15 C. C. A. 569..... | 789 |
| Am. Brake Shoe v. Railway, 143 Fed. 540..... | App. 672 |

TABLE OF CASES CITED

CXV

[References are to sections. "App." refers to Appendix]

Am. Cable v. Chicago, 41 Fed. 522..... App. 717
 Am. Graphophone v. Hawthorne, 92 Fed. 516..... App. 477
 Am. Graphophone v. Universal, 151 Fed. 595; 81 C. C. A. 139 .. App. 207
 Am. Ins. Co. v. Canter, 1 Pet. 511; 7 L. Ed. 242 140
 Am. Stove v. Cleveland, 158 Fed. 978; 86 C. C. A. 182..... App. 207
 Am. Street Car v. Jones, 122 Fed. 803..... App. 714
 Am. Tube Works v. Bridgewater, 26 Fed. 334 App. 366
 Am. Writing Mach. v. Wagner, 151 Fed. 576; 81 C. C. A. 120 ... App. 72
 Ames v. Howard, 1 Sumn. 482; Fed. Cas. 326.....222, 472, 687, 903
 Amory v. Lawrence, 3 Cliff. 523; Fed. Cas. 336 183
 Ammunition v. Norderfelt, 1 Ch. 630..... 365
 Amy v. Supervisors, 11 Wall. 136; 20 L. Ed. 101 481
 Anderson v. Collins, 122 Fed. 451; 58 C. C. A. 669..102, 673, App. 97, 129
 Anderson v. Dunn, 6 Wheat. 204; 5 L. Ed. 242..... App. 577
 Anderson v. Eiler, 50 Fed. 775; 1 C. C. A. 659 759, 764
 Andrea v. Redfield, 98 U. S. 225; 25 L. Ed. 158..... 921
 Andres v. Lee, 21 N. C. 319 305
 Andrews v. Cross, 8 Fed. 269 916, App. 691
 Andrews v. Hovey, 123 U. S. 267; 31 L. Ed. 160; 8 S. Ct. 101 18, 20,
 82, 853
 Andrews v. Hovey, 124 U. S. 694; 31 L. Ed. 557; 8 S. Ct. 676.....74, 82,
 853, 932
 Andrews v. National, 76 Fed. 166; 22 C. C. A. 110 386, 893
 Andrews v. National, 77 Fed. 774; 23 C. C. A. 454..... 112
 Andrews v. Pipe, 61 Fed. 782..... 120, 539
 Andrews v. Thum, 67 Fed. 911; 15 C. C. A. 67..... 655
 Angell v. Angell, 1 Eng. Ch. Rep. 89 App. 371
 Angier v. Eaton, 98 Pa. 594..... 755
 Animarium v. Neiman, 98 Fed. 14 794
 Ansonia v. Electrical, 144 U. S. 11; 36 L. Ed. 327; 12 S. Ct. 601 ... 94, 331,
 431, 440, 599, 635, 656, 662, 671, 672, 676, 689, App. 599
 Appleton v. Star, 60 Fed. 411; 9 C. C. A. 42 188, 427, 672, 707, 817
 Arkell, *In re*, 15 Blatch. 437; Fed. Cas. 531..... 671
 Armitage v. Macc, 96 N. Y. 538..... 164
 Armour v. United States, 153 Fed. 1; 82 C. C. A. 135..... App. 770
 Aron v. Manhattan, 132 U. S. 84; 33 L. Ed. 272; 10 S. Ct. 24..... 48, 49,
 88, 213, 591, 608, 616, 617, 624, 635, 646, 651, 654, 656, 657, 662, 669,
 671, 672, App. 404, 666, 672
 Asay v. Lieber, 92 Pa. St. 377 322
 Ashcroft v. Walworth, 1 Holmes, 152; Fed. Cas. 580 157, 921
 Ashley v. Board, 60 Fed. 55..... 327
 Ashton v. Coale, 52 Fed. 314; 3 C. C. A. 98..... 202
 Ashworth v. Roberts, 9 R. P. C. 309 384
 Aspden v. Nixon, 4 How. 476; 11 L. Ed. 466315, App. 31
 Aspen v. Billings, 150 U. S. 31; 37 L. Ed. 986; 14 S. Ct. 4..... 34, 128, 711
 Aspinwall v. Gill, 32 Fed. 697..... 161, 927
 Association v. Rogers, 42 Minn. 123 386
 Atherton v. Atwood-Morrison, 102 Fed. 949; 43 C. C. A. 72..... 714
 Atkins v. Chilson, 11 Metc. 112..... App. 755
 Atlantic v. Brady, 107 U. S. 192; 27 L. Ed. 438; 2 S. Ct. 225 20, 47,
 48, 215, 216, 313, 437, 593, 596, 614, 616, 636, 653, 655, 656, 657, 658,
 659, 662, 664, 666, 667, 671, 672, 676, 679, 698, 811
 Atlantic v. Parker, 16 Blatch. 281; Fed. Cas. 625..... 105
 Atty. v. Vernon, 1 Vern. 277 26
 Atwater v. Beecher, 8 Fed. 610 App. 344

[References are to sections. "App." refers to Appendix]

Automatic *v.* Pneumatic, 166 Fed. 288; 92 C. C. A. 206 ... App. 65, 861, 862
 Avery *v.* Case, 148 Fed. 214; 78 C. C. A. 110 203
 Ayers, *In re*, 123 U. S. 443; 31 L. Ed. 216; 8 S. Ct. 164 553
 Babcock *v.* Clarkson, 63 Fed. 607; 11 C. C. A. 351 213, 384, 385,
 394, App. 381
 Babcock *v.* Degener, 1 MacArthur, 607; Fed. Cas. 698 18
 Babcock *v.* Toledo, 170 Fed. 81; 95 C. C. A. 363 App. 384
 Badger *v.* Badger, 2 Wall. 37; 17 L. Ed. 836 729
 Badische *v.* Kalle, 104 Fed. 802; 44 C. C. A. 201 390, App. 97, 633
 Badische *v.* Klipstein, 125 Fed. 543 350, App. 348, 633
 Badische *v.* Leveinstein, L. R. 24, Ch. D. 156 230, 768, 815
 Bagnall *v.* Villar, L. R. 12 Ch. D. 812 778
 Bailey *v.* Abrams, 3 B. & A. 96; Fed. Cas. 752 564
 Bailey *v.* Bailey, 67 Vt. 494 841
 Baker *v.* Crane, 138 Fed. 60; 70 C. C. A. 486 App. 845
 Baker *v.* Duncombe, 146 Fed. 744; 77 C. C. A. 234 325
 Baldwin *v.* Sibley, 1 Cliff. 150; Fed. Cas. 805 751, 753
 Balkam *v.* Woodstock, 154 U. S. 177; 38 L. Ed. 953; 14 S. Ct. 1010 ... 921
 Ball *v.* Ball, 36 Fed. 309 510
 Ball *v.* Langles, 102 U. S. 128; 26 L. Ed. 104 871, 877
 Ballard *v.* McClusky, 58 Fed. 880 480, 485, App. 344
 Bank *v.* Beedle, 37 Minn. 527 753
 Bank *v.* Mumford, 2 Barb. Ch. 596 720
 Bank *v.* Patterson, 7 Cranch, 299; 3 L. Ed. 298 156
 Bank *v.* Robinson, 57 Cal. 520 157
 Bank *v.* Widner, 11 Paige Ch. 533 807
 B. & S. Fastener *v.* B. G. Fastener, 58 Fed. 818; 7 C. C. A. 498 ... 54, 194,
 207, 378, 384, 385, 394, 714
 B. & S. Fastener *v.* Edgerton, 96 Fed. 489; 37 C. C. A. 523 194, 904
 B. & S. Fastener *v.* Kraetzer, 150 U. S. 111; 37 L. Ed. 1019; 14 S. Ct. 48
 203, 226
 Bantz *v.* Frantz, 105 U. S. 160; 26 L. Ed. 1013 871, 872, 873, 877
 Barber *v.* National, 129 Fed. 370; 64 C. C. A. 40 App. 366
 Barnard *v.* Gibson, 7 How. 650; 12 L. Ed. 649 116, 130, 304, 893
 Barnes *v.* Walworth, 51 Fed. 88 860
 Barnes *v.* Walworth, 60 Fed. 605; 9 C. C. A. 154 860, App. 97
 Barney *v.* Oelrichs, 138 U. S. 529; 34 L. Ed. 1037; 11 S. Ct. 414 921
 Barrera *v.* Silsbee, 21 How. 146; 16 L. Ed. 86 131
 Barrett *v.* Hall, 1 Mas. 447; Fed. Cas. 1047 440, 473
 Barry *v.* Crane, 22 Fed. 396 App. 366
 Barry *v.* New York, 53 N. Y. 536 411
 Barton *v.* White, 144 Mass. 281 921
 Bate *v.* Gillett, 31 Fed. 809 420, 421, 422
 Bate *v.* Hammond, 129 U. S. 151; 32 L. Ed. 645; 9 S. Ct. 225 420,
 421, 422, 923
 Bate *v.* Sulzberger, 157 U. S. 1; 39 L. Ed. 601; 15 S. Ct. 508 420, 422
 Bates *v.* Clark, 95 U. S. 204; 24 L. Ed. 471 498
 Bates *v.* Coe, 98 U. S. 31; 25 L. Ed. 68 59, 68, 73, 76, 96, 102, 320,
 629, 857, 860, 908, App. 68, 97
 Bates *v.* Force, 149 Fed. 220; 79 C. C. A. 178 226
 Bates *v.* Keith, 84 Fed. 1014; 28 C. C. A. 638 627, 661
 Bates *v.* Keith, 82 Fed. 100 661
 Bates *v.* Serger, 2 O. G. 493 775
 Battin *v.* Taggart, 58 U. S. 77; 15 L. Ed. 37 222, 223, 404, 734, 873,
 880, 888

TABLE OF CASES CITED

cxvii

[References are to sections. "App." refers to Appendix]

Bauserman *v.* Blunt, 147 U. S. 647; 37 L. Ed. 316; 13 S. Ct. 466 921
 Baxter, *Ex parte*, 2 O. G. 470 775
 Beach *v.* American, 63 Fed. 597 247, 459, 670
 Beach, *Ex parte*, 3 O. G. 607 775
 Beach *v.* Hobbs, 92 Fed. 146; 34 C. C. A. 248 257, 561
 Beach *v.* Hobbs, 82 Fed. 916 256
 Bean *v.* Patterson, 110 U. S. 401; 28 L. Ed. 190; 4 S. Ct. 23 App. 273
 Bean *v.* Smallwood, 2 Story, 408; Fed. Cas. 1173 593, 667, 672, 687, 775
 Beatty *v.* Burnes, 12 U. S. 98; 3 L. Ed. 96 921
 Beanbien *v.* Beanbien, 23 How. 190; 16 L. Ed. 484 729
 Bedford *v.* Hunt, 1 Mas. 302; Fed. Cas. 1217 71, 391, 440, 667, 811, 860
 Beebee *v.* Russell, 19 How. 283; 15 L. Ed. 668 130, 304
 Beecher *v.* Atwater, 114 U. S. 523; 29 L. Ed. 232; 5 S. Ct. 1007 47,
 596, 603, 609
 Beedle *v.* Bennett, 122 U. S. 71; 30 L. Ed. 1074; 7 S. Ct. 1090 550,
 717, 770
 Beer Co. *v.* Mass. 97 U. S. 25; 24 L. Ed. 982 920
 Beer *v.* Walbridge, 100 Fed. 465; 40 C. C. A. 496 325, 707, App. 325
 Beggs, *Ex parte*, 50 O. G. 1130 5
 Belcher *v.* Whittemore, 134 Mass. 330 App. 160
 Belding *v.* Challenge, 152 U. S. 100; 38 L. Ed. 370; 14 S. Ct. 492 374,
 486, App. 601
 Belknap *v.* Schild, 161 U. S. 10; 16 L. Ed. 599; 16 S. Ct. 443 285, 384,
 481, 505, 842, 847, App. 384
 Bell *v.* Morrison, 26 U. S. 351; 7 L. Ed. 349 921
 Beman *v.* Rufford, 1 Simon N. S. 550 482
 Bement *v.* National, 186 U. S. 70; 46 L. Ed. 1058; 22 S. Ct. 747 474,
 513, 548, 645, 714, 744, 745, 761, 837, App. 718
 Benbow-Brammer *v.* Richmond, 159 Fed. 161 App. 404
 Benbow-Brammer *v.* Simpson, 132 Fed. 614 247
 Béné *v.* Jeantet, 129 U. S. 683; 32 L. Ed. 803; 9 S. Ct. 428 245, 375,
 411, 904, 915
 Benjamin *v.* Dale, 158 Fed. 617; 85 C. C. A. 439 348
 Bennett *v.* Fowler, 75 U. S. 445; 19 L. Ed. 431 348
 Bensley *v.* N. W. Horsenail, 26 Fed. 250 151
 Berdan's Case, 26 Ct. Cl. 48 498
 Bessette *v.* Conkey, 194 U. S. 324; 48 L. Ed. 997; 24 S. Ct. 665 537, 538,
 App. 538, 577
 Best *v.* Polk, 18 Wall. 112; 27 L. Ed. 805 308
 Betts *v.* Menzies, 4 B. & Q. B. 999 320, 888
 Bevin *v.* East Hamilton, 5 Fish. 23; Fed. Cas. 1379 3
 Bevin *v.* Starr, 114 Fed. 362 335
 Bigelow *v.* Dobson, 10 Fed. 386 842
 Birdsall *v.* Coolidge, 93 U. S. 64; 23 L. Ed. 802 282, 285, 292, 298, 839
 Birdsall *v.* Perego, 5 Blatch. 251; Fed. Cas. 1435 764
 Birdsall *v.* Shaliol, 112 U. S. 485; 28 L. Ed. 768; 5 S. Ct. 244 165, 338,
 512, 757, 763, 765, 798, 839, App. 31, 299, 371
 Birmingham *v.* Gates, 78 Fed. 350; 24 C. C. A. 132 229
 Bischoff *v.* Wethered, 9 Wall. 812; 19 L. Ed. 829 404, 406, 734, 888,
 App. 131, 404
 Bissell *v.* Goshen, 72 Fed. 545; 19 C. C. A. 25 116, 118, 130, 302, 544, 893,
 App. 544, 893
 Bissell *v.* Spring, 124 U. S. 225; 31 L. Ed. 411; 8 S. Ct. 495 893, 894
 Black *v.* Allen, 42 Fed. 618 717
 Black *v.* Thorne, 111 U. S. 122; 28 L. Ed. 372; 4 S. Ct. 326 293, 298, 839

[References are to sections. "App." refers to Appendix]

| | |
|--|---|
| Black Diamond <i>v.</i> Excelsior, 156 U. S. 611; 39 L. Ed. 553; 15 S. Ct. 482 | 204, 304, 325, 473, 496, 707, 712 |
| Blackledge <i>v.</i> Weir, 108 Fed. 71; 47 C. C. A. 212 | 764 |
| Blake <i>v.</i> Oxford, 68 N. H. 302 | 141, 371 |
| Blake <i>v.</i> San Francisco, 113 U. S. 679; 28 L. Ed. 1070; 5 S. Ct. 692 | 596, 651, 654, 671, 672, 676, App. 672 |
| Blakeney <i>v.</i> Goode, 30 Ohio St. 350 | 168 |
| Blakey <i>v.</i> National, 95 Fed. 136; 37 C. C. A. 27 | 544, 566 |
| Blanchard <i>v.</i> Bank, 75 Fed. 249; 21 C. C. A. 319 | 129 |
| Blanchard <i>v.</i> Beers, 2 Blatch. 411; Fed. Cas. 1506 | 459 |
| Blanchard <i>v.</i> Putnam, 75 U. S. 420; 19 L. Ed. 433 | 321, 409, 484, 526, 629, 680, 795 |
| Blanchard <i>v.</i> Reeves, 1 Fish. 103; Fed. Cas. 1515 | 453 |
| Blanchard <i>v.</i> Sprague, 1 Cliff. 238; Fed. Cas. 1156 | 714, 724, 752 |
| Blanchard <i>v.</i> Sprague, 3 Sumn. 535; Fed. Cas. 1518 | 222, 223, 903, App. 741 |
| Blandy <i>v.</i> Griffith, 3 Fish. 609; Fed. Cas. 1529 | 223, 443, 501, App. 459 |
| Blauvelt <i>v.</i> Interior, 80 Fed. 906; 26 C. C. A. 243 | App. 366 |
| Blessing <i>v.</i> Copper, 34 Fed. 753 | 324, 603, 807 |
| Bliss <i>v.</i> Reed, 106 Fed. 314; 45 C. C. A. 304 | App. 604 |
| Block <i>v.</i> Commissioners, 99 U. S. 686; 25 L. Ed. 491 | 894 |
| Bloomer <i>v.</i> McQuewan, 14 How. 539; 14 L. Ed. 532 | 418, 450, 505, 645, 745, 747, 757, 764, 769, 927 |
| Bloomer <i>v.</i> Millinger, 68 U. S. 340; 17 L. Ed. 581 | 418, 505, 757, 769 |
| Blount <i>v.</i> Société, 53 Fed. 98; 3 C. C. A. 455 | 118, 120, 535, 539, 543, 544, 549, 554, App. 544, 579 |
| Board of Councilmen <i>v.</i> Deposit Bank, 127 Fed. 812; 59 C. C. A. 538 | 537 |
| Boardmen, <i>In re</i> , 169 U. S. 39; 42 L. Ed. 653; 18 S. Ct. 291 | 711 |
| Bobbs-Merrill <i>v.</i> Straus, 210 U. S. 339; 52 L. Ed. 122; 28 S. Ct. 748 | 744 |
| Boesch <i>v.</i> Gräff, 133 U. S. 697; 33 L. Ed. 787; 10 S. Ct. 378 | 450, 505, 512, 763 |
| Bogart <i>v.</i> Hinds, 25 Fed. 485 | 801 |
| Bonnette <i>v.</i> Koehler, 82 Fed. 428; 27 C. C. A. 200 | 234, App. 459 |
| Bonsack <i>v.</i> Hulse, 65 Fed. 864; 13 C. C. A. 180 | 365 |
| Bonsack <i>v.</i> Smith, 70 Fed. 383 | 574 |
| Boogher <i>v.</i> Ins. Co., 103 U. S. 90; 26 L. Ed. 310 | 131 |
| Booker <i>v.</i> Booker, 20 Ga. 780 | App. 371 |
| Boone <i>v.</i> Chiles, 10 Pet. 178; 9 L. Ed. 176 | 807 |
| Boston <i>v.</i> Allen, 91 Fed. 248; 33 C. C. A. 485 | 151, 285, 464, 468, App. 212, 223 |
| Boston <i>v.</i> Bemis, 80 Fed. 287; 25 C. C. A. 420 | 68, 374, 378, 637 |
| Boston <i>v.</i> Bemis, 98 Fed. 121; 38 C. C. A. 661 | 790 |
| Boston <i>v.</i> Potter, 123 Mass. 28 | App. 758 |
| Boston <i>v.</i> Woodward, 82 Fed. 97; 27 C. C. A. 69 | 271, 385, App. 381, 384 |
| Bostwick <i>v.</i> Brinkerhoff, 106 U. S. 3; 27 L. Ed. 73; 1 S. Ct. 15 | 116 |
| Bottle <i>v.</i> DeLaVergne, 47 Fed. 59 | 324 |
| Boughton <i>v.</i> Allen, 11 Paige, 321 | 796 |
| Bovill <i>v.</i> Moore, Davis Cas. 361 | 905 |
| Boville <i>v.</i> Moore, 2 Merch. 211 | 204 |
| Bowen <i>v.</i> Ibley, 1 Edw. Ch. 148 | 796 |
| Bowen <i>v.</i> Morris, 2 Taunt. 374 | 156 |
| Bowers <i>v.</i> Atlantic, 104 Fed. 887 | 797 |
| Bowers <i>v.</i> Lake Superior, 149 Fed. 983; 79 C. C. A. 493 | App. 758 |
| Bowers <i>v.</i> Von Schmidt, 63 Fed. 572 | 72 |

TABLE OF CASES CITED

cxix

[References are to sections. "App." refers to Appendix]

| | |
|---|--------------------------|
| Bowker <i>v.</i> Daws, 3 B. & A. 518; Fed. Cas. 1734..... | 476 |
| Boyce <i>v.</i> Grundy, 3 Pet. 215; 7 L. Ed. 207..... | 719 |
| Boyd <i>v.</i> Cherry, 50 Fed. 279..... | 107, 476 |
| Boyd <i>v.</i> Janesville, 158 U. S. 260; 39 L. Ed. 973; 15 S. Ct. 837..... | 198, |
| 202, 349, 441, 629, 680, App. 376, 456, 497, 629 | |
| Boyd <i>v.</i> McAlpin, 2 Robb. 277; Fed. Cas. 1748..... | 411 |
| Boyer <i>v.</i> Keller, 127 Fed. 130; 62 C. C. A. 244..... | 673 |
| Boyle <i>v.</i> Zacharie, 6 Pet. 647; 8 L. Ed. 646..... | 285 |
| Boynton <i>v.</i> Morris, 87 Fed. 225; 30 C. C. A. 617..... | 937 |
| Bradford <i>v.</i> Belknap, 105 Fed. 63..... | 380, App. 322, 637 |
| Bradford <i>v.</i> Corbin, 6 O. G. 223..... | 861 |
| Bradley <i>v.</i> Eagle, 57 Fed. 980; 6 C. C. A. 661..... | 305, 893, 894 |
| Bradley <i>v.</i> Eccles, 126 Fed. 945; 61 C. C. A. 669..... | 335 |
| Bragg <i>v.</i> Fitch, 121 U. S. 478; 30 L. Ed. 1008; 7 S. Ct. 978 .. | 198, 202, |
| 207, 211, 212, 215, 217, 229, 376, 442, 473, 597, 602, 889 | |
| Bragg <i>v.</i> Hartford, 56 Fed. 292..... | 558, App. 717 |
| Brainard <i>v.</i> Buck, 184 U. S. 99; 46 L. Ed. 449; 22 S. Ct. 458..... | 77 |
| Brainard <i>v.</i> Cramme, 12 Fed. 621..... | 688, 770, App. 344 |
| Brant <i>v.</i> Iron Co. 93 U. S. 326; 23 L. Ed. 927..... | 384 |
| Brammer <i>v.</i> Schroeder, 106 Fed. 918; 46 C. C. A. 41..... | App. 129 |
| Brammer <i>v.</i> Witte, 159 Fed. 726; 86 C. C. A. 207..... | 456, App. 461 |
| Brass Co. <i>v.</i> Miller, 5 Fish. 48; Fed. Cas. 17,254..... | 223 |
| Bray <i>v.</i> Hartshorn, 1 Cliff. 538; Fed. Cas. 1820..... | 440 |
| Brazeo <i>v.</i> Schofield, 124 U. S. 495; 31 L. Ed. 484; 8 S. Ct. 604..... | 381 |
| Brechbill <i>v.</i> Randall, 102 Ind. 528..... | 920 |
| Brennan <i>v.</i> Dowagiac, 162 Fed. 472; 89 C. C. A. 392..... | 841 App. 845 |
| Brent <i>v.</i> Davis, 10 Wheat. 350; 6 L. Ed. 393..... | 291 |
| Bresnahan <i>v.</i> Tripp, 72 Fed. 920; 19 C. C. A. 237..... | 35, 561 |
| Bresnahan <i>v.</i> Tripp, 102 Fed. 899; 43 C. C. A. 48..... | 190, 197 |
| Brickill <i>v.</i> Mayor, 7 Fed. 479..... | 857 |
| Brickill <i>v.</i> Mayor, 112 Fed. 65; 50 C. C. A. 1..... | 843 |
| Bricknall <i>v.</i> Hartford, 49 Fed. 372..... | 921 |
| Briggs <i>v.</i> Central, 60 Fed. 87; 8 C. C. A. 480..... | 616, 672 |
| Briggs Petition, 28 N. H. 553..... | 141, 371 |
| Brill <i>v.</i> St. Louis, 90 Fed. 666; 33 C. C. A. 213.. | 207, 378, 442, 587, App. |
| | 201, 207 |
| Brill <i>v.</i> Third Ave. 103 Fed. 289..... | App. 97 |
| Brinkerhoff <i>v.</i> Aloe, 146 U. S. 515; 36 L. Ed. 1068; 13 S. Ct. 221.. | 595, 597, |
| | App. 597 |
| Broasnahan, <i>In re</i> , 18 Fed. 62..... | 574 |
| Brobet <i>v.</i> Brock, 77 U. S. 519; 19 L. Ed. 1002..... | 778 |
| Brockway <i>v.</i> Allen, 17 Wend. 40..... | 156 |
| Broadnax <i>v.</i> Central, 4 Fed. 214..... | 548, 574 |
| Broderick <i>v.</i> Mayhew, 131 Fed. 92..... | 257, 574 |
| Bronson <i>v.</i> Chappell, 12 Wall. 681; 20 L. Ed. 436..... | 753 |
| Bronson <i>v.</i> Railroad, 2 Black, 524; 17 L. Ed. 798..... | 116 |
| Brook <i>v.</i> Ashton, 27 Law. J. Q. B. 145..... | 215, 671, 676 |
| Brookfield <i>v.</i> Elmer, 132 Fed. 312..... | App. 559 |
| Brookfield <i>v.</i> Novelty, 170 Fed. 960; 96 C. C. A. 127..... | App. 604, 847 |
| Brooks <i>v.</i> Byam, 2 Story, 525; Fed. Cas. 1948..... | 165, 764 |
| Brooks <i>v.</i> Fiske, 15 How. 212; 14 L. Ed. 665..... | 145, 201, 375, 459, 467, |
| | 468, 473, 526, 528, 872 |
| Brooks <i>v.</i> Jenkins, 3 McLean, 432; Fed. Cas. 1953..... | 158, 396 |
| Brooks <i>v.</i> Sacks, 81 Fed. 403; 26 C. C. A. 456..... | 60, 74, App. 25, 30 |
| Brooks <i>v.</i> Miller, 28 Fed. 615..... | 717, 718 |

[References are to sections. "App." refers to Appendix]

| | |
|--|--|
| Brooks <i>v.</i> Stolley, 3 McLean, 523; Fed. Cas. 1962..... | 714 |
| Brown <i>v.</i> Davis, 116 U. S. 237; 29 L. Ed. 659; 6 S. Ct. 379 | 103, |
| | 201, 202, 612 |
| Brown <i>v.</i> District of Columbia, 130 U. S. 87; 9 S. Ct. 437..... | 88, 188, 380, |
| | 427, 598, 667, 671, 696 |
| Brown <i>v.</i> District of Columbia, 3 Mackey, 502..... | 411 |
| Brown <i>v.</i> Drohen, 140 Fed. 97..... | 640 |
| Brown <i>v.</i> Duchesne, 60 U. S. 183; 15 L. Ed. 595 | 532 |
| Brown <i>v.</i> Guild, 90 U. S. 181; 23 L. Ed. 161..... | 12, 61, 200, 215, 223, 229, |
| | 245, 473, 577, 590, 605, 609, 610, 617, 629, 641, 860, 871, 937 |
| Brown <i>v.</i> Hall, 6 Blatch. 401; Fed. Cas. 2008..... | 407, 795 |
| Brown <i>v.</i> Huntington, 134 Fed. 735; 67 C. C. A. 639..... | 198 |
| Brown <i>v.</i> King, 107 Fed. 498; 46 C. C. A. 432 | 501 |
| Brown <i>v.</i> Lanyon, 148 Fed. 838; 78 C. C. A. 528..... | 285 |
| Brown <i>v.</i> Lanyon, 179 Fed. 309; 102 C. C. A. 497... App. 836, 843, 845 | |
| Brown <i>v.</i> Lapham, 27 Fed. 77 | 385, 513 |
| Brown <i>v.</i> Lent, 20 Vt. 529 | 481 |
| Brown <i>v.</i> Meyer, 139 U. S. 540; 35 L. Ed. 247; 11 S. Ct. 625..... | 928 |
| Brown <i>v.</i> Meyer, 100 U. S. 671; 25 L. Ed. 738 | 377 |
| Brown <i>v.</i> Piper, 91 U. S. 37; 23 L. Ed. 200 ... | 47, 116, 215, 224, 313, 322, |
| | 323, 324, 325, 389, 390, 394, 483, 493, 591, 593, 616, 617, 651, 653, 656, |
| | 667, 669, 670, 671, 672, 676, 706, 707, 708, 709, 710, 734, 795, 799, 817, |
| | App. 672 |
| Brown <i>v.</i> Shannon, 20 How. 55; 15 L. Ed. 826..... | 714, App. 151 |
| Brown <i>v.</i> Stilwell, 57 Fed. 731; 6 C. C. A. 528 | 211, 375, App. 207 |
| Brown Saddle Co. <i>v.</i> Troxel, 98 Fed. 620 | 645 |
| Bruce <i>v.</i> Marder, 10 Fed. 750 | 222 |
| Brunswick <i>v.</i> Thum, 111 Fed. 904; 50 C. C. A. 61..... | 633, 648, 673, |
| | App. 325 |
| Brush <i>v.</i> California, 52 Fed. 945; 3 C. C. A. 368..... | 375, 798, App. 764 |
| Brush <i>v.</i> Condit, 132 U. S. 39; 33 L. Ed. 251; 10 S. Ct. 1...60, 103, 448, 854 | |
| Brush <i>v.</i> Electric, 45 Fed. 241 | 558, 568 |
| Brush <i>v.</i> Electric, 47 Fed. 48..... | App. 244 |
| Brush <i>v.</i> Electric, 64 Fed. 775..... | 564 |
| Brush <i>v.</i> Julien, 41 Fed. 679 | 55 |
| Brush <i>v.</i> Ware, 15 Pct. 93, 112, 114; 10 L. Ed. 89 | 167 |
| Brush-Swan <i>v.</i> Thomson-Houston, 48 Fed. 224 | 765 |
| Bryan <i>v.</i> Harrison, 27 Pa. St. 233..... | 322 |
| Bryant <i>v.</i> Leland, 6 Fed. 125..... | 401 |
| Bryce <i>v.</i> Dorr, 3 McLean, 583; Fed. Cas. 6497..... | 289 |
| Bryce <i>v.</i> National, 116 Fed. 186; 53 C. C. A. 611..... | 202 |
| Bryce <i>v.</i> Seneca, 140 Fed. 161..... | 851 |
| Buckingham's Appeal, 60 Conn. 143 | 396 |
| Buddicum <i>v.</i> Kirk, 3 Cranch, 295; 2 L. Ed. 584..... | App. 371 |
| Buerk <i>v.</i> Imhauser, 2 B. & A. 452; Fed. Cas. 2107..... | 396, 830 |
| Buffington's <i>v.</i> Eustis, 65 Fed. 804; 13 C. C. A. 143..... | 12, 195, 204, 473 |
| Buffington's <i>v.</i> Harvey, 95 U. S. 99; 24 L. Ed. 381..... | 138 |
| Bullock <i>v.</i> General, 149 Fed. 409; 79 C. C. A. 229 | 309, 904 |
| Bullock <i>v.</i> Jones, 3 B. & A. 195; Fed. Cas. 2132..... | 629 |
| Bullock <i>v.</i> Westinghouse, 129 Fed. 105; 63 C. C. A. 607 | App. 508 |
| Bundy <i>v.</i> Detroit, 94 Fed. 524; 36 C. C. A. 375 ... | 198, 241, 374, 376, 378, |
| | 435, 459, 461, 468, 485, 600, 615, App. 207, 376, 378, 461, 658 |
| Burdell <i>v.</i> Denig, 92 U. S. 716; 23 L. Ed. 764 | 285, 292, 294 |
| Burdett <i>v.</i> Estey, Fed. Cas. 2145 | App. 344 |
| Burdsall <i>v.</i> Curran, 31 Fed. 918 | 451, 797 |

TABLE OF CASES CITED

CXXI

[References are to sections. "App." refers to Appendix]

Burnham *v.* Union, 110 Fed. 765; 49 C. C. A. 163 599, 674, App. 675
 Burns *v.* Cooper, 153 Fed. 148; 82 C. C. A. 300 App. 893
 Burns *v.* Lynde, 6 Allen, 305 717
 Burns *v.* Meyer, 100 U. S. 671; 25 L. Ed. 738 207, 226, 244, 375, 377,
 598, 629, 680, 903, App. 205
 Burns *v.* Mills, 143 Fed. 325; 74 C. C. A. 525 App. 672
 Burr *v.* DeLaVergne, 102 N. Y. 415 168, App. 160
 Burr *v.* Duryea, 1 Wall. 320; 17 L. Ed. 650 196, App. 458, 490
 Burr *v.* Duryee, 68 U. S. 531; 17 L. Ed. 750 310, 426, 499, 503, 531,
 605, 639, 651, 672, 679, 683, 771, 871, 872, 886, 888
 Burr *v.* Duryce, 68 U. S. 579; 17 L. Ed. 660 651, 686
 Burr *v.* Duryee, 2 Fish. 275; Fed. Cas. 2190 532
 Burr *v.* Gregory, 2 Paine, 426; Fed. Cas. 357 714
 Burr *v.* Kimbark, 28 Fed. 574 554, 555, 797
 Burrell *v.* Hackley, 35 Fed. 833 800
 Burt *v.* Ivory, 133 U. S. 349; 33 L. Ed. 647; 10 S. Ct. 349 380, 431,
 437, 440, 591, 601, 608, 609, 612, 617, 646, 654, 665, 667, 671, 672, App.
 599, 675
 Busch *v.* Jones, 184 U. S. 598; 46 L. Ed. 707; 22 S. Ct. 511 717, App. 806
 Busell *v.* Stevens, 137 U. S. 423; 34 L. Ed. 719; 11 S. Ct. 150 363, 599,
 606, 654, 655, 668, 672
 Buser *v.* Novelty, 151 Fed. 478; 81 C. C. A. 16 72
 Bush *v.* Fox, 5 H. L. Cas. 707 671, 676, 679
 Buss *v.* Putney, 38 N. H. 44 753
 Bussey *v.* Excelsior, 110 U. S. 131; 28 L. Ed. 95; 4 S. Ct. 38 41, 216,
 609, 657, 662, 667, 679
 Butler *v.* Eaton, 141 U. S. 240; 35 L. Ed. 713; 11 S. Ct. 985 34, 711
 Butler *v.* Fayerweather, 91 Fed. 458 537
 Butler *v.* Shaw, 21 Fed. 321 13
 Butterworth *v.* Boral, 97 O. G. 1596 App. 421
 Butterworth *v.* Hoe, 112 U. S. 50; 28 L. Ed. 656; 5 S. Ct. 25 13, 143,
 App. 128
 Buxton *v.* Lister, 3 Atk. 383 174
 Cahill *v.* Brown, 3 B. & A. 580; Fed. Cas. 2291 85, 88
 Cahoon *v.* Ring, 1 Cliff. 592; Fed. Cas. 2292 20, 72, 373, 501,
 526, 629, 811
 Cain *v.* Park, 86 O. G. 797 3
 Calculagraph *v.* Wilson, 137 Fed. 20 247
 Caldwell *v.* Powell, 73 Fed. 488; 19 C. C. A. 592 325, 326
 Callaghan *v.* Myers, 128 U. S. 617; 32 L. Ed. 547; 9 S. Ct. 177 290,
 829, 836, 837, App. 845
 California *v.* Henzel, 48 Fed. 375 548
 California *v.* Molitor, 113 U. S. 609; 28 L. Ed. 1106; 5 S. Ct. 618 406
 Camden *v.* Stuart, 144 U. S. 118; 36 L. Ed. 363; 12 S. Ct. 585 836
 Cammeyer *v.* Newton, 94 U. S. 225; 24 L. Ed. 72 26, 498, 745
 Campbell *v.* Am. Shipbuilding, 179 Fed. 498; 103 C. C. A. 122 App. 207
 Campbell *v.* Bayley, 63 Fed. 463; 11 C. C. A. 284 46
 Campbell *v.* Duplex, 101 Fed. 282; 41 C. C. A. 351 207, 599, 654,
 674, 675, App. 675, 701
 Campbell *v.* Duplex, 86 Fed. 315 195, 574
 Campbell *v.* Hall, 16 N. Y. 575 36
 Campbell *v.* Manhattan, 49 Fed. 930 548, 574, 645, 746
 Campbell *v.* Mayor, 9 Fed. 500 853, 857
 Campbell *v.* Mayor, 36 Fed. 260 App. 899
 Campbell *v.* Rankin, 99 U. S. 261; 25 L. Ed. 435 894

[References are to sections. "App." refers to Appendix]

| | |
|---|--------------------------|
| Canal Co. v. Clark, 13 Wall. 311; 20 L. Ed. 581 | 928 |
| Canda v. Michigan, 124 Fed. 486; 61 C. C. A. 194... 195, 937, App. 97 | |
| Canda v. Michigan, 152 Fed. 178; 81 C. C. A. 420..... | 298, 837 |
| Canter v. American, 28 U. S. 307; 7 L. Ed. 306..... | 141, 277 |
| Cantrell v. Wallick, 117 U. S. 689; 29 L. Ed. 1017; 6 S. Ct. 970.. | 61, 447, |
| 453, 501, 506, 532, 561, 629, 630, 636, 638, 673, 850, App. 74 | |
| Carbon Co. v. McMillin, 119 N. Y. 46..... | 744 |
| Carhart v. Austin, 2 Cliff. 528; Fed. Cas. 2288..... | 871 |
| Carnan v. Bowles, 2 Bro. Ch. 84..... | 418 |
| Carnegie v. Cambria, 185 U. S. 403; 46 L. Ed. 968; 22 S. Ct. 698 ... | 101, |
| 561, 648, 817, App. 341, 817 | |
| Carnegie v. Colorado, 165 Fed. 195; 91 C. C. A. 229..... | App. 806 |
| Carpenter v. Dexter, 8 Wall. 513; 19 L. Ed. 426 | 161 |
| Carpenter v. Searle, 60 Fed. 82; 8 C. C. A. 476..... | 871, 878, 884 |
| Carr v. Rice, 1 Fish. 198; Fed. Cas. 2440 | 574 |
| Carr v. U. S., 98 U. S. 433; 25 L. Ed. 209 | 715, 721 |
| Carter v. Baker, 1 Sawy. 512; Fed. Cas. 2472..... | 374 |
| Carter v. Hanes, 70 Fed. 859..... | App. 205 |
| Carter v. Ins. Co. 1 Johns. Ch. 463..... | 720 |
| Carty v. Kellogg, 73 O. G. 285..... | 3, 5 |
| Carver v. Hyde, 16 Pet. 513; 10 L. Ed. 1051..... | 145, 426, 468, 473, 651 |
| Carver v. Mfg. Co., 2 Story, 432; Fed. Cas. 2485..... | 223, 311 |
| Cary v. Acme, 108 Fed. 873; 48 C. C. A. 118 | 537 |
| Cary v. Domestic, 27 Fed. 299..... | 579 |
| Cary v. Lovell, 37 Fed. 654 | 287 |
| Cary v. Neal, 90 Fed. 725..... | 672, 919, App. 598 |
| Cary v. Wolff, 24 Fed. 139..... | 671 |
| Case v. Brown, 69 U. S. 320; 17 L. Ed. 817..... | 605, 872 |
| Case v. Hall, 94 Fed. 300; 36 C. C. A. 259..... | 136 |
| Case v. Terrell, 78 U. S. 199; 20 L. Ed. 134 | 553 |
| Casey v. Cincinnati, 45 Fed. 135 | 924 |
| Casebeer v. Mowry, 55 Pa. St. 422 | 894 |
| Casler, <i>Ex parte</i> , 90 O. G. 446 | App. 229 |
| Cathcart v. Robinson, 30 U. S. 264; 8 L. Ed. 264..... | 174 |
| Cator v. Burke, 1 Br. Ch. 434 | 720 |
| Caverly v. Deere, 66 Fed. 305..... | 111, 363, 593, 602, 646 |
| Cayuta v. Kennedy, 127 Fed. 335..... | 548, App. 559 |
| Cazier v. Mackie-Lovejoy, 138 Fed. 654; 71 C. C. A. 104..... | 247 |
| Celluloid v. American, 30 Fed. 437 | 476, 477 |
| Celluloid v. Arlington, 34 Fed. 324..... | 548, App. 559 |
| Celluloid v. Tower, 26 Fed. 451..... | 696 |
| Celluloid v. Zylonite, 27 Fed. 291 | App. 195 |
| Centaur v. Heinsfurter, 84 Fed. 955; 28 C. C. A. 581 | 929 |
| Central v. Grant, 135 U. S. 207; 34 L. Ed. 97; 10 S. Ct. 736 | 116 |
| Cerealine v. Bates, 101 Fed. 272; 41 C. C. A. 341..... | 646, 823 |
| Chabot v. Overseaming Co. 6 Fish. 71; Fed. Cas. 2567 | 752 |
| Chace v. Vasquez, 11 Wheat. 429; 6 L. Ed. 426..... | 116 |
| Chadwick v. Covell, 151 Mass. 190..... | 898 |
| Chaffee v. Boston, 63 U. S. 217; 16 L. Ed. 240.... | 418, 477, 523, 524, 769, |
| 927, App. 474 | |
| Chambers v. Chrichley, 33 Beav. 374 | 213, 384, 385 |
| Chapman v. Barney, 129 U. S. 677; 32 L. Ed. 800; 9 S. Ct. 426 | 789 |
| Charter v. Charter, 47 Ill. App. 36 | 762 |
| Chase v. Jefferson, 1 Houst. 257 | 387 |
| Chase v. Fillebrown, 58 Fed. 374 | 85, 98, 107 |

TABLE OF CASES CITED

CXXiii

[References are to sections. "App." refers to Appendix]

Chatfield *v.* Wilson, 28 Vt. 49 508
 Chatillon, *Ex parte*, 2 O. G. 115 775
 Chang-Kee *v.* United States, 3 Wall. 320; 18 L. Ed. 72..... 789
 Chemical *v.* Lauer, 10 Blatch. 122; Fed. Cas. 12,135 200, 341
 Chemical *v.* Raymond, 71 Fed. 179; 18 C. C. A. 31..... 904, 908
 Chemical *v.* Vice, 14 Blatch. 179; Fed. Cas. 12,136 548
 Chetwood, *In re*, 165 U. S. 443; 41 L. Ed. 782; 17 S. Ct. 385..... 537
 Chicago *v.* Bush, 2 Biss. 472; Fed. Cas. 2669 459
 Chicago *v.* Sayles, 97 U. S. 554; 24 L. Ed. 1053 ... 54, 55, 56, 213, 222, 224,
 230, 375, 378, 441, 442, 468, 497, 507, 768, 780, 815, 872, 876, App. 440,
 441, 632, 780
 Chicago *v.* Tompkins, 176 U. S. 170; 44 L. Ed. 418; 20 S. Ct. 336.. App. 845
 Child *v.* Powder Works, 45 N. H. 547 894
 Chiles, *Re*, 22 Wall. 157; 22 L. Ed. 819 App. 577
 Chinnock *v.* Paterson, 112 Fed. 531; 50 C. C. A. 384 326, 717
 Chinnock *v.* Paterson, 110 Fed. 199 327
 Christensen, *In re*, 194 U. S. 458; 48 L. Ed. 1072; 24 S. Ct. 729 ... App. 536,
 538, 577
 Christensen *v.* Westinghouse, 129 Fed. 96; 63 C. C. A. 598 536
 Christie *v.* Seybold, 55 Fed. 69; 5 C. C. A. 33..... 613, 682, App. 65, 861
 Christie *v.* Seybold, 54 O. G. 957..... 811
 Christman *v.* Ramsey, Fed. Cas. 2704..... App. 344
 Cimiotti *v.* American, 198 U. S. 399; 49 L. Ed. 1100; 25 S. Ct. 697.... 206,
 226, 378, 433, 456, 467, 473, 700, App. 456
 Cimiotti *v.* American, 115 Fed. 498; 53 C. C. A. 230..... 456
 Cimiotti *v.* Nearsel, 123 Fed. 479; 59 C. C. A. 58..... 257, 456
 Cincinnati *v.* Bay, 200 U. S. 179; 50 L. Ed. 428; 26 S. Ct. 208... App. 744
 Clark *v.* Adie, L. R. 2 App. Cas. 423.... 213, 230, 330, 384, 385, 768, 815
 Clark *v.* Adie, L. R. 10 Ch. 667..... 202, 466
 Clark *v.* Clark, 58 U. S. 315; 14 L. Ed. 315-322..... 183
 Clark *v.* Deere, 80 Fed. 534; 25 C. C. A. 619..... 111, 646
 Clark *v.* Ferguson, 119 U. S. 335; 30 L. Ed. 406; 7 S. Ct. 382 591,
 609, 636, 664, 667, 672
 Clark *v.* Willimantic, 140 U. S. 481; 35 L. Ed. 521; 11 S. Ct. 846 .. 65, 71,
 74, 108, 613, App. 65, 862
 Clark *v.* Wooster, 119 U. S. 322; 30 L. Ed. 392; 7 S. Ct. 217 550, 568,
 717, 718, 719, 730, App. 717, 806
 Clements *v.* Odorless, 109 U. S. 641; 27 L. Ed. 1060; 3 S. Ct. 525.... 871,
 876, 877, 885
 Cleveland *v.* Chamberlain, 1 Black. 419; 17 L. Ed. 93 887
 Cleveland *v.* Detroit, 131 Fed. 853; 68 C. C. A. 233 .. 56, 780, App. 691
 Cleveland *v.* Kauffman, 126 Fed. 658..... App. 668
 Clough *v.* Barker, 106 U. S. 166; 27 L. Ed. 134; 1 S. Ct. 188.... 107, 230,
 375, 453, 485, 497, 506, 608, 673, 699, 768, 815
 Clough *v.* Gilbert, 106 U. S. 178; 27 L. Ed. 138; 1 S. Ct. 198... 375, 453
 Cluett *v.* Claffin, 140 U. S. 180; 35 L. Ed. 385; 11 S. Ct. 725 646
 Clum *v.* Brewer, 2 Curt. 506; Fed. Cas. 2909..... 418, 927
 Coburn *v.* Clark, 15 Fed. 804 561, 579
 Cochrane *v.* Badische, 111 U. S. 293; 28 L. Ed. 433; 4 S. Ct. 455.. 519, 774
 Cochrane *v.* Deener, 94 U. S. 780; 24 L. Ed. 139 ... 148, 348, 379, 434,
 459, 461, 506, 688, 770, 817, 819, App. 817
 Coder *v.* Arts, 152 Fed. 943; 82 C. C. A. 91 App. 129
 Coffin *v.* Douglass, 61 Tex. 406..... 753
 Coffin *v.* Ogden, 85 U. S. 120; 21 L. Ed. 821.... 10, 61, 71, 88, 89, 103,
 408, 415, 561, 590, 630, 854, 858, App. 97

[References are to sections. "App." refers to Appendix]

Cohansey Mfg. Co. v. Wharton, 28 Fed. 189..... 190, 473
 Cohn v. United States, 93 U. S. 366; 23 L. Ed. 907 106, 320
 Colgate v. Western, 15 Blatch. 365; Fed. Cas. 2995.....3, 618, 672
 Collar Co. v. White, 2 B. & A. 60; Fed. Cas. 14,396 689
 Cole v. Thayer, 25 Mich. 212..... App. 144
 Colorado v. United States, 123 U. S. 307; 31 L. Ed. 182; 8 S. Ct. 131... 26
 Colt v. Arms Co. 1 Fish. 108; Fed. Cas. 3030..... 497, 506
 Columb v. Webster, 84 Fed. 592; 28 C. C. A. 225 37, App. 31
 Columbia v. Duff, 184 Fed. 876; 107 C. C. A. 200..... App. 37
 Columbia v. Freeman, 71 Fed. 302..... 574, 920
 Columbia Wire Co. v. Boyce, 104 Fed. 172; 44 C. C. A. 588 542
 Columbine v. Chichester, 2 Phil. 27 151
 Columbus v. Robbins, 52 Fed. 337; 3 C. C. A. 103... 116, 118, 120, 539, 544
 Columbus v. Robbins, 64 Fed. 384; 12 C. C. A. 174... 116, 459, 468, 545,
 App. 459
 Columbus v. Standard, 148 Fed. 622; 78 C. C. A. 394 74, App. 65
 Commercial v. Fairbank, 135 U. S. 176; 34 L. Ed. 88; 10 S. Ct. 972.. 420, 421
 Com. v. Alger, 7 Cush. 53..... 920
 Com. v. Props. 7 Mass. 417 807
 Commercial Acetylene v. Acme, 188 Fed. 89 App. 561
 Commercial Acetylene v. Avery, 152 Fed. 642 App. 579
 Commercial Acetylene v. Autolux, 181 Fed. 387 App. 476
 Commissioner v. Whiteley, 4 Wall. 522; 18 L. Ed. 335 25
 Commonwealth v. Johnson, 6 Pa. 136 App. 144
 Computing v. Automatic, 204 U. S. 609; 51 L. Ed. 645; 27 S. Ct. 307 .. 207
 App. 201, 207, 213
 Computing v. National, 79 Fed. 962 924, App. 924
 Conrad v. Atlantic, 26 U. S. 416; 7 L. Ed. 385 778
 Conley v. Marum, 83 Fed. 309 323
 Conqueror, The, 166 U. S. 110; 41 L. Ed. 937; 17 S. Ct. 510 397
 Consolidated v. Accumulator, 55 Fed. 485; 5 C. C. A. 202..... 120,
 539, 544, 567
 Consolidated v. American, 82 Fed. 993 59
 Consolidated v. Ashton, 26 Fed. 319 App. 371
 Consolidated v. Barnard, 43 Fed. 527 624
 Consolidated v. Coombs, 39 Fed. 25 223, 459
 Consolidated v. Coombs, 39 Fed. 803..... 548, 574, 645, 746
 Consolidated v. Columbian, 79 Fed. 795 219, 228, 692, 797
 Consolidated v. Crosby, 113 U. S. 157; 28 L. Ed. 939; 5 S. Ct. 513... 230,
 375, 435, 453, 459, 497, 506, 622, 624, 631, 635, 655, 717, 768, 811, 815,
 864, App. 497
 Consolidated v. Crosby, 141 U. S. 441; 35 L. Ed. 809; 12 S. Ct. 49 .. 290,
 298, 828, 829, 837, 845, App. 838, 845
 Consolidated v. Detroit, 59 Fed. 902 635
 Consolidated v. Guildler, 9 Fed. 155 213, 384, 555
 Consolidated v. Hays, 100 Fed. 984; 41 C. C. A. 142..... 457, 692, 701
 Consolidated v. Holtzer, 67 Fed. 907; 15 C. C. A. 63..... 615, 616, 627,
 658, 661, 904
 Consolidated v. Littauer, 84 Fed. 164; 28 C. C. A. 133..... 561, 692
 Consolidated v. McKeesport, 40 Fed. 21 207
 Consolidated v. Pacific, 58 Fed. 226; 7 C. C. A. 195 120, 539
 Consolidated v. Walker, 138 U. S. 124; 34 L. Ed. 920; 11 S. Ct. 292... 49,
 212, 225, 440, 671, 672
 Consolidated v. West End, 85 Fed. 662; 29 C. C. A. 386..... 59, 486
 Consolidated v. Woerle, 29 Fed. 449..... 76

TABLE OF CASES CITED

CXXV

[References are to sections. "App." refers to Appendix]

Consolidated *v.* Wright, 94 U. S. 92; 24 L. Ed. 68 18, 74, 414,
853, 856, 857, App. 727, 856

Con. B. S. Co. *v.* Detroit, 47 Fed. 894 622, 633, 635

Con. Fastener Co. *v.* Am. Fastener Co. 94 Fed. 523 572

Con. Piedmont *v.* Pacific, 58 Fed. 226; 7 C. C. A. 195..... 539

Consolidated Purifier Co. *v.* Wolf, 28 Fed. 814..... 766

Consolidated Rubber Tire *v.* Diamond, 157 Fed. 677; 85 C. C. A. 249
..... App. 118, 253, 535

Continental *v.* Eastern, 210 U. S. 405; 51 L. Ed. 922; 28 S. Ct. 748 .. 267,
484, 744, App. 129, 212, 223, 322

Continental *v.* Empire, 8 Blatch. 295; Fed. Cas. 3142 366, 367

Continental *v.* Pendergast, 126 Fed. 381..... App. 381

Converse *v.* Cannon, 2 Woods. 7; Fed. Cas. 3144 501

Coon *v.* Wilson, 113 U. S. 268; 28 L. Ed. 963; 5 S. Ct. 537..... 871, 872,
875, 877, 878, 885, 887

Coop *v.* Development, 47 Fed. 899..... 324

Copeland *v.* Crane, 9 Pick. 79..... 847

Corbin *v.* Eagle, 150 U. S. 38; 37 L. Ed. 989; 14 S. Ct. 28... 54, 207, 208,
871, App. 207, 885

Corbin *v.* Yale, 58 Fed. 563..... 384

Corcoran *v.* Canal, 94 U. S. 741; 24 L. Ed. 190..... 31

Cordova *v.* Hood, 17 Wall. 1; 21 L. Ed. 587..... 167

Corning *v.* Burden, 15 How. 252; 14 L. Ed. 683.... 148, 222, 426, 629, 651,
680, 686, 688, 690, 770, 795, 815, 817, 819, 903, App. 629

Cornley *v.* Marckwold, 131 U. S. 159; 33 L. Ed. 117; 9 S. Ct. 744 ... 288

Corser *v.* Overall Co. 59 Fed. 781..... 554

Corrington *v.* Westinghouse, 173 Fed. 69 App. 9

Cortelyou *v.* Carter, 118 Fed. 1022..... 257

Cortelyou *v.* Johnson, 145 Fed. 933 476

Cortelyou *v.* Lowe, 111 Fed. 1005..... 474, 476, 513, 761

Corvallis *v.* Curran, 8 Fed. 150 497, 506

Coupe *v.* Royer, 155 U. S. 565; 39 L. Ed. 263; 15 S. Ct. 199..... 223, 285,
293, 294, 299, 777, 837, 842, 847, App. 717

Coupe *v.* Weatherhead, 16 Fed. 673 453, 454

Covert *v.* Covert, 106 Fed. 183 App. 856

Covert *v.* Sargent, 38 Fed. 237 288

Cox *v.* Griggs, 1 Biss. 362; Fed. Cas. 3302 861

Craighead *v.* Wilson, 18 How. 199; 15 L. Ed. 332 130

Cram *v.* Morris, 6 Pet. 598; 8 L. Ed. 596..... 734

Cramer *v.* Fry, 68 Fed. 201 481

Cramer *v.* Singer, 93 Fed. 636; 35 C. C. A. 508..... 386, 893

Cranson *v.* Smith, 37 Mich. 309 920

Crandall *v.* Watters, 9 Fed. 659 671

Crane *v.* Price, 1 Web. 393..... 655, 667, 671, 676, 679, 696, 769

Crane *v.* Price, 4 Man. & G. 580 671, 676

Crawford *v.* Heysinger, 123 U. S. 589; 31 L. Ed. 269; 8 S. Ct. 399 ... 54,
202, 207, 380, 602, 871

Crawford *v.* Points, 13 How. 11; 14 L. Ed. 10 116

Creamer *v.* Bowers, 35 Fed. 206 288

Creamer *v.* Washington, 168 U. S. 124; 18 S. Ct. 1 711

Crescent *v.* Gottfried, 128 U. S. 158; 32 L. Ed. 690; 9 S. Ct. 83.... 682, 692,
App. 672

Crier *v.* Innes, 170 Fed. 324; 95 C. C. A. 508 App. 679

Crockett *v.* Lee, 7 Wheat. 522; 5 L. Ed. 520..... 789

Crompton *v.* Knowles, 7 Fed. 199..... 95, 224

[References are to sections. "App." refers to Appendix]

| | |
|---|--|
| Cromwell v. Sac, 94 U. S. 351; 24 L. Ed. 195 | 31, 893, 894 |
| Cropper v. Smith, 26 Ch. Div. 700 | 384 |
| Crosby Case, 3 Wilson, 188 | 577 |
| Crossley v. Dixon, 10 H. of L. Cas. 293 | 213 |
| Crosthwaite v. Steel, 6 R. P. C. 190 | 384 |
| Crotty v. Chicago, 169 Fed. 593; 95 C. C. A. 91 | App. 893 |
| Crouch v. Roemer, 103 U. S. 797; 26 L. Ed. 426 | 380 |
| Crown v. Aluminum, 108 Fed. 845; 48 C. C. A. 72 | 375, 506, 543, 574, 631, 692, App. 497, 637 |
| Crown v. Standard, 136 Fed. 841; 69 C. C. A. 200 | 350 |
| Cunningham v. Macon, 109 U. S. 446; 27 L. Ed. 992; 3 S. Ct. 109 | 553 |
| Curtis v. Overman, 58 Fed. 784; 7 C. C. A. 493 | 120, 539, 561 |
| Curtis v. Platt, L. R. 3 Ch. Div. 134 | 230, 768, 815 |
| Curran v. Burdsall, 20 Fed. 835 | 384, 451, 766, 927 |
| Curson v. Belworthy, 22 Eng. Law & Eq. 1 | 425 |
| Cushman v. Parkman, 9 O. G. 1108 | 861 |
| Cutter v. Sheldon, 10 Blatch. 1; Fed. Cas. 13,331 | 756 |
| Dake v. Rice, 130 Mass. 410 | 157 |
| Dale v. Hyatt, 125 U. S. 46; 31 L. Ed. 683; 8 S. Ct. 756 | 714 722, 724, App. 718 |
| Dalzell v. Dueber, 149 U. S. 315; 37 L. Ed. 749; 13 S. Ct. 886 | 141, 151, 162, 756, 800, App. 160 |
| Daniel v. Miller, 81 Fed. 1000 | 797, App. 381, 384 |
| Daniels v. Eldridge, 125 Mass. 356 | 157 |
| Daniels v. Railroad, 3 Wall. 250; 18 L. Ed. 224 | 113 |
| D'Arcey v. Staples, 161 Fed. 733; 88 C. C. A. 606 | App. 658 |
| Dashiell v. Grosvenor, 162 U. S. 425; 40 L. Ed. 1025; 16 S. Ct. 805 | 93 |
| Davey v. Prouty, 107 Fed. 505; 46 C. C. A. 439 | 435 |
| Davis v. Brown, 94 U. S. 423; 24 L. Ed. 204 | 894 |
| Davis v. Brown, 9 Fed. 647 | 20 |
| Davis v. Davis, 2 Atk. 21 | 305 |
| Davis v. Edison, 60 Fed. 276; 8 C. C. A. 615 | 523, 541, 544, 561 |
| Davis v. Frederick, 19 Fed. 99 | 857 |
| Davis v. Perry, 120 Fed. 941; 57 C. C. A. 231 | 608, 612 |
| Davis v. Smith, 19 Fed. 823 | App. 717 |
| Davis v. United States, 23 Ct. Cl. 329 | 756 |
| Davock v. Chicago, 69 Fed. 468 | 324 |
| Davoll v. Brown, 1 Wood & M. 53; Fed. Cas. 3662 | 903 |
| Dawson v. Follen, 2 Wash. 311; Fed. Cas. 3670 | 667 |
| Dawson v. Johnson, 1 Fost. & F. 656 | 778 |
| Day v. Fair Haven, 132 U. S. 98; 33 L. Ed. 265; 10 S. Ct. 11 | 49, 195, 223, 239, 667 |
| Day v. Woodworth, 13 How. 363; 14 L. Ed. 181 | 283 |
| Daylight v. Marcus, 110 Fed. 980 | 180 |
| Dayton v. Westinghouse, 118 Fed. 562; 55 C. C. A. 390 | 349 |
| Dean v. Hodge, 35 Minn. 146 | App. 160 |
| Dean v. Mason, 61 U. S. 198; 15 L. Ed. 876 | 292, 796, 837, 839 |
| Debs, <i>In re</i> , 158 U. S. 564; 39 L. Ed. 1092; 15 S. Ct. 900 | 536, 537, 924, App. 577 |
| Debs, <i>Ex parte</i> , 159 U. S. 251; 15 S. Ct. 1039 | 538 |
| Decatur v. Paulding, 14 Pet. 497; 10 L. Ed. 560 | 25 |
| Dececo v. Gilchrist, 125 Fed. 293; 60 C. C. A. 207 | 608 |
| Dederick v. Cassell, 9 Fed. 306 | 674, App. 91 |
| Dederick v. Fox, 56 Fed. 714 | 3 |
| Dederick v. Whitman, 26 Fed. 763 | 158, 396 |

TABLE OF CASES CITED

CXXVII

[References are to sections. "App." refers to Appendix]

Deere v. Case, 55 Fed. 841; 6 C. C. A. 157 608, 672
 Deere v. Dowagiac, 153 Fed. 177; 82 C. C. A. 351 717
 Deering v. Winona, 155 U. S. 286; 39 L. Ed. 153; 15 S. Ct. 118..... 60,
 74, 195, 232, 245, 378, 390, 408, 464, 468, 620, 629, 702, 903, App. 71,
 74, 87, 247
 DeLamater v. Heath, 58 Fed. 414; 7 C. C. A. 279 192, 221, 234, 856
 DeLaval v. Vermont, 109 Fed. 813..... 159
 DeLaVergne v. Featherstone, 147 U. S. 209; 37 L. Ed. 138; 13 S. Ct. 283
55, 56, 181, 207, 239, 300, App. 780
 DeLaVergne v. Featherstone, 49 Fed. 916..... 55
 DeLaVergne v. Valentine, 66 Fed. 765; 14 C. C. A. 77..... 195, 503
 Delaware & A. Tel. v. Delaware, 50 Fed. 677; 2 C. C. A. 1..... 746
 DeLorica v. Whitney, 63 Fed. 611; 11 C. C. A. 355 473, 496, 627
 Denise v. Swett, 142 N. Y. 602 764
 Dennison v. Thomas, 94 Fed. 651..... 794
 Denniston v. Stewart, 18 How. 565; 15 L. Ed. 489 113
 Densmore v. Scofield, 102 U. S. 375; 26 L. Ed. 214 715, 745
 Derby v. Thompson, 146 U. S. 476; 30 L. Ed. 1051; 13 S. Ct. 181 ... 380
 Deslions v. LaCompagnie, 210 U. S. 95; 52 L. Ed. 973; 28 S. Ct. 664... 129
 DeSollar v. Hauscome, 158 U. S. 216; 39 L. Ed. 956; 15 S. Ct. 816... 894
 Detmold v. Reeves, 1 Fish. 127; Fed. Cas. 3831..... 683
 Detroit v. Renchard, 9 Fed. 293 860, 867
 Devlin v. Paynter, 64 Fed. 398; 12 C. C. A. 188..... 226, 459
 D'Wolf v. Raband, 1 Pet. 476; 7 L. Ed. 474..... 734
 Dexter v. Arnold, 2 Sumn. 109; Fed. Cas. 3858 847
 Dexter v. Sayward, 79 Fed. 237 App. 273
 Dhegetaft v. London, 4 Br. P. C. 2d. Ed. 436 720
 Diamond v. Seus, 159 Fed. 497..... App. 717
 Diamond Rubber Tire v. Consolidated, 220 U. S. 428; 55 S. Ct. 327; 31 L.
 Ed. 444 App. 387
 Dick v. Oil Well, 25 Fed. 105 324
 Dickerson v. Codwise, 11 Paige, 189..... 116
 Dickerson v. Machine, 35 Fed. 143..... 567, 570, 575
 Dickerson v. Matheson, 57 Fed. 524; 6 C. C. A. 466 505
 Dickerson v. Matheson, 47 Fed. 319..... 505
 Dickerson v. Matheson, 50 Fed. 73..... 505
 Dickerson v. Tinsling, 84 Fed. 192; 28 C. C. A. 139..... 513, 744
 Dillingham v. Snow, 5 Mass. 554 App. 758
 Distilling v. People, 41 N. E. 188..... 744
 Dixon v. Moyer, 4 Wash. 68; Fed. Cas. 3931 152
 Dixon-Woods v. Pfeifer, 55 Fed. 390; 5 C. C. A. 148, 188, 427, 679, 691,
 916, App. 691
 Dobbs v. Penn, 5 Exch. 427..... 671, 676
 Dobson v. Cubley, 149 U. S. 117; 37 L. Ed. 671; 13 S. Ct. 766 380
 Dobson v. Dornan, 118 U. S. 10; 30 L. Ed. 63; 6 S. Ct. 946..... 277, 846,
 App. 331
 Dobson v. Hartford, 114 U. S. 439; 29 L. Ed. 177; 5 S. Ct. 945..... 247,
 277, 281, 290, 298, 337, 846, 847
 Dobson v. Lees, 137 U. S. 258; 34 L. Ed. 652; 11 S. Ct. 71..... 54, 207,
 876, 885
 Dodge v. N. Y. C. 150 Fed. 738; 80 C. C. A. 404..... App. 653
 Dodge v. Porter, 98 Fed. 624..... 613
 Doe v. Earl, 1 Adol. & E. 783..... 36
 Doe v. Grymes, 1 Pet. 469; 7 L. Ed. 466..... 734
 Doig v. Morgan, 91 Fed. 1001; 33 C. C. A. 683 App. 253, 535

[References are to sections. "App." refers to Appendix]

| | |
|---|--|
| Doig <i>v.</i> Morgan, 122 Fed. 460; 59 C. C. A. 616 | 591, 626 |
| Donnell <i>v.</i> Columbia, 2 Sumn. 366; Fed. Cas. 3987..... | 836 |
| Dorsey <i>v.</i> Bradley, 12 Blatch. 202; Fed. Cas. 4015 | 505, 576, 899 |
| Doten <i>v.</i> City, 138 Fed. 406; 70 C. C. A. 308 | 842 |
| Double Pointed <i>v.</i> Two Rivers, 109 U. S. 117; 27 L. Ed. 877; 3 S. Ct. 105216, 609, 657, 662, 667, 669, 672, 679 | 607 |
| Double Pointed <i>v.</i> Two Rivers, 3 Fed. 26 | 607 |
| Dougherty <i>v.</i> Steel Co. 88 Wis. 343..... | 20 |
| Dougherty <i>v.</i> West, 2 Fish, 553; Fed. Cas. 4029 | 554 |
| Dowagiac <i>v.</i> Brennan, 127 Fed. 143; 62 C. C. A. 257..... | 485 |
| Dowagiac <i>v.</i> Minnesota, 183 Fed. 314; 105 C. C. A. 526..... | App. 843 |
| Dowagiac <i>v.</i> Minnesota, 118 Fed. 136; 55 C. C. A. 86..... | 376, 635 |
| Dowagiac <i>v.</i> Superior, 162 Fed. 479; 89 C. C. A. 399..... | 841 |
| Dowagiac <i>v.</i> Superior, 115 Fed. 886; 33 C. C. A. 36.... 207, 459, 468, 598, 599, 622, 631, 671, 673, 674, 911, 919, App. 598, 622 | |
| Downton <i>v.</i> Yaeger, 108 U. S. 466; 27 L. Ed. 789; 3 S. Ct. 10..... | 320 |
| Drake <i>v.</i> Brownell, 123 Fed. 86; 59 C. C. A. 216..... | 325 |
| Draper <i>v.</i> Hudson, 3 O. G. 354; Fed. Cas. 4069 | 775 |
| Draper <i>v.</i> Mills, 13 O. G. 276; Fed. Cas. 4072 | 613, 867 |
| Draper <i>v.</i> Wattles, 3 B. & A. 618; Fed. Cas. 4073..... | 856, 857 |
| Dravo <i>v.</i> Fabel, 132 U. S. 487; 33 L. Ed. 421; 10 S. Ct. 170..... | 411 |
| Drewson <i>v.</i> Hartje, 131 Fed. 734; 65 C. C. A. 548 | App. 812 |
| Dreyfus <i>v.</i> Scarle, 124 U. S. 60; 31 L. Ed. 352; 8 S. Ct. 390 | 609, 616, 671, 672, 682 |
| Dryfoos <i>v.</i> Wiese, 124 U. S. 32; 31 L. Ed. 362; 8 S. Ct. 354..... | 202, 215, 217, 375, 602, 936 |
| DuBois <i>v.</i> Kirk, 158 U. S. 58; 39 L. Ed. 895; 15 S. Ct. 729... 96, 102, 305, 456, 673, 691 | |
| DuBois <i>v.</i> Railroad, 5 Fish. 208; Fed. Cas. 4109 | 894 |
| Dubuque, <i>Ex parte</i> , 68 U. S. 69; 17 L. Ed. 514 | 138, 891 |
| Dudley <i>v.</i> Munger, 50 Fed. 785..... | 120 |
| Dueber <i>v.</i> Robbins, 75 Fed. 17; 21 C. C. A. 198.... 385, 623, 636, 675 | |
| Duer <i>v.</i> Corbin, 149 U. S. 216; 37 L. Ed. 707; 13 S. Ct. 850.. 615, 635, 636, App. 636 | |
| Duff <i>v.</i> Sterling, 107 U. S. 636; 27 L. Ed. 517; 2 S. Ct. 487..... | 202, 211, 213, 215, 217, 229, 230, 375, 441, 477, 497, 507, 680, 768, 815, App. 205 |
| Duffy <i>v.</i> Lyth, 5 Watts, 120..... | 894 |
| Dunbar <i>v.</i> Eastern, 81 Fed. 201; 26 C. C. A. 330..... | 596, App. 653 |
| Dunbar <i>v.</i> Meyers, 94 U. S. 187; 24 L. Ed. 34.... 313, 323, 325, 341, 344, 437, 473, 591, 596, 599, 612, 617, 619, 653, 655, 667, 669, 708, 734, 799, App. 341, 795 | |
| Dunbar <i>v.</i> Tack Co. 4 B. & A. 518; Fed. Cas. 4127a | 672 |
| Duncan <i>v.</i> Jandow, 82 U. S. 165; 2 L. Ed. 142..... | 154 |
| Dunham <i>v.</i> Dennison, 154 U. S. 103; 38 L. Ed. 924; 14 S. Ct. 986.... | 468, 874 |
| Dunham <i>v.</i> Railroad, 2 B. & A. 327; Fed. Cas. 4151 | 927 |
| Dunlap <i>v.</i> Schofield, 152 U. S. 244; 38 L. Ed. 426; 14 S. Ct. 576.. 336, 777 | |
| Dunlap <i>v.</i> Willbrandt, 151 Fed. 223; 80 C. C. A. 575 | 47 |
| Dunn <i>v.</i> Rector, 14 Johns. 118..... | 156 |
| Duplex <i>v.</i> Campbell, 69 Fed. 250; 16 C. C. A. 220.... 118, 544, App. 561 | |
| Durand <i>v.</i> Schulze, 61 Fed. 819; 10 C. C. A. 97 | 240 |
| Durant <i>v.</i> Essex, 101 U. S. 555; 25 L. Ed. 961 | 128 |
| Eachus <i>v.</i> Broomall, 115 U. S. 429; 29 L. Ed. 419; 6 S. Ct. 229..... | 224, 390, 394, 483, 795, App. 881 |
| Eades <i>v.</i> Harris, 1 Younge. & C. 230..... | 169 |

TABLE OF CASES CITED

CXXIX

[References are to sections. "App." refers to Appendix]

Eagleton *v.* West, 111 U. S. 490; 28 L. Ed. 493; 4 S. Ct. 593 55, 56,
207, 239, 300, 780, 809, 812, App. 780

Eagleton *v.* West, 2 Fed. 774 809, 812

Eames *v.* Andrews, 122 U. S. 40; 30 L. Ed. 1064; 7 S. Ct. 1073 59, 85,
98, 188, 426, 427, 598, 640, 679, 691, 819, 911, 916, App. 625, 691

Eames *v.* Godfrey, 68 U. S. 78; 17 L. Ed. 547 202, 466, 473, 528, 612,
872, App. 456, 490, 503

Eames *v.* Worcester, 123 Fed. 67; 60 C. C. A. 37 468, 615, 665, App.
498

Eastern *v.* Continental, 142 Fed. 479 App. 65

Eastern *v.* Hope, 95 U. S. 297; 24 L. Ed. 477 736

Eastern *v.* Standard, 30 Fed. 63 856, App. 817

Eastman *v.* Mayor, 134 Fed. 844; 69 C. C. A. 628 614, 851, 855, App. 10,
899

Easton *v.* Salisbury, 21 How. 426; 16 L. Ed. 181 308

Eaton *v.* Lewis, 115 Fed. 635 335

Eaton *v.* Lewis, 127 Fed. 1018; 61 C. C. A. 562 335

Eby *v.* King, 158 U. S. 366; 39 L. Ed. 1018; 15 S. Ct. 972 878, 887

Ecaubert *v.* Appleton, 67 Fed. 917; 15 C. C. A. 73 21, 170

Eck *v.* Kutz, 132 Fed. 758 App. 97

Eclipse Mfg. Co. *v.* Adkins, 36 Fed. 554 324

Eddy *v.* Dennis, 95 U. S. 560; 24 L. Ed. 363 202, 375, App. 591

Edison *v.* Beacon, 54 Fed. 678 256, 561, 562, App. 562

Edison *v.* Columbia, 56 Fed. 496 561

Edison *v.* Kaufman, 105 Fed. 960 513, 744, 761

Edison *v.* Mt. Morris, 58 Fed. 572; 7 C. C. A. 375 568, 574

Edison *v.* Peninsular, 101 Fed. 831; 43 C. C. A. 479 476, 756, App. 476

Edison *v.* Peninsular, 95 Fed. 669 476

Edison *v.* Philadelphia, 60 Fed. 397 254

Edison *v.* Pike, 116 Fed. 863 474, 513, 744, 761

Edison *v.* Sawyer-Man, 53 Fed. 592; 3 C. C. A. 605 568, 729

Edison *v.* Thakara, 167 Pa. 530 755

Edison *v.* United States, 59 Fed. 501; 8 C. C. A. 200 539

Edmeston *v.* Lyde, 1 Paige, 637 157

Egbert *v.* Lippmann, 104 U. S. 333; 26 L. Ed. 755 18, 74, 412, 413, 414,
415, 416, 851, 853, 854, 855, 856, 857

Elder *v.* McClaskey, 70 Fed. 557; 17 C. C. A. 251 116

Eldred *v.* Kirkland, 130 Fed. 342; 64 C. C. A. 588 222

Electric *v.* Boston, 139 U. S. 481; 35 L. Ed. 250; 11 S. Ct. 586 871, 872,
876, 877, App. 207, 871

Electric *v.* Brush, 52 Fed. 130; 2 C. C. A. 682 350, 356, App. 354

Electric *v.* Brush, 44 Fed. 602 170, 587

Electric *v.* Carborundum, 102 Fed. 618; 42 C. C. A. 537 223

Electric *v.* Edison, 61 Fed. 834; 10 C. C. A. 106 35, 256, 535, 539,
541, 561, 564

Electric *v.* Fuller, 59 Fed. 1003; 8 C. C. A. 442 486

Electric *v.* Hall, 114 U. S. 87; 29 L. Ed. 96; 5 S. Ct. 1069 468, 473

Electric *v.* Hall, 6 Fed. 603 860

Electric *v.* Jamaica, 61 Fed. 655 654

Electric *v.* Julien, 47 Fed. 892 579

Electric *v.* McKeesport, 73 O. G. 1289 814

Electric *v.* Pittsburg, 125 Fed. 926 506

Electric *v.* Westinghouse, 171 Fed. 83; 9 C. C. A. 187 App. 400

Electric Mach. *v.* Morris, 156 Fed. 972 App. 212

Electrical Accumulator *v.* Julien, 38 Fed. 117 App. 341, 344

[References are to sections. "App." refers to Appendix]

| | |
|--|--|
| <i>Elgin v. Marshall</i> , 106 U. S. 578; 27 L. Ed. 249; 1 S. Ct. 484..... | 894 |
| <i>Elizabeth v. American</i> , 97 U. S. 126; 24 L. Ed. 1000..... | 18, 82, 290, 298, 392, 412, 413, 414, 416, 417, 453, 459, 503, 529, 651, 779, 809, 827, 828, 829, 837, 838, 843, 844, 845, 846, 847, 851, 853, 854, 855, 856, 857, App. 838, 845, 851 |
| <i>Ellbert v. St. Paul</i> , 50 Fed. 205..... | 216 |
| <i>Ellicott v. Wiltz</i> , 107 U. S. 711; 27 L. Ed. 448; 2 S. Ct. 128..... | 553 |
| <i>Ellis v. Roupell</i> , 32 Beav. 303..... | App. 371 |
| <i>Ellithorpe v. Robertson</i> , 4 Blatch. 307; Fed. Cas. 4408..... | 860, 867 |
| <i>Emack v. Kane</i> , 34 Fed. 46..... | 924 |
| <i>Emerick v. Armstrong</i> , 1 Ohio, 513..... | App. 144 |
| <i>Emerson v. Slater</i> , 22 How. 41; 16 L. Ed. 365..... | 176 |
| <i>Emerson v. Van Nort</i> , 116 Fed. 974..... | 68, App. 74 |
| <i>Emmons v. Sladden</i> , 9 O. G. 354..... | 418 |
| <i>Enoch Morgans v. Gibson</i> , 122 Fed. 420; 59 C. C. A. 46..... | 538 |
| <i>Enterprise v. Deisler</i> , 46 Fed. 854..... | App. 253 |
| <i>Envelope v. Seymer</i> , 28 L. J. (N. S.) C. P. 22..... | 671, 676, 679 |
| <i>Erie v. American</i> , 70 Fed. 58; 16 C. C. A. 632..... | 207, 214 |
| <i>Ertel v. Stahl</i> , 65 Fed. 517; 13 C. C. A. 29..... | 572 |
| <i>Ertel v. Stahl</i> , 65 Fed. 519; 13 C. C. A. 31..... | 551, 567 |
| <i>Estey v. Burdett</i> , 109 U. S. 633; 27 L. Ed. 1058; 3 S. Ct. 531..... | 216, 304, 657, 662, 667, 679, 833 |
| <i>Estis v. Trabue</i> , 128 U. S. 225; 32 L. Ed. 437; 9 S. Ct. 58..... | 134 |
| <i>Eureka v. Bailey</i> , 78 U. S. 488; 20 L. Ed. 209..... | 510, 742, 764 |
| <i>Evans v. Eaton</i> , 3 Wheat. 454; 4 L. Ed. 433..... | 95, 418 |
| <i>Evans v. Eaton</i> , 3 Wash. 443; Fed. Cas. 4611..... | 905 |
| <i>Evans v. Kelly</i> , 13 Fed. 903..... | 223 |
| <i>Evans v. State Bank</i> , 141 U. S. 107; 35 L. Ed. 654; 11 S. Ct. 885.. | App. 129 |
| <i>Excelsior v. Brown</i> , 74 Fed. 321; 20 C. C. A. 428..... | 137 |
| <i>Excelsior v. Pacific</i> , 185 U. S. 282; 46 L. Ed. 910; 22 S. Ct. 681..... | 714, App. 718 |
| <i>Excelsior v. Union</i> , 32 Fed. 221..... | 688, 770, 823 |
| <i>Expanded v. Bradford</i> , 214 U. S. 366; 53 L. Ed. 1034; 29 S. Ct. 652.. | App. 348, 817 |
| <i>Eyve v. Potter</i> , 15 How. 42; 14 L. Ed. 40..... | 425 |
| <i>Fabries Co. v. Smith</i> , 100 U. S. 110; 25 L. Ed. 547..... | 274 |
| <i>Facer v. Midvale</i> , 38 Fed. 231..... | App. 559 |
| <i>Fahs v. Darling</i> , 82 Ill. 142..... | App. 144 |
| <i>Fairbanks v. Stickney</i> , 123 Fed. 79; 59 C. C. A. 209..... | 342 |
| <i>Fairclough v. Marshall</i> , L. R. 4 Ch. Div. 37..... | 778 |
| <i>Falk v. Missouri</i> , 103 Fed. 295; 43 C. C. A. 240..... | 636 |
| <i>Fanning v. Gregorie</i> , 16 How. 524; 14 L. Ed. 523..... | 156 |
| <i>Farley v. Kittson</i> , 120 U. S. 303; 30 L. Ed. 684; 7 S. Ct. 534.... | 141, 800 |
| <i>Farmers' Loan v. McClure</i> , 78 Fed. 209..... | 129, 544 |
| <i>Farmers' v. Spruks</i> , 127 Fed. 691; 62 C. C. A. 447..... | 631, 797 |
| <i>Farmers' v. Spruks</i> , 119 Fed. 594..... | 797 |
| <i>Farquhar v. National</i> , 102 Fed. 714; 42 C. C. A. 600..... | App. 924 |
| <i>Farrington v. Board</i> , 4 Fish. 216; Fed. Cas. 4687..... | 524 |
| <i>Fassett v. Ewart</i> , 62 Fed. 404; 10 C. C. A. 441..... | 353 |
| <i>Faulks v. Kamp</i> , 3 Fed. 898..... | 213, 384, 555, 766, 927 |
| <i>Faure's Appeal</i> , 52 O. G. 754..... | App. 672 |
| <i>Fay v. Cordesman</i> , 109 U. S. 408; 27 L. Ed. 979; 3 S. Ct. 236.... | 202, 206, 207, 211, 215, 217, 246, 374, 375, 380, 468, 612, 889, 905, App. 202, 374, 456 |
| <i>Feather v. Queen</i> , 6 Best & S. 257..... | 498 |

TABLE OF CASES CITED

CXXXI

[References are to sections. "App." refers to Appendix]

Featherstone *v.* Bidwell, 57 Fed. 631; 6 C. C. A. 487 871
 Featherstone *v.* Ormonde, 53 Fed. 110 App. 505
 Feeter *v.* Heath, 11 Wend. 482 807
 Feibermann *v.* Packard, 108 U. S. 14; 1 S. Ct. 138 134
 Felix *v.* Ledos, 54 Fed. 163 190
 Fenner *v.* Sanborn, 37 Barb. 610 151
 Ferguson *v.* Dent, 46 Fed. 88 277
 Ferguson *v.* Earl, 9 Clark & F. 251 481
 Ferguson *v.* Wilson, L. R. 2 Ch. 77 151
 Field *v.* Scabury, 19 How. 323; 15 L. Ed. 650 26
 Fire Ins. Assn. *v.* Wickham, 128 U. S. 426; 32 L. Ed. 503; 9 S. Ct. 113 .. 113
 Fisher *v.* Boody, 1 Curt. 206; Fed. Cas. 4814 425
 Fisk, *Ex parte*, 113 U. S. 713; 28 L. Ed. 1117; 5 S. Ct. 724 401
 Fitch *v.* Bragg, 16 Fed. 243 298
 Fleckner *v.* Bank, 8 Wheat. 338; 5 L. Ed. 338 156
 Fleming, The Walter M. 9 Fed. 474 732
 Flitcraft *v.* Com. Title, 211 Pa. 119 154
 Flood *v.* Hicks, 2 Biss. 169; Fed. Cas. 4877 669
 Florida Construction *v.* Young, 59 Fed. 721 539
 Florsheim *v.* Schilling, 137 U. S. 64; 34 L. Ed. 574; 11 S. Ct. 20... 49, 88,
 437, 596, 597, 608, 612, 655, 671, 672, 696, App. 675
 Flower *v.* Detroit, 127 U. S. 563; 32 L. Ed. 175; 8 S. Ct. 1291 871
 Foley *v.* Harrison, 15 How. 448; 14 L. Ed. 433 26
 Fond Du Lac *v.* May, 137 U. S. 395; 34 L. Ed. 714; 11 S. Ct. 98 404,
 App. 679, 707, 734
 Foote *v.* Silsby, 2 Blatch. 260; Fed. Cas. 4919 941
 Forbush *v.* Cook, 2 Fish. 668; Fed. Cas. 4931 668
 Force *v.* Sawyer, 143 Fed. 894; 75 C. C. A. 102 App. 840
 Force *v.* Sawyer, 111 Fed. 902 App. 381, 384
 Ford *v.* Bancroft, 98 Fed. 309; 39 C. C. A. 91 380
 Forgay *v.* Conrad, 6 How. 201; 12 L. Ed. 200 116, 304, App. 117
 Forncrook *v.* Root, 127 U. S. 176; 32 L. Ed. 97; 8 S. Ct. 1247... 612, 854
 Forrelly *v.* Woodfolk, 60 U. S. 288; 15 L. Ed. 670 130
 Forsyth *v.* City, 166 U. S. 506; 41 L. Ed. 1095; 17 S. Ct. 665 31
 Forsyth *v.* Garlock, 142 Fed. 461; 73 C. C. A. 577 435
 Foster *v.* Crossin, 44 Fed. 62 332, 635
 Foster *v.* Goddard, 1 Black, 506; 17 L. Ed. 228 321, 807
 Foster *v.* Lindsay, 3 Dill. 126; Fed. Cas. 4976 587
 Foster *v.* Moore, 1 Curt. 279; Fed. Cas. 4978 380, 468
 Fourgeres *v.* Murbarger, 44 Fed. 292 327
 Fowle *v.* Park, 131 U. S. 88; 33 L. Ed. 67; 9 S. Ct. 658 513
 Fowler *v.* City of New York, 121 Fed. 747; 58 C. C. A. 113 ... 148, App. 653
 Fowler *v.* City, 110 Fed. 749 323
 Fox *v.* Perkins, 52 Fed. 205; 3 C. C. A. 32 431, 636, 646, 665
 Foxley's Case, 5 Co. 109 926
 Fraim *v.* Keen, 25 Fed. 820 630
 Frank *v.* Bernard, 131 Fed. 269 213
 Franks *v.* Martin, 1 Eden. 309 174
 Frash *v.* Moore, 211 U. S. 1; 53 L. Ed. 65; 29 S. Ct. 6 App. 143
 Frearson *v.* Loe, 9 Ch. Div. 48 764
 Freeman *v.* Asmus, 145 U. S. 226; 36 L. Ed. 685; 12 S. Ct. 821.. App. 871
 Freeman, *Ex parte*, 109 O. G. 1339 App. 331
 French *v.* Carter, 137 U. S. 239; 34 L. Ed. 664; 11 S. Ct. 90 600, 667
 French *v.* Hay, 89 U. S. 231; 22 L. Ed. 799 137
 Frost *v.* Cohn, 119 Fed. 505; 56 C. C. A. 185 .. 631, 648, 697, App. 505, 693

[References are to sections. "App." refers to Appendix]

| | |
|---|---|
| Frost <i>v.</i> Cohn, 112 Fed. 1009 | App. 693 |
| Frow <i>v.</i> DeLaVega, 15 Wall. 552; 21 L. Ed. 60..... | 305 |
| Fuller <i>v.</i> Bartlett, 68 Wisc. 73..... | 151, App. 366 |
| Fuller <i>v.</i> Berger, 120 Fed. 274; 56 C. C. A. 588..... | 548, 574, 745, 935 |
| Fuller <i>v.</i> Yentzer, 94 U. S. 288; 24 L. Ed. 103... .. | 223, 426, 469, 473, 612, 651, 670, 672, 679, 686, 872, App. 91 |
| Fullerton <i>v.</i> Anderson-Barngrover, 166 Fed. 443; 92 C. C. A. 295.. | App. 212 |
| Furbush <i>v.</i> Cook, 2 Fish. 668; Fed. Cas. 4931 | 603, 668 |
| Furrer <i>v.</i> Ferris, 145 U. S. 132; 36 L. Ed. 649; 12 S. Ct. 821.... | 129, 544, App. 129 |
| Gage <i>v.</i> Herring, 107 U. S. 640; 27 L. Ed. 601; 2 S. Ct. 819..... | 187, 201, 202, 206, 207, 274, 280, 342, 374, 380, 466, 468, 473, 522, 532, 612, 874, 877, 883, 887, 889 |
| Gage <i>v.</i> Kellog, 23 Fed. 891..... | 688, 770 |
| Gallihier <i>v.</i> Cadwell, 145 U. S. 368; 36 L. Ed. 738; 12 S. Ct. 873 .. | 728, 921 |
| Gally <i>v.</i> Colt, 30 Fed. 118 | 929 |
| Galt <i>v.</i> Parlin, 60 Fed. 417; 9 C. C. A. 49 | 188, 427 |
| Galvin <i>v.</i> City, 115 Fed. 511; 53 C. C. A. 165..... | 431, 665 |
| Gaines <i>v.</i> Rugg, 148 U. S. 228; 37 L. Ed. 432; 13 S. Ct. 611..... | 128, 891 |
| Gaisman <i>v.</i> Gallert, 105 Fed. 955 | 219 |
| Gamewell, <i>In re</i> , 73 Fed. 908; 20 C. C. A. 111..... | 790, 891 |
| Gamewell <i>v.</i> Municipal, 61 Fed. 208; 9 C. C. A. 450 | 115, 123, 550 |
| Gamewell <i>v.</i> Municipal, 77 Fed. 490; 23 C. C. A. 250 | 532, 579, 629, 807 |
| Gandy <i>v.</i> Main, 143 U. S. 587; 36 L. Ed. 272; 12 S. Ct. 598..... | 495, 598, 617, 622, 627, 634, 635, 671 |
| Gandy <i>v.</i> Marble, 122 U. S. 432; 30 L. Ed. 1223; 7 S. Ct. 129.... | 383, 727, App. 26 |
| Gardner <i>v.</i> Herz, 118 U. S. 180; 30 L. Ed. 158; 6 S. Ct. 1027.... | 49, 596, 614, 662, 667, 696 |
| Gardt <i>v.</i> Brown, 113 Ill. 475 | 544 |
| Garretson <i>v.</i> Clark, 111 U. S. 120; 28 L. Ed. 371; 4 S. Ct. 291..... | 279, 290, 297, 298, 837, 838, 839, 843, 844, 845, 846, App. 845 |
| Gaskill <i>v.</i> Meyers, 81 Fed. 854; 26 C. C. A. 642..... | 876, 889 |
| Garst <i>v.</i> Harris, 177 Mass. 72 | 513 |
| Gates <i>v.</i> Fraser, 153 U. S. 332; 38 L. Ed. 734; 14 S. Ct. 883.. | 167, 437, 676 |
| Gayler <i>v.</i> Wilder, 10 How. 477; 13 L. Ed. 504 ... | 10, 11, 71, 150, 151, 152, 154, 164, 165, 270, 391, 418, 532, 629, 750, 752, 762, 765, 796, 799, App. 759 |
| G. & B. S. M. Co. <i>v.</i> Williams, 2 Fish. 133; Fed. Cas. 5847..... | 554, 561 |
| Geary <i>v.</i> Sheridan, 8 Ves. 192 | 305 |
| Geist <i>v.</i> Stier, 134 Pa. 216 | 311 |
| General <i>v.</i> Blackmore, 156 Fed. 968..... | App. 887 |
| General <i>v.</i> Campbell, 137 Fed. 600..... | 326 |
| General <i>v.</i> International, 126 Fed. 755; 61 C. C. A. 329 | 937 |
| General <i>v.</i> Yost, 139 Fed. 568; 71 C. C. A. 552..... | 88, 615 |
| Gen. Electric <i>v.</i> New England, 123 Fed. 310..... | App. 552 |
| Gen. Electric <i>v.</i> New England, 128 Fed. 738; 63 C. C. A. 448 ... | App. 559 |
| Gen. Sub-Construction <i>v.</i> Natcher, 167 Fed. 549..... | App. 195 |
| Georgia <i>v.</i> Brailsford, 2 Dall. 402; 1 L. Ed. 400 | 549, 562 |
| Germain <i>v.</i> Wilgus, 67 Fed. 597; 14 C. C. A. 561 | 371, 574 |
| German <i>v.</i> United States, 148 U. S. 573; 37 L. Ed. 564; 13 S. Ct. 702 | 498 |
| German-American <i>v.</i> Loew, 103 Fed. 303 | 476, 477 |
| Germania <i>v.</i> Boynton, 71 Fed. 797; 19 C. C. A. 118 | 167 |

TABLE OF CASES CITED

CXXXiii

[References are to sections. "App." refers to Appendix]

Germer *v.* Art, 150 Fed. 141; 80 C. C. A. 9 309, 904
 Gerrich *v.* Sweetser, 4 Pink. 374 411
 Giant *v.* California, 4 Fed. 720 871
 Gibbons *v.* Wilson, 75 U. S. 269; 19 L. Ed. 453 498, 715
 Gibbons *v.* Ogden, 9 Wheat. 1; 6 L. Ed. 3 920
 Gibbs *v.* Hoefner, 19 Fed. 323 634, App. 635
 Gifford *v.* Helms, 98 U. S. 248; 25 L. Ed. 57 532
 Giles *v.* Austin, 62 N. Y. 486 App. 755
 Gill *v.* United States, 160 U. S. 426; 40 L. Ed. 424; 16 S. Ct. 322 . . . 151,
 366, 756, App. 366
 Gill *v.* Wells, 89 U. S. 1; 22 L. Ed. 699 145, 310, 322, 468, 469, 472, 473,
 604, 612, 804, 871, 872, 877, 905, App. 871
 Gillespie *v.* Cummings, 1 B. & A. 587; Fed. Cas. 5434 804
 Gillett *v.* Bate, 86 N. Y. 87 157
 Gill's Case, 25 Ct. Cl. 415 498
 Gilman *v.* Philadelphia, 3 Wall. 713; 18 L. Ed. 96 920
 Gilmore *v.* Anderson, 38 Fed. 846 558, 568
 Glascott *v.* Lang, 3 Mylne & C. 455; 2 Phil. Ch. 310 425, 562
 Glendale *v.* Smith, 100 U. S. 110; 25 L. Ed. 547 273
 Glenn *v.* Liggett, 135 U. S. 533; 34 L. Ed. 262; 10 S. Ct. 867 . . . App. 386
 Globe *v.* Walker, 210 U. S. 356; 52 L. Ed. 1096; 28 S. Ct. 726 744
 Globe-Wernicke *v.* Brown, 121 Fed. 90; 57 C. C. A. 344 548
 Globe-Wernicke *v.* Macey, 119 Fed. 696; 56 C. C. A. 304 App. 384
 Glue Co. *v.* Upton, 4 Cliff. 237; Fed. Cas. 9607 774
 Godden *v.* Kimmell, 99 U. S. 201; 25 L. Ed. 431 729
 Godfrey *v.* Eames, 68 U. S. 317; 17 L. Ed. 684 3; 6, App. 9
 Goeble *v.* American, 55 Fed. 825 324
 Gold *v.* United States, 3 Fish. 489; Fed. Cas. 5508 587
 Good *v.* Deland, 121 N. Y. 1 745
 Goodyear *v.* Beverly, 1 Cliff. 348; Fed. Cas. 5557 450, 927
 Goodyear *v.* Bishop, 4 Blatch. 438; Fed. Cas. 5558 765
 Goodyear *v.* Congress, Fed. Cas. 5565 App. 714
 Goodyear *v.* Day, 1 Blatch. 565; Fed. Cas. 5568 724
 Goodyear *v.* Day, 2 Wall. Jr. 283; Fed. Cas. 5569 821
 Goodyear *v.* Davis, 102 U. S. 222; 26 L. Ed. 149 54, 207, 375, 380,
 671, 676, 696, 871, 889
 Goodyear *v.* Jackson, 112 Fed. 146; 50 C. C. A. 159 App. 508
 Goodyear *v.* Railroad Co. 2 Wall. Jr. 356; Fed. Cas. 5563 411, 821
 Goodyear *v.* Rubber, 116 Fed. 363; 53 C. C. A. 583 49, 224, 226, 599,
 654, 904, 919, App. 598
 Goodyear *v.* Rubber, 2 Cliff. 351; Fed. Cas. 5583 820
 Goodyear *v.* Rubber, 4 Blatch. 63; Fed. Cas. 5586 714
 Goodyear *v.* Union, Fed. Cas. 5586 App. 714
 Gompers *v.* Bucks, 221 U. S. 418; 55 L. Ed. 797; 31 S. Ct. 492 . . . App. 577
 Gordon *v.* Anthony, 16 Blatch. 234; Fed. Cas. 5605 157
 Gordon *v.* Ogden, 3 Pet. 33; 7 L. Ed. 592 22
 Gordon *v.* Warder, 150 U. S. 47; 37 L. Ed. 992; 14 S. Ct. 32 86, 375,
 502, 525, 618
 Gorham *v.* White, 81 U. S. 511; 20 L. Ed. 731 331, 332, 334, 337
 Gormley *v.* Bunyan, 138 U. S. 623; 34 L. Ed. 1086; 11 S. Ct. 453 789
 Goshen *v.* Bissel, 72 Fed. 67; 19 C. C. A. 13 195, 598, 672, 911, 919,
 App. 598
 Goss Printing Press *v.* Scott, 103 Fed. 650 636
 Gottfried *v.* Brewing, 5 B. & A. 4; Fed. Cas. 5633 223, 523
 Gottfried *v.* Miller, 104 U. S. 521; 26 L. Ed. 851 766, 927

[References are to sections. "App." refers to Appendix]

| | |
|--|--|
| Gottfried <i>v.</i> Seipp, 8 Fed. 322 | 524 |
| Gould <i>v.</i> Banks, 8 Wend. 562 | 168 |
| Gould <i>v.</i> Rees, 82 U. S. 187; 21 L. Ed. 39. See <i>Rees v. Gould.</i> | |
| Gould <i>v.</i> Sessions, 67 Fed. 163; 14 C. C. A. 366 | 505, 536, 537 |
| Gould Coupler <i>v.</i> Pratt, 70 Fed. 622 | 473 |
| Goulds <i>v.</i> Cowing, 105 U. S. 253; 26 L. Ed. 987..... | 282, 290, 298, 837, 838, 839, 845, App. 838 |
| Gove <i>v.</i> Jennes, 19 Me. 53 | 778 |
| Graham <i>v.</i> Mfg. Co. 11 Fed. 138..... | 349, 350, 856, App. 349 |
| Graham <i>v.</i> McCormick, 11 Fed. 859..... | 349, 350 856, 857, App. 349 |
| Graham <i>v.</i> Mason, 5 Fish. 1; Fed. Cas. 5671 | 188, 197, 407 |
| Graham <i>v.</i> Merrill, 5 Cold. 631..... | 539 |
| Grand <i>v.</i> Winegar, 82 U. S. 373; 21 L. Ed. 170..... | 372 |
| Grand Trunk <i>v.</i> Cummings, 106 U. S. 700; 27 L. Ed. 266; 1 S. Ct. | 493 407 |
| Gramophone <i>v.</i> Gramophone, 107 Fed. 129..... | 386 |
| Grant <i>v.</i> Ins. Co. 106 U. S. 429; 27 L. Ed. 237; 1 S. Ct. 414..... | 116 |
| Grant <i>v.</i> Raymond, 6 Pet. 218; 8 L. Ed. 376... 7, 222, 263, 366, 745, 746, 837, 873, 903, 915, App. 741 | |
| Grant <i>v.</i> Walter, 148 U. S. 547; 37 L. Ed. 552; 13 S. Ct. 699..... | 86, 202, 431, 437, 525, 616, 635, 636, 665, 670 |
| Graves <i>v.</i> Fisher, 5 Me. 70..... | 807 |
| Gray <i>v.</i> Grinberg, 159 Fed. 318; 86 C. C. A. 328 | 496 |
| Grayson <i>v.</i> Lynch, 163 U. S. 468; 41 L. Ed. 230; 16 S. Ct. 1064 | 129 |
| Great Western <i>v.</i> Birmingham, 2 Phil. Ch. 602..... | 562 |
| Greeley, <i>Ex parte</i> , 6 Fish. 575; Fed. Cas. 5745 | 636 |
| Green <i>v.</i> Barney, 19 Fed. 420 | 568 |
| Green <i>v.</i> Campagna, 82 Fed. 490..... | App. 371 |
| Green <i>v.</i> Fisk, 103 U. S. 518; 26 L. Ed. 486..... | 130 |
| Green <i>v.</i> Mills, 69 Fed. 852; 16 C. C. A. 516..... | 116, 302, 539, 544 |
| Green <i>v.</i> Pathen, 13 Wend. 295..... | 807 |
| Green <i>v.</i> Richards, 23 N. J. Eq. 32 | 365 |
| Green <i>v.</i> Terwilliger, 56 Fed. 384 | 398 |
| Greene <i>v.</i> Buckley, 135 Fed. 520; 68 C. C. A. 70 | 207, 433, 525 |
| Greene <i>v.</i> Buckley, 120 Fed. 955..... | 797 |
| Greist <i>v.</i> Parsons, 125 Fed. 116; 60 C. C. A. 34 | 673 |
| Grier <i>v.</i> Wilt, 120 U. S. 412; 30 L. Ed. 712; 7 S. Ct. 718..... | 389, 394, 795 |
| Griswold <i>v.</i> Harker, 62 Fed. 389; 10 C. C. A. 435..... | 374, 441, 507, 608, 631, App. 374 |
| Griswold <i>v.</i> Wagner, 68 Fed. 494; 15 C. C. A. 525..... | 646, 656 |
| Grossmayer, <i>In re</i> , 177 U. S. 48; 20 S. Ct. 535 | 723 |
| Grove <i>v.</i> Hodge, 55 Pa. 504, 516 | 365 |
| Guaranty <i>v.</i> Green, 139 U. S. 137; 35 L. Ed. 116; 11 S. Ct. 512..... | 787 |
| Guidet <i>v.</i> Brooklyn, 105 U. S. 550; 26 L. Ed. 1106.. | 596, 599, 660, 669, 908 |
| Gunson <i>v.</i> Sewell, 1 Blatch. 244; Fed. Cas. 5881 | 344 |
| Gutta Percha <i>v.</i> Goodyear, 3 Sawy. 542; Fed. Cas. 5879 | 567 |
| Guyon <i>v.</i> Serrill, 1 Blatch. 245; Fed. Cas. 5881 | 343 |
| Haberman, <i>In re</i> , 147 U. S. 525; 37 L. Ed. 266; 13 S. Ct. 527..... | 545 |
| Hadden <i>v.</i> Spader, 20 Johns. Ch. 554 | 157 |
| Hagood <i>v.</i> Southern, 117 U. S. 52; 29 L. Ed. 805; 6 S. Ct. 608..... | 553 |
| Hailes <i>v.</i> Albany, 123 U. S. 582; 31 L. Ed. 284; 8 S. Ct. 262..... | 344 |
| Hailes <i>v.</i> Van Wormer, 87 U. S. 353; 22 L. Ed. 241..... | 46, 47, 48, 49, 223, 261, 344, 440, 473, 594, 595, 596, 597, 601, 603, 607, 608, 609, 617, 629, 647, 656, 657, 674, 675, App. 597, 603 |
| Haines <i>v.</i> McLaughlin, 135 U. S. 584; 22 L. Ed. 241; 10 S. Ct. 876... .. | 734 |

TABLE OF CASES CITED

CXXXV

[References are to sections. "App." refers to Appendix]

Hake v. Brown, 47 Fed. 783..... App. 344
Hale v. World, 127 Fed. 964; 62 C. C. A. 596..... 207
Hall v. Bird, 3 Fish. 505; Fed. Cas. 5926..... 20
Hall v. Conder, 2 C. B. N. S. 22..... 384, App. 381
Hall v. General, 153 Fed. 907; 82 C. C. A. 653..... 567, App. 564
Hall v. MacNeale, 107 U. S. 90; 27 L. Ed. 367; 2 S. Ct. 73..... 89, 412,
 414, 416, 596, 617, 662, 667, 671, 679, 851, 853, 856, 857
Hall v. Mister, Salk. 84..... 807
Hall v. Stout, 4 Del. Ch. 272..... App. 371
Hall v. Wiles, 2 Blatch. 194; Fed. Cas. 5954..... 343, 344
Hallock v. Davison, 107 Fed. 482..... 622
Hamilton v. Kingsbury, 17 Blatch. 264; Fed. Cas. 5985..... 763
Hammacher v. Wilson, 26 Fed. 239..... 755, App. 755
Hammershley v. Seamoni, 7 Fed. 584..... 375
Hammond v. Hart, 4 B. & A. 111; Fed. Cas. 6003..... 765, 798
Hammond v. Masen, 92 U. S. 724; 23 L. Ed. 767..... 751, 758
Hammond v. Stockton, 70 Fed. 716; 17 C. C. A. 356..... 332, 337
Hanifen v. Godschalk, 84 Fed. 649; 28 C. C. A. 507..... 59, App. 97
Hanifen v. Godschalk, 78 Fed. 811..... 82
Hanlon v. Primrose, 56 Fed. 600..... 324
Hapgood v. Hewitt, 119 U. S. 226; 30 L. Ed. 369; 7 S. Ct. 193..... 40, 366,
 367, 368, 751, 756, App. 160, 365, 758
Hardin v. Boyd, 113 U. S. 756; 28 L. Ed. 1141; 5 S. Ct. 771..... 510
Harding v. Handy, 24 U. S. 103; 6 L. Ed. 103..... 807
Hardwick v. Masland, 71 Fed. 887..... 398
Harley v. U. S. 198 U. S. 229; 49 L. Ed. 1029; 25 S. Ct. 634..... App. 498
Harmon v. Struthers, 57 Fed. 637..... 412, 856
Harper v. Holman, 84 Fed. 222..... 794
Harris v. Allen, 15 Fed. 106..... 377
Harris v. Bernhart, 97 Cal. 546..... 387
Harrison v. Foundry, 1 App. Cas. 574..... 668
Harrison v. Glucose, 116 Fed. 304; 53 C. C. A. 484..... 744
Harrison v. Nixon, 9 Pet. 483; 9 L. Ed. 480..... 807
Hart v. Buckner, 54 Fed. 925; 5 C. C. A. 1..... 539
Hart v. Ten Eyck, 2 Johns. Ch. 108..... 841
Hartell v. Tilghman, 99 U. S. 547; 25 L. Ed. 357..... 176, 449, 714, 721,
 724, 764, 765, 899, App. 714, 718, 755
Hartman v. Park, 145 Fed. 358..... 574
Hartshorn v. Saginaw, 119 U. S. 664; 30 L. Ed. 539; 7 S. Ct. 421..... 225
Hartshorn v. Tripp, 7 Blatch. 120; Fed. Cas. 6168..... 20
Harwood v. G. N. R., 11 H. L. Cas. 654..... 671, 672, 676, 679
Haskell v. Jones, 86 Pa. 173..... 920
Hatch v. Electric, 100 Fed. 975; 41 C. C. A. 133..... 257
Hatch v. Moffat, 15 Fed. 252..... 688, 770, 823
Hatch v. Reardon, 204 U. S. 152; 51 L. Ed. 415; 27 S. Ct. 188..... 550
Hathaway v. First National, 134 U. S. 494; 33 L. Ed. 1004; 10 S. Ct. 608
 131
Hat-Sweat v. Porter, 34 Fed. 745..... 510
Hausskenecht v. Claypool, 66 U. S. 431; 17 L. Ed. 172..... 921
Hawes v. Petroleum, 101 Mass. 385..... App. 386
Hawkins v. Crook, 2 P. W. 556..... 305
Hawkins, Ex parte, 147 U. S. 486; 37 L. Ed. 251; 13 S. Ct. 512..... 142
Hawkins v. Glenn, 131 U. S. 319; 33 S. Ct. 184; 9 L. Ed. 739..... App. 386
Hawkins v. Hunt, 14 Ill. 42..... 717
Hawks v. Swett, 4 Hun. 146..... 899

[References are to sections. "App." refers to Appendix]

| | |
|--|--|
| Haworth <i>v.</i> Harcastle, 1 Web. 480 | 222, 223 |
| Hayden <i>v.</i> Oriental, 15 Fed. 605 | 921 |
| Hayes <i>v.</i> Dayton, 8 Fed. 702 | 804 |
| Hayes <i>v.</i> Fischer, 102 U. S. 121; 26 L. Ed. 95 | 537, 538, 577 |
| Hayes-Young <i>v.</i> St. Louis, 137 Fed. 80; 70 C. C. A. 1 | App. 5, 351 |
| Hays <i>v.</i> Sulzor, 1 Fish. 532; Fed. Cas. 6271 | 629 |
| Hayward <i>v.</i> Andrews, 106 U. S. 672; 27 L. Ed. 271; 1 S. Ct. 544 | 150, 165, 719, 765 |
| Hayward <i>v.</i> Bank, 96 U. S. 611; 24 L. Ed. 855 | 729 |
| Heald <i>v.</i> Carey, 11 C. B. 977 | 57 |
| Heald <i>v.</i> Rice, 104 U. S. 737; 26 L. Ed. 910 | 356, 404, 496, 596, 608, 617, 670, 671, 672, 674, 676, 734, 871, 872, 873, 877, App. 131 |
| Heap <i>v.</i> Tremont, 82 Fed. 449; 27 C. C. A. 316 | 59, 616, 691 |
| Heath <i>v.</i> Hay, 67 Fed. 246 | 603 |
| Heath <i>v.</i> Unwin, 15 Sim. 552 | 508 |
| Heaton <i>v.</i> Eureka, 77 Fed. 288; 25 C. C. A. 267 | 474, 476, 477, 510, 513, 548, 574, 576, 645, 714, 744, 745, 756, 761, 837, App. 476, 714, 761 |
| Heaton-Peninsular <i>v.</i> Elliott, 58 Fed. 220 | 673 |
| Heaton-Peninsular <i>v.</i> Schlochtermeyer, 69 Fed. 592 | 327 |
| Heaton <i>v.</i> Schlochtermeyer, 72 Fed. 520; 18 C. C. A. 674 | 327 |
| Heide <i>v.</i> Panoulis, 188 Fed. 914; 110 C. C. A. 656 | App. 404 |
| Hein, <i>In re</i> , 166 U. S. 432; 41 L. Ed. 1066; 17 S. Ct. 624 | App. 25 |
| Heine <i>v.</i> Smith, 43 Fed. 786 | 380 |
| Heinze <i>v.</i> Butte, 107 Fed. 165; 46 C. C. A. 219 | 542 |
| Henderson <i>v.</i> Carbondale, 140 U. S. 25; 35 L. Ed. 332; 11 S. Ct. 691 | 578 |
| Henderson <i>v.</i> Mayor, 92 U. S. 259; 23 L. Ed. 543 | 920 |
| Henderson <i>v.</i> Tompkins, 60 Fed. 758 | 324 |
| Hendryx <i>v.</i> Fitzpatrick, 19 Fed. 810 | App. 577 |
| Hendy <i>v.</i> Golden, 127 U. S. 370; 32 L. Ed. 207; 8 S. Ct. 1275 | 211, 221, 234, 313, 393, 595, 596, 602, 609, 658, 664, 667, 669, 672, 734, 795, 799 |
| Henry <i>v.</i> Francestown, 2 B. & A. 221; Fed. Cas. 6382 | 857, App. 856 |
| Henry <i>v.</i> Providence, 3 B. & A. 501; Fed. Cas. 6384 | 857 |
| Henry <i>v.</i> Soapstone Co. 2 Fed. 78 | 856 |
| Herbert <i>v.</i> Adams, 4 Mas. 15; Fed. Cas. 6394 | 152, 796 |
| Herbert <i>v.</i> Rainey, 54 Fed. 248 | 924 |
| Herdie <i>v.</i> Roessler, 109 N. Y. 27 | 920 |
| Herman <i>v.</i> Brooklyn, Fed. Cas. 6703 | 804 |
| Herman <i>v.</i> Youngstown, 191 Fed. 579; 112 C. C. A. 185 | App. 344, 615 |
| Herrick <i>v.</i> Giant, 60 Fed. 80; 8 C. C. A. 475 | 618 |
| Herring <i>v.</i> Gage, 15 Blatch. 124; Fed. Cas. 6442 | 797 |
| Herring <i>v.</i> Hall, 208 U. S. 554; 52 L. Ed. 616; 28 S. Ct. 350 | 154 |
| Hermann <i>v.</i> Hermann, 29 Fed. 92 | 151, 752 |
| Hicklin <i>v.</i> Marco, 56 Fed. 549; 6 C. C. A. 10 | 789 |
| Hicks <i>v.</i> Kelsey, 85 U. S. 670; 21 L. Ed. 852 | 261, 380, 629, 646, 655, 667, 671, 676, 696, 775, App. 697 |
| Hien <i>v.</i> Pungs, 68 O. G. 657 | 5 |
| Higgin <i>v.</i> Murdock, 132 Fed. 810; 65 C. C. A. 466 | 88 |
| Higgin Mfg. Co. <i>v.</i> Scherer, 100 Fed. 459; 40 C. C. A. 491 | 118, 323, 325 |
| Hill <i>v.</i> Esplay, 31 Pa. St. 334 | 387 |
| Hill <i>v.</i> Evans, 6 Law T. N. S. 90 | 320 |
| Hill <i>v.</i> Hermans, 59 N. Y. 396 | App. 144 |
| Hill <i>v.</i> Thompson, 2 March. 435; Fed. Cas. 15,297 | 3, 204, 931 |
| Hill <i>v.</i> Thompson, 1 Web. 232 | 489 |
| Hill <i>v.</i> United States, 149 U. S. 593; 37 L. Ed. 862; 13 S. Ct. 1011 .. | 498, 715 |

TABLE OF CASES CITED

CXXXVII

[References are to sections. "App." refers to Appendix]

Hill v. United States, 50 U. S. 386; 13 L. Ed. 385..... 553
 Hill v. Whitcomb, 1 Holmes, 317; Fed. Cas. 6502 714
 Hill v. Wooster, 132 U. S. 693; 33 L. Ed. 502; 10 S. Ct. 228..... 46, 584,
 608, 612, 617, 646, 654, 671, 672, 679
 Hillborn v. Hale, 69 Fed. 958; 16 C. C. A. 569 374, 459, App. 204
 Himeley v. Rose, 9 U. S. 313; 3 L. Ed. 111 140
 Hiram, The, 1 Wheat. 440; 4 L. Ed. 440..... 411
 Hitchcock v. Tremain, 9 Blatch. 550; Fed. Cas. 6540..... 61
 Hoare v. Silverlock, 12 Ad. & El. (N. S.) 624..... 706
 Hobbie v. Jennison, 149 U. S. 355; 37 L. Ed. 766; 13 S. Ct. 879 450,
 505, 523, 524
 Hobbs v. Beach, 180 U. S. 383; 45 L. Ed. 586; 21 S. Ct. 409 54, 222,
 257, 435, 608, 612, 635, 640, 651, 671, 673, 700, 937, App. 622, 656, 671,
 673
 Hobbs v. Gooding, 111 Fed. 403; 49 C. C. A. 414..... 692
 Hocke v. New York Central, 122 Fed. 467; 58 C. C. A. 627 698
 Hocking v. Hocking, 4 Web. 434..... 384
 Hockholzer v. Eager, 2 Sawy. 361; Fed. Cas. 6556 567
 Hoe v. Knapp, 27 Fed. 204 371, 574, 645, 745
 Hoe v. Michle, 141 Fed. 112 574
 Hoff v. Iron Clad, 139 U. S. 326; 35 L. Ed. 179; 11 S. Ct. 580.... 380, 696
 Hogg v. Emerson, 11 How. 587; 3 L. Ed. 824 223
 Hohorst v. Hamburg-American, 148 U. S. 262; 37 L. Ed. 443; 13 S. Ct. 590
304, App. 117, 133
 Hohorst, *In re*, 150 U. S. 653; 37 L. Ed. 1211; 14 S. Ct. 221..... 579
 Holabird v. Burr, 17 Conn. 563 827
 Holland v. Shipley, 127 U. S. 396; 32 L. Ed. 185; 5 S. Ct. 1089... 596, 667
 Holliday v. Hunt, 70 Ill. 109 920
 Holliday v. Mattheson, 24 Fed. 185..... 505
 Hollister v. Benedict, 113 U. S. 59; 28 L. Ed. 901; 5 S. Ct. 717 216,
 437, 498, 591, 592, 596, 614, 628, 629, 636, 646, 649, 654, 655, 659, 662,
 667, 679, 682
 Holly v. Machine Co., 4 Fed. 74 476
 Holmes v. Truman, 67 Fed. 542; 14 C. C. A. 517..... 845
 Holzapfels v. Rahtjens, 183 U. S. 51; 46 L. Ed. 49; 22 S. Ct. 6 929
 Holmes v. Metropolitan, 21 Fed. 458..... 420, 421, 422
 Horner v. Graves, 7 Bing. 735..... 365
 Horton v. Mabon, 12 C. B. (N. S.) 437..... 679
 Horton v. N. Y. Central, 12 Abb. N. C. 30 App. 755
 Hoskin v. Fisher, 125 U. S. 217; 31 L. Ed. 759; 5 S. Ct. 834.. 397, 871, 876, 888
 Hotchkiss v. Cupples, 53 Fed. 1018 App. 777
 Hotchkiss v. Greenwood, 11 How. 248; 13 L. Ed. 683.... 47, 261, 437,
 593, 596, 629, 646, 653, 655, 656, 657, 667, 671, 672, 676, 679, 687, 696,
 697, 775, App. 468
 Houck v. Christy, 152 Fed. 612; 81 C. C. A. 602 App. 129
 Househill v. Nelson, 1 Web. 685 230, 641, 688, 689, 768, 770, 815
 Houston v. Stern, 74 Fed. 636; 20 C. C. A. 636 285
 Hovey v. Stevens, 1 Wood. & M. 290; Fed. Cas. 6745..... 857
 Howard v. Detroit, 150 U. S. 164; 37 L. Ed. 1039; 14 S. Ct. 68..... 614,
 615, 636, 658, 904, 908, 915
 Howard v. St. Paul, 35 Fed. 743 797
 Howe v. Abbott, 2 Story, 190; Fed. Cas. 6766 473, 503, 616, 656, 657,
 667, 670, 672, 687
 Howe v. National, 134 U. S. 388; 33 L. Ed. 963; 10 S. Ct. 570.... 207, 223,
 440, 592, 646, 654, 662, 671

[References are to sections. "App." refers to Appendix]

Howe v. Neemes, 18 Fed. 40..... 442
 Howe v. Underwood, 1 Fish. 160; Fed. Cas. 6775 811
 Howe v. Williams, Fed. Cas. 6778 App. 247
 Howell v. State, 10 Lea. 544 577
 Howes v. Nutes, 4 Cliff. 173; Fed. Cas. 6790 223
 Howland, *Ex parte*, 12 O. G. 889..... 375
 Howlett v. Tarte, 10 C. B. N. S. 813..... 894
 Hoxie v. Carr, 1 Sumn. 173; Fed. Cas. 6802 21
 Hoyt v. Computing, 96 Fed. 250..... App. 777
 Hoyt v. Horne, 145 U. S. 302; 36 L. Ed. 713; 12 S. Ct. 922 215, 230,
 375, 378, 435, 448, 453, 457, 459, 486, 503, 506, 529, App. 204
 Hubbell v. United States, 179 U. S. 77; 45 L. Ed. 95; 21 S. Ct. 24 207,
 App. 207, 213
 Hubel v. Dick, 28 Fed. 132 871, 878
 Huber v. Myers, 34 Fed. 752..... 765
 Huber v. Nelson, 148 U. S. 270; 37 L. Ed. 447; 13 S. Ct. 603..... 375, 420,
 871, 877, 885, App. 871
 Huber v. Nelson, 38 Fed. 830..... 420, 821, 822, 885
 Hughes v. Alexander, 5 Duer, 488..... 893
 Hughes v. Northern, 18 Fed. 106 717
 Humiston v. Stainthorp, 2 Wall. 106; 17 L. Ed. 905 116, 130, 304,
 891, 893
 Huntington v. Saunders, 120 U. S. 78; 30 L. Ed. 580; 7 S. Ct. 356 ... 807
 Hunt v. Hallingsworth, 100 U. S. 100; 25 L. Ed. 569..... 720
 Hurlbut v. Schillinger, 130 U. S. 456; 32 L. Ed. 1011; 9 S. Ct. 584..... 290,
 298, 344, 837, 845, App. 845
 Hutchings v. King, 68 U. S. 53; 17 L. Ed. 544 778
 Hutter v. De Q. Bottle, 128 Fed. 283; 62 C. C. A. 652..... 481, 612
 Idaho, The, 93 U. S. 575; 23 L. Ed. 978..... 841
 Ide v. Trorlicht, 115 Fed. 137; 53 C. C. A. 341..... 277, 342, 349, 468,
 609, App. 2, 11, 277, 349
 Illingsworth v. Spaulding, 43 Fed. 827..... 756
 Illinois v. Illinois, 184 U. S. 77; 46 L. Ed. 440; 22 S. Ct. 300 App. 893
 Imhauser v. Buerk, 101 U. S. 647; 25 L. Ed. 945 374, 380, 468,
 484, 612, 674, App. 68, 374
 Incandescent Lamp Patent, 159 U. S. 465; 40 L. Ed. 221; 16 S. Ct. 75
 380, 904, 908
 Indiana v. Case, 154 Fed. 365; 83 C. C. A. 343..... 574, 744
 Indiana v. Crocker, 103 Fed. 496; 43 C. C. A. 287..... 203
 Independent v. Jeffrey, 76 Fed. 981..... 350
 Industrial v. Electric, 58 Fed. 732; 7 C. C. A. 471 120, 716
 Industrial v. Wilcox, 112 Fed. 535; 50 C. C. A. 387..... 351, App. 358
 Indianapolis v. Horst, 93 U. S. 291; 23 L. Ed. 898..... 921
 Indurated Fiber v. Grace, 52 Fed. 124 324, 327
 Ingels v. Mast, 6 Fish. 415; Fed. Cas. 7033..... 843
 Ingersoll v. Jewett, 16 Blatch. 378; Fed. Cas. 7039..... 36
 Ingersoll v. Musgrove, Fed. Cas. 7040..... App. 277
 Inman v. Beach, 71 Fed. 420; 18 C. C. A. 165 459
 Innis v. Boiler Works, 22 Fed. 780 856
 Insurance Co. v. Bangs, 103 U. S. 780; 26 L. Ed. 608 894
 Insurance Co. v. Norton, 96 U. S. 234; 24 L. Ed. 689 2
 Insurance Co. v. Piaggio, 16 Wall. 378; 2 L. Ed. 358 App. 137
 Interior v. Perkins, 80 Fed. 528; 25 C. C. A. 613 593, 603, 668, 672
 International v. Brammer, 138 Fed. 396; 71 C. C. A. 633..... 453
 International v. Dey, 142 Fed. 736; 74 C. C. A. 68 603

TABLE OF CASES CITED

CXXXIX

[References are to sections. "App." refers to Appendix]

International *v.* Gaylord, 140 U. S. 55; 35 L. Ed. 347; 11 S. Ct. 716 600, 855

International *v.* Kellogg, 171 Fed. 657; 96 C. C. A. 395 App. 2

International *v.* Maurer, 44 Fed. 618 327, 874

International *v.* Richmond, 30 Ged. 775 App. 812

Interurban *v.* Westinghouse, 186 Fed. 166; 108 C. C. A. 298.. App. 543, 561

Ireson *v.* Pierce, 39 Fed. 795 82

Ironclad *v.* Vollrath, 52 Fed. 143 570

Irwin *v.* Hasselman, 97 Fed. 964; 38 C. C. A. 587 626

Isaacs *v.* Cooper, 4 Wash. 259; Fed. Cas. 7096..... 242, 574

Ives *v.* Hamilton, 92 U. S. 426; 23 L. Ed. 494..... 230, 378, 435, 448, 453, 459, 499, 503, 651

Ives *v.* Sargent, 119 U. S. 652; 30 L. Ed. 544; 7 S. Ct. 436..... 871, 874, 875, 876, 877, 878

Jackson *v.* Lawton, 10 Johns. 23..... 26

Jackson *v.* Ludeling, 21 Wall. 616; 22 L. Ed. 692 App. 805

Jacobs *v.* Baker, 74 U. S. 295; 19 L. Ed. 200 684, App. 679

James *v.* Campbell, 104 U. S. 356; 26 L. Ed. 786..... 9, 26, 95, 223, 244, 310, 347, 348, 356, 498, 505, 747, 871, 872, 873, 877, 888, 903, App. 98

Javos *v.* Fleece, 60 Fed. 622..... 794

Jennings *v.* Keble, 10 Fed. 669 332, 635, App. 331

Jennings *v.* Pierce, 15 Blatch. 42; Fed. Cas. 7283 417

Jensen *v.* Norton, 64 Fed. 662; 12 C. C. A. 608 544, App. 544

Jerome, *Ex parte*, 3 O. G. 64..... 775

Jewell *v.* Jackson, 140 Fed. 340; 72 C. C. A. 304 202, 574, App. 212

Jewell *v.* Knight, 123 U. S. 426; 31 L. Ed. 190; 8 S. Ct. 193..... 113

Johnson *v.* Flushing, 105 U. S. 539; 26 L. Ed. 1162..... 871, 872, 877

Johnson *v.* Foos, 141 Fed. 73; 72 C. C. A. 105 654, App. 277

Johnson *v.* Forty-Second St. R. 33 Fed. 499..... 604

Johnson *v.* Chisholm, 115 Fed. 625; 53 C. C. A. 123 616

Johnson *v.* McCullough, 4 Fish. 170; Fed. Cas. 7401 72

Johnson *v.* National, 106 Fed. 319 792

Johnson *v.* Root, 2 Cliff. 108; Fed. Cas. 7409..... 11

Johnson *v.* Tidewater, 50 Fed. 90..... 245

Johnson *v.* Toledo, 119 Fed. 885; 56 C. C. A. 415 616

Johnson *v.* Union, 59 Fed. 20 164, 165, 171

Johnson *v.* Wharton, 152 U. S. 252; 38 L. Ed. 429; 14 S. Ct. 608 .. 31, 532, 893

Joliet *v.* Dice, 105 Ill. 649..... 151

Jonathan *v.* Whitehurst, 72 Fed. 496..... 167

Jones *v.* Barker, 11 Fed. 597 74

Jones *v.* Berger, 58 Fed. 1006 753

Jones *v.* Morehead, 68 U. S. 155; 17 L. Ed. 662 298, 667, 671, 676, 679, 775

Jones *v.* Munger, 49 Fed. 61; 1 C. C. A. 158..... 622, 936

Jones *v.* Munger, 50 Fed. 785; 1 C. C. A. 668..... 120, 130, 539, 544, 545, 893

Jones *v.* Pearce, 1 Web. 125..... 289

Jones *v.* Seawall, 3 Cliff. 563; Fed. Cas. 7495..... 2, 18, 857

Jordan *v.* Moore, L. R. 1 C. P. 624..... 679

Jordan *v.* Overseers, 4 Ohio, 295..... 920

Jourolmon *v.* Ewing, 85 Fed. 103; 29 C. C. A. 41..... 890

Judd *v.* Gibbs, 3 Gray, 539 753

Jupe *v.* Pratt, 1 Web. 146 230, 768, 815

Kahn *v.* Starrels, 136 Fed. 597; 69 C. C. A. 371..... 277, 342

[References are to sections. "App." refers to Appendix]

Kalamazoo *v.* Duff, 113 Fed. 264; 51 C. C. A. 221 App. 461, 622
 Kalem *v.* Harper, 222 U. S. 55; 56 L. Ed. —; 32 S. Ct. 20 . . . App. 476, 477
 Kane *v.* Huggins, 44 Fed. 287 App. 559
 Kansas City *v.* Devol, 127 Fed. 363 App. 277
 Kaolatype *v.* Hoke, 30 Fed. 444 116, 324, 603, 792
 Kay *v.* Marshall, 1 Mylne, 373 204
 Kay *v.* Marshall, O. & F. 245 672, 679
 Keach, *In re*, 14 R. I. 571 921
 Kearney *v.* Denn, 15 Wall. 51; 21 L. Ed. 41 537
 Kearney, *Ex parte*, 7 Wheat. 38; 5 L. Ed. 36 537, 577, 578, 725, 825
 Kearney, *In re*, 160 U. S. 231; 40 L. Ed. 402; 16 S. Ct. 273 579
 Kearney *v.* Railroad, 30 Fed. 330 860
 Keasbey, *In re*, 160 U. S. 221; 40 L. Ed. 402; 16 S. Ct. 273 579
 Keasby *v.* Carey, 139 Fed. 571 72
 Keech *v.* Hall, 1 Doug. 21 778
 Keeler *v.* Standard, 157 U. S. 659; 39 L. Ed. 848; 15 S. Ct. 738 505,
 App. 718
 Kelleher *v.* Darling, 4 Cliff. 424; Fed. Cas. 7653 857
 Kelley *v.* Ypsilanti, 44 Fed. 19 299, 924, App. 924
 Kelly *v.* Clow, 89 Fed. 297; 32 C. C. A. 205 593, 668, 672, 908
 Kendall *v.* Winsor, 62 U. S. 322; 16 L. Ed. 165 3, 6, 7, 857, 932,
 App. 2, 727
 Kendrick *v.* Emmons, 1 Holmes, 234; Fed. Cas. 7694 448
 Kendrick *v.* Emmons, 2 B. & A. 208; Fed. Cas. 7695 497, 506
 Kennedy *v.* Hazleton, 128 U. S. 667; 32 L. Ed. 576; 9 S. Ct. 202 56, 780,
 App. 780
 Kennedy *v.* Ins. Co. 3 H. & J. 367 156
 Kennon *v.* Gilmer, 131 U. S. 22; 33 L. Ed. 110; 9 S. Ct. 696 138
 Kent *v.* Simonds, 39 Fed. 606 692
 Kerr *v.* Clampitt, 95 U. S. 188; 24 L. Ed. 493 537
 Keshkonong *v.* Burton, 104 U. S. 668; 26 L. Ed. 886 921
 Kessler *v.* Eldred, 206 U. S. 285; 51 L. Ed. 1065; 27 S. Ct. 611 31, 250,
 564, 573, 720, App. 31, 564
 Ketchum *v.* Johnson, 8 Fed. 586 505
 Key *v.* Marshall, 8 Clark & F. 245 656, 657
 Keyes *v.* Eureka, 158 U. S. 150; 39 L. Ed. 929; 15 S. Ct. 772 366, 717,
 732, 756, 793
 Keyes *v.* Eureka, 45 Fed. 199 717
 Keyes *v.* Grant, 118 U. S. 25; 30 L. Ed. 54; 6 S. Ct. 974 404, 406, 492,
 App. 131
 Keyes *v.* Pueblo, 31 Fed. 560 568, 730
 Keystone *v.* Adams, 151 U. S. 139; 38 L. Ed. 103; 14 S. Ct. 295 215,
 298, 375, 622, 626, 635, 636, 692, 837, 842, 843, App. 622, 845
 Keystone *v.* Martin, 132 U. S. 91; 33 L. Ed. 275; 10 S. Ct. 32 116, 117,
 130, 304
 Keystone *v.* Phoenix, 95 U. S. 274; 24 L. Ed. 344 12, 195, 202, 204, 207,
 211, 212, 219, 222, 223, 226, 244, 375, 377, 380, 598, 635, 671, 676,
 837, 843, App. 201, 205, 420
 Kilborn *v.* Liveright, 165 Fed. 902 817
 Kilborn *v.* Sunderland, 130 U. S. 509; 32 L. Ed. 1005; 9 S. Ct. 594 720
 Kilborn *v.* Rewes, 8 Gray, 415 169
 Kilbourne *v.* Bingham, 50 Fed. 697; 1 C. C. A. 617 696
 Kilmer *v.* Griswold, 67 Fed. 1017; 15 C. C. A. 161 120, 539
 Kimberly *v.* Arms, 129 U. S. 512; 32 L. Ed. 764; 9 S. Ct. 355 129, 544,
 578, 836, App. 129

TABLE OF CASES CITED

cxli

[References are to sections. "App." refers to Appendix]

King v. Anderson, 90 Fed. 500 700, 797
 King v. Bilhofer, 127 Fed. 127; 62 C. C. A. 241..... 198
 King v. Butler, 3 Lev. 220 26
 King v. Cutter, 1 Stark. 354 242
 King v. Gallun, 109 U. S. 99; 27 L. Ed. 870; 3 S. Ct. 202.... 216, 313, 646,
 656, 657, 662, 667, 672, 679, 706, 707, 710
 King v. Hubbard, 97 Fed. 795; 38 C. C. A. 423 .. 247, 459, 460, App. 376
 King v. Wheeler, 2 B. & A. 345 222, 669
 Kingsbury v. Buckner, 134 U. S. 650; 33 L. Ed. 1047; 10 S. Ct. 638 ... 128
 Kingston v. Preston, Den. 634 760
 Kinloch v. Western, 113 Fed. 659; 51 C. C. A. 369.. 459, 544, 635, App. 459
 Kinsman v. Parkhurst, 59 U. S. 289; 15 L. Ed. 385..... 385, 510, 513
 Kirby v. Armstrong, 5 Fed. 801..... App. 277
 Kirchberger v. American, 128 Fed. 599; 64 C. C. A. 107..... 56, 309
 Kisinger-Ison v. Bradford, 123 Fed. 91; 59 C. C. A. 221..... 790
 Kittle v. Hall, 29 Fed. 508..... 5, 55, 568, 732
 Kittridge v. Race, 92 U. S. 116; 23 L. Ed. 488 277
 Klein v. Ins. Co. 104 U. S. 88; 26 L. Ed. 662..... App. 755
 Klein v. Russell, 86 U. S. 433; 22 L. Ed. 116..... 223, 375, 377, 857
 Klein v. Seattle, 77 Fed. 200; 23 C. C. A. 114..... 635, 636
 Knapp v. Morss, 150 U. S. 221; 37 L. Ed. 1059; 14 S. Ct. 81.... 54, 86,
 207, 208, 211, 215, 229, 234, 246, 376, 426, 468, 502, 525, 596, 597, 616,
 618, 636, 651, 672, 690, App. 376
 Knapp v. Railroad, 20 Wall. 177; 22 L. Ed. 328..... 537
 Knease v. Bank, 4 Wash. 9; Fed. Cas. 7875..... 667
 Kneeland v. Sheriff, 2 Fed. 901..... 108
 Knickerbocker v. Rogers, 61 Fed. 297 App. 74
 Knight v. Railroad, 3 Fish. 1; Fed. Cas. 7882 775
 Knox v. Mining Co. 6 Sawy. 430; Fed. Cas. 7907..... 459
 Knoxville v. Africa, 77 Fed. 501; 23 C. C. A. 252..... 118, 544
 Kohl v. United States, 91 U. S. 367; 23 L. Ed. 449..... 498
 Kokomo v. Kitselman, 189 U. S. 8; 47 L. Ed. 689; 23 S. Ct. 521.. 206, 378,
 433, 469, 502, 525, 529, 614, 680
 Kraatz v. Tieman, 79 Fed. 322 App. 65
 Krajeuski v. Pharr, 105 Fed. 514; 44 C. C. A. 572..... 223
 Krementz v. Cottle, 148 U. S. 556; 37 L. Ed. 558; 13 S. Ct. 719 443,
 615, 622, 626, 633, 634, 635, 671, 673, App. 693
 Krick v. Jansen, 52 Fed. 823..... 324, 807
 Krumbhaar v. Birch, 83 Pa. 426 11
 Kountze v. Omaha, 107 U. S. 378; 27 L. Ed. 609; 2 S. Ct. 911... App. 273
 Lacroix v. Lyon, 33 Fed. 437..... 386
 Ladd v. Cameron, 25 Fed. 37..... 579
 Lake Shore v. National, 110 U. S. 229; 28 L. Ed. 129; 4 S. Ct. 33.... 214,
 223, 550, 608, 717, 937
 Lalance v. Haberman, 55 Fed. 292; 5 C. C. A. 111..... 518
 Lamb v. Lamb, 120 Fed. 267; 56 C. C. A. 247 223, 634, 937, App. 381
 Lamson v. Godehard, 59 Fed. 776; 8 C. C. A. 265 587
 Lamson v. Hillman, 123 Fed. 416; 59 C. C. A. 510..... 506, 574, 673
 Lander v. Cowles, 16 O. G. 405 82
 Lane v. Locke, 150 U. S. 193; 37 L. Ed. 1049; 14 S. Ct. 78 .. 151, 366, 568,
 730, 732, 756, 793
 Lane v. Welds, 99 Fed. 286; 39 C. C. A. 528.... 31, 386, 622, 623, 627, 893
 Langdon v. De Groot, 1 Pain, 203; Fed. Cas. 8059..... 775
 Langford v. United States, 101 U. S. 341; 25 L. Ed. 1010..... 498
 Lansdale v. Smith, 106 U. S. 391; 27 L. Ed. 219; 1 S. Ct. 350 729

[References are to sections. "App." refers to Appendix]

Lanyon *v.* Brown, 115 Fed. 150; 53 C. C. A. 354 159
 Lapham-Dodge *v.* Severin, 40 Fed. 762..... App. 201, 209
 Lappin *v.* Corning, 94 Fed. 162..... 323
 La Rue *v.* Electric, 31 Fed. 80..... 634
 Last Chance *v.* Tyler, 157 U. S. 683; 39 L. Ed. 859; 15 S. Ct. 733.... 31,
 532, 893, 894
 Latta *v.* Shawk, Fed. Cas. 8116..... App. 68
 Lattimore *v.* Hardsocg, 121 Fed. 986; 58 C. C. A. 287..... 845
 Lawes *v.* Purser, 38 Eng. L. & E. Rep. 48 764
 Lawther *v.* Hamilton, 124 U. S. 1; 31 L. Ed. 325; 8 S. Ct. 342.... 435, 639,
 692, 817
 Lay *v.* Indianapolis, 120 Fed. 831; 57 C. C. A. 313..... 3
 Lay *v.* Marshall, 7 Scott, 548..... 669
 Leary *v.* Railroad, 139 Mass. 580 20
 Lee *v.* Blandy, 1 Bond, 361; Fed. Cas. 8182..... 158, 376
 Leeds *v.* Victor, 213 U. S. 301; 53 L. Ed. 805; 29 S. Ct. 495... App. 9, 193,
 420, 421, 476, 561, 674, 817
 Le Fort *v.* Delafield, 3 Edw. Ch. 22 796
 Leggett *v.* Avery, 101 U. S. 256; 25 L. Ed. 865... 54, 207, 310, 770, 870,
 871, 872, 889
 Leggett, *Ex parte*, 2 O. G. 199 775
 Leggett *v.* Standard, 149 U. S. 287; 37 L. Ed. 737; 13 S. Ct. 902.... 355,
 732, 871, 874, 889
 Le Guen *v.* Gouveneur, 1 Johns. Ch. 500..... 141, 302, 371
 Lehigh *v.* Kearney, 158 U. S. 461; 39 L. Ed. 1055; 15 S. Ct. 871... 207, 602
 Lehigh *v.* Mellon, 104 U. S. 112; 26 L. Ed. 639..... 211, 212, 218, 222,
 223, 244, 598, App. 420
 Lehnbeuter *v.* Holthaus, 105 U. S. 94; 26 L. Ed. 939.... 71, 99, 332, 495,
 560, 561, 598, 629, 634, 635, 638, App. 495, 635
 Lennon, *In re*, 166 U. S. 548; 41 L. Ed. 1110; 17 S. Ct. 658 App. 577
 Lenox *v.* Roberts, 2 Wheat. 373; 4 L. Ed. 371..... 720
 Lepper *v.* Randall, 113 Fed. 627; 51 C. C. A. 337..... 485
 LeRoy *v.* Tatham, 14 How. 156; 14 L. Ed. 367 ... 426, 593, 651, 683,
 689, 775, 866, 903
 Letson *v.* Alaska, 130 Fed. 129; 64 C. C. A. 463..... 435, 640
 Lettelier *v.* Mann, 91 Fed. 917 412
 Lewin *v.* Welsbach, 81 Fed. 904 924
 Lewis *v.* Chapman, 3 Beav. 133 732
 Lewis *v.* Pennsylvania, 59 Fed. 129; 8 C. C. A. 41..... 211
 Lewis *v.* Premium, 163 Fed. 950; 90 C. C. A. 310..... App. 212
 License Cases, 5 How. 504; 12 L. Ed. 504 920
 Lightner *v.* Boston, 1 Law Des. 338 751, 758
 Lighter *v.* Brooks, 2 Cliff. 287; Fed. Cas. 8344..... 481
 Ligowski *v.* American, 34 Fed. 328..... 3
 Lindsay *v.* Stein, 10 Fed. 907..... 3, 5
 Litchfield *v.* Goodnow's, 123 U. S. 549; 31 L. Ed. 199; 8 S. Ct. 210.... 893,
 App. 386
 Little *v.* Barreme, 6 U. S. 170; 2 L. Ed. 168 498
 Little *v.* Bowers, 134 U. S. 547; 33 L. Ed. 1016; 10 S. Ct. 620..... 550
 Littlefield *v.* Perry, 88 U. S. 205; 22 L. Ed. 577 152, 153, 160, 161, 163,
 165, 282, 290, 298, 511, 714, 722, 765, 796, 798, 835, 837, 845, 846, App.
 722
 Livingston, *Ex parte*, 20 O. G. 1746..... 5
 Livingston *v.* Woodsworth, 15 How. 546; 14 L. Ed. 809... 290, 292, 298,
 837, 839, 847

TABLE OF CASES CITED

exliii

[References are to sections. "App." refers to Appendix]

Livingstone v. Jones, 3 Wall. Jr. 330; Fed. Cas. 8414 292

Livingstone v. Van Ingen, 9 Johns. 507 920

Lockwood v. Cleveland, 20 Fed. 164 587

Lockwood v. Faber, 27 Fed. 63 904

Lockwood v. Wicks, 75 Fed. 118; 21 C. C. A. 257 550

Loew v. German-American, 107 Fed. 949; 47 C. C. A. 94 118, 476, 477,
App. 544

Loew v. Miller, 138 Fed. 886; 71 C. C. A. 266..... 436, 441

Long v. Pope, 75 Fed. 835; 21 C. C. A. 533 226, 378, 527

Loom Co. v. Higgins, 105 U. S. 580; 26 L. Ed. 1177... 72, 76, 108, 222, 232,
321, 391, 392, 396, 440, 459, 469, 608, 611, 617, 622, 624, 626, 631, 635,
647, 648, 651, 655, 656, 663, 671, 673, 674, 692, 693, 700, 807, 809, 811,
860, 864, 865, 903, 917, App. 603, 608

Loom Co. v. Higgins, 15 Blatch. 446; Fed. Cas. 17,342 65

Lord v. Veazie, 8 How. 255; 12 L. Ed. 249 887

Lorraine v. Thurmond, 51 O. G. 1781 860

Losh v. Hague, 1 Web. 207..... 440

Louden v. Janesville, 148 Fed. 686; 78 C. C. A. 548..... App. 212

Louisiana v. Jumel, 107 U. S. 711; 27 L. Ed. 448; 2 S. Ct. 128..... 553

Louisiana v. McComb, 92 U. S. 531; 23 L. Ed. 623..... 553

Lourie v. Lenhart, 130 Fed. 122; 64 C. C. A. 456..... App. 459

Lovejoy v. Murray, 3 Wall. 1; 18 L. Ed. 129..... 894

Lovell v. Cary, 147 U. S. 623; 37 L. Ed. 307; 13 S. Ct. 472.... 616, 636,
656, 672, 676, App. 599

Lowell v. Lewis, 1 Mas. 182; Fed. Cas. 8568..... 223, 285, 289, 440, 905

Ludington v. Leonard, 119 Fed. 937..... App. 205

Lumber Co. v. Buchtel, 101 U. S. 638; 25 L. Ed. 1073..... 893, 894

Lupton v. White, 15 Ves. 432 841, 847

Lyman v. Lalor, 1 B. & A. 403; Fed. Cas. 8632 860

Lynch v. Murphy, 161 U. S. 247; 40 L. Ed. 688; 16 S. Ct. 523..... 161

Lyon v. Donaldson, 34 Fed. 789 283

Lyons v. Drucker, 106 Fed. 416; 45 C. C. A. 368..... App. 325

Mabie v. Haskell, 2 Cliff. 507; Fed. Cas. 8653 473, 485, 600

Macauley v. White, 9 Fed. 698 577

Macbeth v. Gillinder, 54 Fed. 169 256, App. 201, 209

Macfarlane v. Price, 1 Stark. 199 242

Machesney v. Brown, 29 Fed. 145 171

Machine v. Pearce, Fed. Cas. 4132..... App. 68

Mackey v. Daniel, 59 Md. 484 App. 144

Macnamara v. Hulse, Car. & M. 4 669

Maddock v. Coxon, 45 Fed. 578 380

Magic v. Douglas, 2 Fish. 330; Fed. Cas. 8948..... 574

Magic v. Economy, 97 Fed. 87; 38 C. C. A. 56..... 209

Magic Ruffle v. Elm City, Fed. Cas. 8949..... App. 714

Magin v. Karle, 150 U. S. 387; 37 L. Ed. 1118; 14 S. Ct. 153..... 103

Magoun v. New England, Fed. Cas. 8960 App. 366

Magowan v. New York, 141 U. S. 332; 35 L. Ed. 781; 12 S. Ct. 62.... 222,
612, 622, 624, 626, 631, 635, 655, 811, 864

Mahler v. Animarium, 111 Fed. 530; 49 C. C. A. 431 707

Mahn v. Harwood, 112 U. S. 354; 28 L. Ed. 665; 5 S. Ct. 174; 6 S. Ct.
451.... 12, 204, 207, 222, 244, 308, 313, 393, 795, 799, 871, 872, 876,
877, 878, 885, 889, App. 26

Maitland v. Gibson, 63 Fed. 840; 11 C. C. A. 446 50

Malin v. Kinney, 1 Cai. 117..... 411

Malone v. Marriott, 64 Ala. 486 116

[References are to sections. "App." refers to Appendix]

Manghaum v. Sharpe, 17 C. B. (N. S.) 443 927

Mann v. Bank, 86 Fed. 51; 29 C. C. A. 547 129, 544

Manning v. Cape Ann, 108 U. S. 462; 27 L. Ed. 793; 2 S. Ct. 860.... 18, 103

Mann's v. Monarch, 34 Fed. 130..... 273, App. 666

Mfg. Co. v. Nairn, 7 Ch. Div. 834..... 928

Mfg. Co. v. Shakespear, 39 L. J. Ch. 36 928

Many v. Jagger, 1 Blatch. 372; Fed. Cas. 9055 440, 451, 795

Marble v. Ripley, 10 Wall. 339; 19 L. Ed. 955 App. 722

Marchand v. Emken, 132 U. S. 195; 33 L. Ed. 332; 10 S. Ct. 65 636,
667, 671

Marden v. Campbell, 67 Fed. 809; 15 C. C. A. 26 116, 120, 123,
539, 893

Maryland v. Dorr, 46 Fed. 773 823

Market v. Rowley, 155 U. S. 621; 39 L. Ed. 284; 15 S. Ct. 224 ... 380, 431,
496, 665, 712, 734

Marsh v. Keating, 1 Bing. N. C. 198 926

Marsh v. Marshall, 53 Pa. St. 396..... 322

Marsh v. Nichols, 128 U. S. 605; 32 L. Ed. 538; 9 S. Ct. 168.... 532, 827

Marsh v. Nichols, 140 U. S. 344; 35 L. Ed. 413; 11 S. Ct. 798 722

Marsh v. Sayles, 5 Fish. 610; Fed. Cas. 9119..... 3

Marsh v. Seymour, 97 U. S. 348; 24 L. Ed. 963 283, 839

Marsh v. Whitmore, 21 Wall. 178; 22 L. Ed. 482..... 729

Marshall v. Mee, Fed. Cas. 9129..... App. 861

Marston v. Swett, 66 N. Y. 211..... 764

Martinton v. Fairbanks, 112 U. S. 670; 28 L. Ed. 862; 5 S. Ct. 321 131

Martin v. Hazard, 93 U. S. 302; 23 L. Ed. 885..... 133

Martin v. Martin, 67 Fed. 786; 14 C. C. A. 642 385

Marvel v. Merritt, 116 U. S. 11; 29 L. Ed. 550; 6 S. Ct. 207..... 903

Mason v. Crosby, 3 Wood. & M. 258; Fed. Cas. 9236..... 836

Mason v. Graham, 90 U. S. 261; 23 L. Ed. 86..... 837, 845

Masseth v. Johnston, 59 Fed. 613..... 372, 574

Masseth v. Palm, 51 Fed. 824 448

Mast v. Dempster, 82 Fed. 327; 27 C. C. A. 191 2, 74, 197,
App. 74

Mast v. Stover, 177 U. S. 485; 44 L. Ed. 856; 20 S. Ct. 708... 73, 118, 122,
224, 250, 253, 540, 557, 593, 616, 656, 657, 661, App. 118, 253, 535, 652,
672

Mast v. Superior, 154 Fed. 45; 83 C. C. A. 157..... 841

Masten v. Hunt, 55 Fed. 78; 5 C. C. A. 42 194, 904

Masten v. Hunt, 51 Fed. 216..... 194

Masterson v. Herndon, 77 U. S. 416; 19 L. Ed. 953..... 134

Masury v. Anderson, 11 Blatch. 162; Fed. Cas. 9270 244

Match v. Rosber, 106 N. Y. 473 365

Matheson v. Campbell, 78 Fed. 910; 24 C. C. A. 284..... 903, 909

Matheson v. Campbell, 69 Fed. 597 909, 914

Mathews v. Flower, 25 Fed. 830..... 356

Mathews v. Lister, 154 Fed. 490..... App. 381

Mathers v. Green, 34 Beav. 170 927

Mathis v. Meek, 1 Heisk. 534 539

Matteson v. Caine, 17 Fed. 525..... 442

Matthews v. Boston, 105 U. S. 54; 26 L. Ed. 1022..... 877

Matthews v. Iron Clad, 124 U. S. 347; 31 L. Ed. 477; 8 S. Ct. 639.... 871,
872, 877, 885

Matthews v. National, 71 Fed. 518..... 548, App. 559

Matthews v. Spagenberg, 19 Fed. 823..... App. 344

TABLE OF CASES CITED

cxlv

[References are to sections. "App." refers to Appendix]

Mawman v. Tegg, 2 Russ. 390..... App. 845
 Maxwell v. Kennedy, 8 How. 222; 12 L. Ed. 210..... 732, 793
 Maxwell Land Grant Case, 122 U. S. 365; 30 L. Ed. 1211; 7 S. Ct. 1271
 136, App. 25
 Maxwell v. Schwartz, 57 N. W. 141..... 539
 May v. Armstrong, 26 Ky. 261..... App. 371
 May v. Juneau, 137 U. S. 408; 34 L. Ed. 729; 11 S. Ct. 102..... 734,
 App. 795
 Mayor v. American, 60 Fed. 1016; 9 C. C. A. 336..... 158
 Mayor v. Ransom, 64 U. S. 487; 16 L. Ed. 515... 286, 288, 292, 295, 298
 McAleer v. United States, 150 U. S. 424; 37 L. Ed. 1130; 14 S. Ct. 160
 151, 366
 McCarty v. Lehigh, 160 U. S. 110; 40 L. Ed. 358; 16 S. Ct. 240... 195, 216,
 219, 220, 223, 646, 937
 McClain v. Ortmyer, 141 U. S. 419; 35 L. Ed. 800; 12 S. Ct. 76..... 12,
 195, 201, 202, 203, 204, 211, 223, 226, 240, 245, 380, 473, 587, 592, 598,
 615, 623, 626, 635, 636, 672, 673, 903, App. 636
 McCleary v. Baker, 63 Fed. 841; 11 C. C. A. 451..... 601
 McCloskey v. DuBois, 8 Fed. 710..... 775
 McCluney v. Silliman, 28 U. S. 270; 7 L. Ed. 269..... 921
 McClurg v. Kingsland, 1 How. 202; 11 L. Ed. 102... 151, 271, 347, 366,
 367, 369, 429, 639, 751, 752, 756, 757, 759, 770, 850, 856, 857, App. 366
 McComb v. Brodie, 1 Woods. 153; Fed. Cas. 8708..... 287
 McComb v. Frink, 149 U. S. 629; 37 L. Ed. 876; 13 S. Ct. 993..... 894
 McCormick v. Aultman, 169 U. S. 606; 42 L. Ed. 875; 18 S. Ct. 443.. 887
 McCormick v. Aultman, 69 Fed. 371; 16 C. C. A. 259... 188, 198, 221, 226,
 234, 241, 376, 378, 380, 427, 435, 442, 468, 519, 532, 679, 919, App. 204
 McCormick v. Aultman, 58 Fed. 778..... 602
 McCormick v. Minneapolis, 42 Fed. 152..... App. 861
 McCormick v. Minnesota, 42 Fed. 152..... 811
 McCormick v. Seymour, 2 Blatch. 240; Fed. Cas. 8726..... 857
 McCormick v. Talcott, 61 U. S. 402; 15 L. Ed. 930... 202, 224, 230, 375,
 376, 378, 380, 441, 442, 456, 468, 497, 506, 507, 517, 587, 612, 641, 686,
 768, 815, 871, App. 434, 441
 McCrea v. Holdsworth, 6 Ch. Ap. L. R. 418..... 331
 McCreary v. Pennsylvania, 141 U. S. 459; 35 L. Ed. 817; 12 S. Ct. 40
95, 843, 846, App. 845
 McCune v. Baltimore, 154 Fed. 63; 83 C. C. A. 175..... App. 717
 McDermott v. Strong, 4 Johns. Ch. 687..... 157
 McDonald v. Miller, 84 Fed. 344..... App. 371
 McDonald v. Whitney, 24 Fed. 600..... 485, 736
 McDowell v. Ideal, 187 Fed. 814; 109 C. C. A. 574..... App. 871
 McDowell v. Kurtz, 77 Fed. 206; 23 C. C. A. 119..... 459, 544, 554
 McElmoyle v. Cohen, 38 U. S. 312; 10 L. Ed. 310..... 921
 McEwan v. McEwan, 91 Fed. 787..... 223
 McFarland v. Hall, 17 Tex. 691..... 116
 McGahey v. Virginia, 135 U. S. 662; 34 L. Ed. 304; 10 S. Ct. 972..... 553
 McGourkey v. Toledo, 146 U. S. 536; 36 L. Ed. 1079; 13 S. Ct. 170... 116,
 304, 893
 McKay v. Dizer, 61 Fed. 102; 9 C. C. A. 382..... 380
 McKay v. Jackman, 12 Fed. 615..... 688, 770
 McKay v. Smith, 39 Fed. 556..... 755
 McKay v. Smith, 29 Fed. 295..... 510
 McKeeves v. United States, 14 Ct. Cl. 414..... 287
 McLaughlin v. Peoples, 21 Fed. 574..... 568, 719, 730, 732, 793

[References are to sections. "App." refers to Appendix]

McLean *v.* Fleming, 96 U. S. 245; 24 L. Ed. 828 558, 568, 728, 921
 McLish *v.* Roff, 141 U. S. 661; 35 L. Ed. 893; 12 S. Ct. 118..... 116
 McMicken *v.* Perin, 59 U. S. 507; 15 L. Ed. 504 125, 836
 McMillin *v.* Barclay, 5 Fish. 189; Fed. Cas. 8902..... 2, 18, 856, 857
 McMullen *v.* Bowers, 102 Fed. 494; 42 C. C. A. 470 App. 714
 McMurray *v.* Mallory, 111 U. S. 97; 28 L. Ed. 365; 4 S. Ct. 375.... 532,
 612, 877, 887
 McSherry *v.* Dowagiac, 101 Fed. 716; 41 C. C. A. 627 228, 376, 378,
 456, 459, 468, 841, App. 378, 435
 McSherry *v.* Dowagiac, 160 Fed. 948; 89 C. C. A. 26 837, 845
 Meader *v.* Norton, 1 Wall. 442 308
 Medsker *v.* Bonebrake, 108 U. S. 66; 27 L. Ed. 654; 2 S. Ct. 351 ... 836
 Mellor *v.* Carroll, 141 Fed. 992 App. 381
 Menasha *v.* Dodge, 85 Fed. 971; 29 C. C. A. 508..... 544
 Menendez *v.* Holt, 128 U. S. 514; 32 L. Ed. 526; 9 S. Ct. 143 ... 558, 568
 Mercantile Trust Co. *v.* Wood, 60 Fed. 346; 8 C. C. A. 658 129
 Mergenthaler *v.* Press Publishing Co., 57 Fed. 502..... 603, 782
 Mergenthaler *v.* Ridder, 65 Fed. 853 797
 Merriam *v.* Whittemore, 5 Gray, 316..... 893
 Merrill *v.* Yeomans, 94 U. S. 568; 24 L. Ed. 235... 196, 207, 219, 222, 223,
 226, 244 473, 507, 521, 609, 688, 821, 824, App. 633
 Merrill *v.* Yeomans, 1 B. & A. 47; Fed. Cas. 9472 820
 Merrill *v.* Yeomans, 5 O. G. 267 775
 Merrow *v.* Shoemaker, 59 Fed. 120..... 613
 Meserole *v.* Paper, 6 Blatch. 356; Fed. Cas. 9488 714
 Messinger *v.* Anderson, 171 Fed. 785; 96 C. C. A. 785..... App. 893
 Metallic *v.* Brown, 104 Fed. 345; 43 C. C. A. 568..... 459, App. 378
 Metallic *v.* Brown, 110 Fed. 665; 49 C. C. A. 147..... 274, 342
 Metcalf *v.* City, 68 Fed. 859; 16 C. C. A. 37..... 128
 Metcalf *v.* Watertown, 153 U. S. 671; 38 L. Ed. 861; 14 S. Ct. 947... 921
 Metropolitan *v.* Young, 14 Blatch. 46; Fed. Cas. 9508..... 607
 Mevs *v.* Conover, 93 U. S. cxlii; 23 L. Ed. 1008..... 837
 Michigan *v.* Consolidated, 67 Fed. 121; 14 C. C. A. 232..... 54, 56, 780
 Michigan *v.* Rust, 168 U. S. 589; 42 L. Ed. 591; 18 S. Ct. 208..... 26
 Miehle *v.* Read, 90 O. G. 426..... 3
 Miles *v.* U. S. 103 U. S. 304; 26 L. Ed. 481 131
 Milkman *v.* Ordway, 106 Mass. 232, 256..... 151
 Millard *v.* Chase, 108 Fed. 399; 47 C. C. A. 429..... 194
 Miller *v.* Brass Co., 104 U. S. 350; 26 L. Ed. 783 ... 12, 200, 204, 222, 380,
 473, 605, 609, 731, 871, 872, 873, 876, 877, 878, 883, 885, 886, 888, App.
 378, 871
 Miller *v.* Eagle, 151 U. S. 186; 38 L. Ed. 121; 14 S. Ct. 310.... 86, 188,
 197, 215, 348, 349, 351, 353, 354, 355, 356, 357, 358, 359, 360, 361, 374,
 375, 376, 378, 380, 426, 427, 435, 468, 496, 525, 528, 587, 598, 629, 672,
 680, 860, 919, App. 188, 358, 376, 528, 598, 692
 Miller *v.* Foree, 116 U. S. 22; 29 L. Ed. 552; 6 S. Ct. 204..... 616, 671
 Miller *v.* Handley, 61 Fed. 100 74
 Miller *v.* M'Intyre, 6 Pet. 61; 8 L. Ed. 320..... 137
 Miller *v.* Miller, 2 Pick. 570..... 807
 Miller *v.* Schwarner, 130 Fed. 561..... App. 717
 Miller *v.* Tobacco Co, 7 Fed. 91 App. 386
 Miller *v.* Taylor, 4 Burr, 2303..... 16, 920
 Miller *v.* Whittier, 36 Me. 585 847
 Milligan *v.* Upton, 97 U. S. 3; 24 L. Ed. 985... 313, 646, 667, 775, 795, 823
 Milligan *v.* Upton, Fed. Cas. 9607..... App. 679

TABLE OF CASES CITED

cxlvii

[References are to sections. "App." refers to Appendix]

Mills v. Green, 159 U. S. 651; 40 L. Ed. 293; 16 S. Ct. 132..... 274, 550
 Millward v. Banes, 11 O. G. 1060 811
 Murphy v. Excelsior, 70 Fed. 491..... 473
 Milner v. Yesbera, 111 Fed. 386; 49 C. C. A. 397..... 118, 325
 Milwaukee v. Brunswick-Balke, 126 Fed. 171; 61 C. C. A. 175.. 436, 441, 673
 Minter's Patent, 1 Web. 132 368
 Mississippi v. Cromwell, 91 U. S. 643; 23 L. Ed. 368..... 174
 Missouri v. Bell Tel., 23 Fed. 539..... 746
 Missouri v. Texas, 38 Fed. 775 277
 Mitchell v. Ewart, 81 Fed. 390; 26 C. C. A. 443 459
 Mitchell v. International, 169 Fed. 145 App. 924
 Mitchell v. Harmony, 13 How. 115; 14 L. Ed. 113..... 481, 498
 Mitchell v. Hawley, 83 U. S. 544; 21 L. Ed. 322... 150, 165, 418, 450, 505,
 523, 765, 899, 927
 Mitchell v. Tilghman, 86 U. S. 287; 22 L. Ed. 125... 212, 214, 223, 409,
 904, 937
 Moffat v. Blake, 145 Fed. 40; 75 C. C. A. 265..... App. 129
 Moffat v. United States, 112 U. S. 24; 28 L. Ed. 623; 5 S. Ct. 10 26
 Moffit v. Garr, 66 U. S. 273; 17 L. Ed. 207 532, 887, 889
 Moffit v. Rogers, 106 U. S. 423; 27 L. Ed. 76; 1 S. Ct. 70..... 872, 877
 Moffit v. Rogers, 8 Fed. 147..... 672
 Moline v. Carson, 72 Fed. 387; 18 C. C. A. 606 App. 836
 Montesquieu v. Sandys, 18 Ves. 302..... 425
 Montross v. Mabic, 30 Fed. 4 366, 756
 Moody v. Fiske, 2 Mas. 112; Fed. Cas. 9745 242, 914
 Moore v. Cheeseman, 23 Mich. 290 717
 Moore v. Green, 19 How. 69; 15 L. Ed. 533 729
 Moore v. Marsh, 74 U. S. 515; 19 L. Ed. 37 150, 750, 827
 Moore v. Robbins, 96 U. S. 530; 24 L. Ed. 848..... 26
 Morey v. Lockwood, 75 U. S. 230; 19 L. Ed. 339... 459, 503, 651, 871, 873
 Morgan v. Albany, 152 U. S. 425; 38 L. Ed. 500; 14 S. Ct. 627... 54, 207,
 208, 476, 477, 513, 523, 524, 771, App. 31, 207, 468
 Morgan v. Alliance, 176 Fed. 100; 100 C. C. A. 30 App. 344, 400, 598,
 631
 Morgan v. Daniels, 153 U. S. 120; 38 L. Ed. 657; 14 S. Ct. 772..... 59,
 74, 582, 587, 860, 895, App. 25, 30, 584
 Morgan v. Seaward, 1 Web. 170 634, 649
 Morgan v. United States, 81 U. S. 531; 20 L. Ed. 738..... 498, 715
 Morley v. Hawkes, Y. & J. 520 798
 Morley v. Lancaster, 129 U. S. 263; 32 L. Ed. 715; 9 S. Ct. 299 201,
 224, 229, 241, 245, 375, 378, 380, 432, 442, 492, 497, 506, 519, 532, 587,
 605, 607, 640, 641, 642, 643, 674, 686, App. 376, 497
 Morris v. Barclay, 68 Pa. St. 173 744
 Morris v. McMillin, 112 U. S. 244; 28 L. Ed. 702; 5 S. Ct. 218 216,
 596, 654, 657, 662, 667, 676, 679
 Morse v. Elmendorf, 11 Paige, 277..... 151
 Morse v. Morse, 103 Mass. 73..... 365, 744
 Morton v. Infirmary, 2 Fish. 320; Fed. Cas. 9865 683
 Morton v. Nebraska, 21 Wall. 660; 22 L. Ed. 639 308
 Morton's Patent, 8 Op. Atty's. Gen. 269 683
 Mosher v. Joyce, 51 Fed. 441; 2 C. C. A. 322 298, 845
 Mosler v. Mosler, 127 U. S. 354; 32 L. Ed. 182; 8 S. Ct. 1148 348, 353,
 356, 596, 617, 820, App. 358
 Mossberg v. Nutter, 124 Fed. 966; 60 C. C. A. 98 790
 Mott v. Hicks, 1 Cow. 513..... 156

[References are to sections. "App." refers to Appendix]

| | |
|---|--|
| Motte <i>v.</i> Bennett, 2 Fish. 642; Fed. Cas. 9884..... | 574 |
| Motteux <i>v.</i> Insurance, 1 Atk. 545..... | 720 |
| Mowry <i>v.</i> Barber, 1 McArthur, 563; Fed. Cas. 9892..... | 3 |
| Mowry <i>v.</i> Whitney, 81 U. S. 434; 20 L. Ed. 858..... | 26, 837, App. 26 |
| Mowry <i>v.</i> Whitney, 81 U. S. 620; 20 L. Ed. 860..... | 282, 284, 285, 290, 298, 378, 597, 688, 770, 817, 835, 837, 840, 844, 845, 846, 847 |
| Muller, <i>In re</i> , 7 Blatch. 23; Fed. Cas. 9911..... | 577 |
| Muller <i>v.</i> Lodge, 77 Fed. 621; 23 C. C. A. 357..... | 207, 221, 234, 376; 378, 435, 597, 603, 840 |
| Munger <i>v.</i> Connell, 1 O. G. 491..... | 861 |
| Munson <i>v.</i> Mayor, 124 U. S. 601; 31 L. Ed. 586; S. S. Ct. 622.... | 440, 647, 688 |
| Muntz <i>v.</i> Foster, 2 Web. 93..... | 674 |
| Murphy <i>v.</i> Excelsior, 76 Fed. 965; 22 C. C. A. 658..... | 376, 473 |
| Murray <i>v.</i> Clayton, L. R. 10 Ch. 675..... | 202, 466 |
| Murray <i>v.</i> Clayton, 7 Ch. App. 577..... | 668 |
| Murray <i>v.</i> Orr, 153 Fed. 369; 82 C. C. A. 445..... | App. 578 |
| Myers <i>v.</i> Brown, 102 Fed. 250; 42 C. C. A. 320..... | 131 |
| Myers <i>v.</i> Frame, 8 Blatch. 446; Fed. Cas. 9991..... | 223, 343, App. 344 |
| Mygatt, <i>Ex parte</i> , 121 O. G. 1676..... | App. 331 |
| Nagle, <i>Ex parte</i> , C. D. 1870, 137..... | 375 |
| Nashua <i>v.</i> Boston, 61 Fed. 237; 9 C. C. A. 468..... | 789 |
| Nashville <i>v.</i> McConnell, 82 Fed. 65..... | 924 |
| Nassua <i>v.</i> Sprague, 95 Fed. 415; 37 C. C. A. 146..... | 536, 537 |
| Nathan <i>v.</i> Craig, 47 Fed. 522..... | 807 |
| Nathan Mfg. Co. <i>v.</i> Craig, 49 Fed. 370..... | 587 |
| National <i>v.</i> Aikin, 163 Fed. 254; 91 C. C. A. 114.... | App. 400, 604, 615, 655 |
| National <i>v.</i> American, 53 Fed. 367; 3 C. C. A. 559.... | 190, 251, 252, 374, 469, 603, 604, App. 68, 603 |
| National <i>v.</i> Automatic, 105 Fed. 670; 44 C. C. A. 664..... | 542 |
| National <i>v.</i> Belcher, 71 Fed. 876; 18 C. C. A. 375..... | 903 |
| National <i>v.</i> Boston, 156 U. S. 502; 39 L. Ed. 511; 15 S. Ct. 434..... | 435, 481, 616, 691 |
| National <i>v.</i> Boston, 45 Fed. 481..... | 252 |
| National <i>v.</i> Boston, 41 Fed. 48..... | 755 |
| National <i>v.</i> Brown, 36 Fed. 317..... | 860 |
| National <i>v.</i> Buckeye, 171 Fed. 847; 96 C. C. A. 515..... | App. 376 |
| National <i>v.</i> Connecticut, 73 Fed. 491..... | 213, 797 |
| National <i>v.</i> Daab, 136 Fed. 891..... | 574 |
| National <i>v.</i> Elsas, 81 Fed. 197..... | 283 |
| National, <i>Ex parte</i> , 201 U. S. 156; 26 L. Ed. 404..... | 120, App. 118, 133 |
| National <i>v.</i> Hedden, 148 U. S. 482; 37 L. Ed. 529; 13 S. Ct. 680.. | 356, 692 |
| National <i>v.</i> Insurance Co., 104 U. S. 54; 26 L. Ed. 693..... | 841 |
| National <i>v.</i> Interchangeable, 106 Fed. 693; 45 C. C. A. 544.... | 129, 375, 376, 378, 380, 435, 441, 442, 459, 468, 473, 506, 544, 587, 598, 609, 612, 622, 626, 635, 636, 671, 672, 675, App. 74, 188, 207, 208, 212, 223, 376, 441, 459, 497, 503, 598, 671 |
| National <i>v.</i> Leland, 94 Fed. 502; 37 C. C. A. 372..... | 481 |
| National <i>v.</i> Quick, 67 Fed. 130; 20 C. C. A. 410..... | 744 |
| National <i>v.</i> Schlegel, 128 Fed. 733; 64 C. C. A. 594..... | 714 |
| National <i>v.</i> Spiro, 78 Fed. 774; 24 C. C. A. 334..... | 112 |
| National <i>v.</i> Stecher, 81 Fed. 395; 26 C. C. A. 448..... | 380 |
| National <i>v.</i> Stolts, 174 Fed. 413; 98 C. C. A. 617..... | App. 325 |
| National <i>v.</i> Thomson, 106 Fed. 531..... | 916 |
| National Folding <i>v.</i> American, 55 Fed. 488..... | 152 |
| National Folding <i>v.</i> Robertson, 99 Fed. 985..... | 645 |

TABLE OF CASES CITED

[References are to sections. "App." refers to Appendix]

National Progress *v.* Williams, 44 Fed. 190..... 219
 Nat. Recording *v.* International, 158 Fed. 824 App. 381
 Nat. Surety *v.* Kansas, 182 Fed. 54; 104 C. C. A. 494..... App. 128
 Needham *v.* Oxley, 8 L. T. N. S. 604 764
 Needham *v.* Washburn, 7 O. G. 651..... 795
 Nellis *v.* Pennock, 13 Fed. 451..... 171
 Nelson *v.* Hartford, 1 Web. 295..... 230, 375, 497, 639, 768, 815
 Nelson *v.* Hartford, 1 Web. 331..... 688, 770, 903
 Nelson *v.* Thompson, 1 Web. 275 686, 815
 Nesbit *v.* Riverside, 144 U. S. 610; 36 L. Ed. 562; 12 S. Ct. 746 894
 Nesbits Case, C. D. 1870, 106..... 6
 Nesmith *v.* Sheldon, 6 How. 41; 12 L. Ed. 39..... 113
 Nestor *v.* Brewing Co., 161 Pa. St. 473..... 744
 New *v.* Walker, 108 Ind. 365..... 920
 New Departure *v.* Bevin, 73 Fed. 469; 19 C. C. A. 534..... 596
 New Departure *v.* Bevin, 64 Fed. 859 459, 468, App. 459
 New Orleans *v.* Steamship, 20 Wall. 387; 22 L. Ed. 354 ... 536, 537, 538,
 577, 578, 725
 New Process *v.* Maus, 122 U. S. 413; 30 L. Ed. 1193; 7 S. Ct. 1304.. 100,
 148, 688, 770
 Newall *v.* Wilson, 2 De G. M. & G. 282 256
 Newark *v.* Newark, 23 N. J. Eq. 515 539
 Newhall *v.* McCabe, 125 Fed. 919; 60 C. C. A. 629..... 567
 Newhall *v.* Sanger. 92 U. S. 761; 23 L. Ed. 769..... 308
 Newton *v.* Buck, 72 Fed. 777..... 164, 165
 Newton *v.* Furst, 119 U. S. 373; 30 L. Ed. 442; 7 S. Ct. 369..... 202, 215,
 602, 877, 885
 New York *v.* Ambler, 103 Fed. 316..... 207
 New York *v.* American, 42 Fed. 455..... 797
 New York *v.* Buffalo, 18 Fed. 638..... 558, 568
 New York *v.* Hollingsworth, 56 Fed. 224; 5 C. C. A. 490 371
 New York *v.* New Jersey, 137 U. S. 445; 34 L. Ed. 741; 11 S. Ct. 193
 324, 325, 335, 411, 709
 New York *v.* New York, 9 Fed. 578..... App. 371
 New York *v.* Peoria, 21 Fed. 878..... 717
 New York Central *v.* U. S. 212 U. S. 481; 53 L. Ed. 613; 29 S. Ct. 304
 App. 777
 New York Filter *v.* Chemical, 93 Fed. 827..... 548, App. 559
 New York Filter *v.* Jackson, 91 Fed. 422..... 561
 New York Filter *v.* Loomis, 91 Fed. 421..... 729
 New York Filter *v.* Niagara, 80 Fed. 924; 26 C. C. A. 252 .. App. 253, 535
 New York Life *v.* Statham, 93 U. S. 24; 23 L. Ed. 789..... App. 755
 New York Phonograph *v.* National, 163 Fed. 534..... App. 381
 Ney *v.* Ney, 69 Fed. 405; 16 C. C. A. 293..... 198, 376
 Noonan *v.* Chester, 99 Fed. 90; 39 C. C. A. 426.... 213, 384, 385, 442,
 App. 381, 384
 North *v.* Kirshaw, 4 Blatch. 70; Fed. Cas. 10,311..... 551
 N. Am. Exploration *v.* Adams, 104 Fed. 404; 45 C. C. A. 185.... 129, 544
 North Bloomfield, *In re*, 27 Fed. 795..... 577
 North Carolina *v.* Temple, 134 U. S. 22; 33 L. Ed. 849; 10 S. Ct. 509. 553
 Northern Trust Co. *v.* Snyder, 77 Fed. 818; 23 C. C. A. 480..... 277
 Northup *v.* Adams, 2 B. & A. 567; Fed. Cas. 10,328..... 332, 337, 635
 Northwestern *v.* New Haven, 28 Fed. 234..... 459
 Northwestern *v.* Philadelphia, 1 B. & A. 177; Fed. Cas. 10,337..... 860
 Northwood *v.* Dalzell, 100 Fed. 198; 40 C. C. A. 295..... 325

[References are to sections. " App." refers to Appendix]

| | | |
|--------------------------|--|--|
| Norton v. Can Co. | 45 Fed. 637 | 374, 448 |
| Norton v. Eagle, | 57 Fed. 929 | 568, App. 562 |
| Norton v. Eagle, | 59 Fed. 137 | 680 |
| Norton v. Jensen, | 49 Fed. 859; 1 C. C. A. 452 | 448, 456, 459, 506, 903 |
| Norton v. Jensen, | 90 Fed. 415; 33 C. C. A. 141 | 378, 448, 473 |
| Norton v. San Jose, | 79 Fed. 793; 25 C. C. A. 194 | 31 |
| Nourse v. Allen, | Fed. Cas. 459 | 804 |
| Nudd v. Burrows, | 91 U. S. 426; 23 L. Ed. 286 | 921 |
| Nutter v. Brown, | 98 Fed. 892; 39 C. C. A. 332 | 661 |
| Odell v. Stout, | 22 Fed. 159 | 860, 867, App. 552 |
| Odorine v. Amesbury, | 2 Mason, 28; Fed. Cas. 10,430 | 348, 356 |
| Office v. Globe, | 77 Fed. 465; 23 C. C. A. 242 | 624 |
| Office v. Fenton, | 174 U. S. 492; 43 L. Ed. 1058; 19 S. Ct. 641 | 49, 597, 675, 695, 707, 709, App. 597 |
| Ogilvie v. Hearne, | 13 Ves. 463 | 305 |
| Ogle v. Ege, | 4 Wash. 584; Fed. Cas. 10,462 | 574 |
| Oldham v. James, | 14 Irish Ch. 81 | 151 |
| Olin v. Timken, | 155 U. S. 141; 39 L. Ed. 100; 15 S. Ct. 49 | 627, 636 |
| Oliver v. Blair, | 5 Pac. 917 | App. 144 |
| Oliver v. Piatt, | 3 How. 333; 11 L. Ed. 332 | 167, 794, 804 |
| Oliver v. Rumford, | 109 U. S. 75; 27 L. Ed. 862; 3 S. Ct. 61 | 40, 150, 165, 270, 271, 366, 751, 756, 762, 765, 899 |
| Onderdonk v. Fanning, | 4 Fed. 148 | 384, 555 |
| O'Neal v. United States, | 190 U. S. 36; 23 S. Ct. 776 | 538 |
| O'Reilly v. Morse, | 15 How. 62; 14 L. Ed. 601 | 222, 230, 340, 341, 342, 377, 380, 424, 490, 506, 639, 679, 686, 688, 768, 770, 815, 817, 819, 880 |
| Ormsom v. Clarke, | 13 C. B. (N. S.) 337 | 679 |
| O'Rourke v. McMullen, | 160 Fed. 933; 88 C. C. A. 115 | App. 656 |
| Orr v. Murray, | 163 Fed. 54; 89 C. C. A. 492 | App. 838 |
| Osborn v. Bank, | 22 U. S. 738; 6 L. Ed. 738 | 553 |
| Osborne v. Glazier, | 31 Fed. 402 | 630 |
| Osgood v. Franklin, | 2 Johns. Ch. 1 | 796 |
| Osgood v. Metropolitan, | 75 Fed. 670; 21 C. C. A. 491 | 616 |
| Otis v. Portland, | 127 Fed. 557; 62 C. C. A. 339 | App. 358 |
| Otley v. Watkins, | 36 Fed. 323 | 377 |
| Oval v. Sandy Creek, | 60 Fed. 285 | 356, 380, 485 |
| Overseers v. Sears, | 39 Mass. 122 | App. 758 |
| Overweight v. Improved, | 94 Fed. 155; 36 C. C. A. 125 | 198 |
| Overweight v. Vogt, | 102 Fed. 957; 43 C. C. A. 80 | 45, 49, 597, 599, 603, 674, 695, App. 675 |
| Owens v. Twin City, | 168 Fed. 259; 93 C. C. A. 561 | App. 204, 208, 212 |
| Packard v. Lacing, | 70 Fed. 66; 16 C. C. A. 639 | 68, 92, 93, 371, App. 68 |
| Packet v. Sickles, | 86 U. S. 611; 22 L. Ed. 203 | 285, 292, 294, App. 292 |
| Packet v. Sickles, | 51 U. S. 440; 13 L. Ed. 417 | 842 |
| Paddock v. Commercial, | 104 Mass. 521 | 836 |
| Page v. Land, | 49 Fed. 936 | 937 |
| Paillard v. Bruno, | 29 Fed. 864 | 420, 421, 422 |
| Paine v. Central, | 118 U. S. 152; 30 L. Ed. 193; 6 S. Ct. 1019 | 131 |
| Paine v. Trask, | 56 Fed. 233; 5 C. C. A. 497 | 158 |
| Palmer v. Corning, | 156 U. S. 342; 39 L. Ed. 445; 15 S. Ct. 381 | 473, 595, 597 |
| Palmer v. Lozier, | 90 Fed. 732; 33 C. C. A. 255 | 349, 351, 353, 357, 598, 672, 919, App. 358, 598 |

TABLE OF CASES CITED

cli

[References are to sections. "App." refers to Appendix]

Palmyra, The, 10 Wheat, 502; 6 L. Ed. 501..... 116

Paper Bag Cases, 105 U. S. 766; 26 L. Ed. 959..165, 274, 505, 686, 752,
796, 798

Paper Bag Case, 210 U. S. 405; 52 L. Ed. 1122; 28 S. Ct. 748.... App.
212, 376, 435, 574

Paper Bag Cases, 30 Fed. 63..... 426, 686

Paris v. Hill, 102 Fed. 148; 42 C. C. A. 227 App. 544

Parker v. Appert, 75 O. G. 1201..... App. 421

Parker v. Haworth, 4 McLean, 370; Fed. Cas. 10,738.. 158, 396, 503, 903

Parker v. Hulme, 1 Fish. 44; Fed. Cas. 10,740..... 45, 508, 689

Parker v. McKee, 24 Fed. 808..... 213, 384, 451, 555, 797

Parker v. Stiles, 5 McLean, 44; Fed. Cas. 10,749..... 223

Parker v. Yale, 123 U. S. 87; 31 L. Ed. 100; S S. Ct. 38.....204, 222, 871,
872, 875, 876, 877, 885, 888, App. 871

Parkham v. American, 4 Fish. 468; Fed. Cas. 10,713..... 61

Parkhurst v. Kinsman, 1 Blatch. 488; Fed. Cas. 10,757..... 11

Parkinson, *Ex parte*, C. D. 1871, 251..... 337

Parkman's Admr. v. Aicardi, 34 Ala. 393..... 796

Parks v. Booth, 102 U. S. 96; 26 L. Ed. 54.. 73, 96, 282, 432, 604, 608, 835

Parks v. Stevens, L. R. Eq. 358..... 679

Parlin v. Moline, 89 Fed. 329; 32 C. C. A. 221 633

Parramore v. Taylor, 114 Fed. 97; 52 C. C. A. 45..... 631

Parrish v. Ferris, 2 Black, 606..... 31

Parry v. Hitchcock, 58 Fed. 402..... 234

Parsons v. Bedford, 3 Pet. 433; 7 L. Ed. 732..... 131

Parsons v. Robinson, 122 U. S. 112; 30 L. Ed. 1122; 7 S. Ct. 1153.... 116

Patent v. Glover, 141 U. S. 560; 35 L. Ed. 858; 12 S. Ct. 79..... 636

Pattee v. Kingman, 129 U. S. 294; 32 L. Ed. 700; 9 S. Ct. 389... 667, 871

Pattee v. Moline, 9 Fed. 821..... App. 91

Patterson v. Commonwealth, 97 U. S. 501; 24 L. Ed. 1115....505, 645,
745, 746, 871, 920, 921

Paxson v. Brown, 61 Fed. 874; 10 C. C. A. 125..... App. 129

Paxton v. Brinton, 107 Fed. 137..... 209

Peabody v. Norfolk, 98 Mass. 452..... 898

Pearce v. Mulford, 102 U. S. 112; 26 L. Ed. 93..... 440, 647, 671, 676

Pearl v. Ocean, 2 B. & A. 469; Fed. Cas. 10,876..... 380, App. 692

Peck v. Collins, 103 U. S. 660; 26 L. Ed. 512..... 532, 887

Peck v. Cooper, 112 Ill. 192..... 481

Peck v. Jones, 70 Pa. St. 83..... 322

Peer v. Humphrey, 2 Ad. & E. 495..... 418

Penfield v. Chambers, 92 Fed. 630; 34 C. C. A. 579....376, 378, 435, 459,
App. 378, 435

Penfield v. Potts, 126 Fed. 475; 61 C. C. A. 371..... 31, 219, 937

Pennington v. King, 7 Fed. 462..... 447

Pennock v. Dialogue, 2 Pet. 1; 7 L. Ed. 327..... 6, 7, 366, 386, 387, 857

Pennoyer v. McConnaughy, 140 U. S. 1; 35 L. Ed. 363; 11 S. Ct. 699 .. 553

Pennsylvania v. Libby, L. R. 3 Eq. 308..... 551

Pennsylvania Drill Co. v. Simpson, 29 Fed. 288..... 860, 867

Pennsylvania v. Locomotive, 110 U. S. 490; 28 L. Ed. 222; 4 S. Ct. 220
...206, 215, 596, 616, 617, 618, 635, 638, 651, 656, 662, 667, 670, 671,
672, 675, 676, 679, 687, 695, 858, App. 404

Pennsylvania Steel v. Vermilye, 90 Fed. 493; 33 C. C. A. 619..... 805

Pentlarge v. Pentlarge, 19 Fed. 817..... 587

People v. Super. Niag. 4 Hill. 23 834

Peoria v. Cleveland, 58 Fed. 227; 7 C. C. A. 197..... 877, 878

[References are to sections. "App." refers to Appendix]

| | |
|---|--|
| Perkins v. Buchanan, 129 Fed. 134..... | 506 |
| Perkins v. Tourniquet, 6 How. 206; 12 L. Ed. 204..... | 116 |
| Perkins v. Hart, 24 U. S. 237; 6 L. Ed. 237..... | 113 |
| Perkins v. Nashua, 2 Fed. 451..... | 412 |
| Perrin v. Lepper, 72 Mich. 541..... | 539 |
| Perry v. Littlefield, 17 Blatch. 272; Fed. Cas. 11,008..... | 510 |
| Perry v. Revere, 103 Fed. 314; 43 C. C. A. 248..... | 43 |
| Perry v. Skinner, 1 Web. 253..... | 343 |
| Peters v. Active, 129 U. S. 530; 32 L. Ed. 738; 9 S. Ct. 389.... | 86, 525, 671, 854 |
| Peters v. Active, 130 U. S. 626; 32 L. Ed. 1057; 9 S. Ct. 643..... | 591 |
| Peters v. Active, 21 Fed. 319..... | 525 |
| Peters v. Hanson, 129 U. S. 541; 32 L. Ed. 742; 9 S. Ct. 393.... | 591, 617, 671, App. 696 |
| Peterson v. Wooden, 3 McLean, 248; Fed. Cas. 11,038..... | 444 |
| Pettibone v. Penn. Steel, 133 Fed. 730..... | App. 74 |
| Phelps v. Oaks, 117 U. S. 236; 29 L. Ed. 888; 6 S. Ct. 714..... | 921 |
| Philadelphia v. Edison, 65 Fed. 551; 13 C. C. A. 40..... | 254, 561 |
| Philip v. Nock, 84 U. S. 460; 21 L. Ed. 679..... | 285, 286, 287, 292, 298 |
| Phillips v. Detroit, 111 U. S. 604; 28 L. Ed. 532; 4 S. Ct. 580.... | 88, 216, 596, 597, 609, 657, 662, 666, 667, 672, 679, 696, 707, 710, App. 599 |
| Phillips v. Page, 65 U. S. 164; 16 L. Ed. 639..... | 47, 407, 440, 593, 596, 653, 667, 671, 676, 679, 775, 795 |
| Phoenix v. Spiegel, 133 U. S. 360; 33 L. Ed. 663; 10 S. Ct. 409.... | 54, 198, 207, 212, 224, 374, 468, App. 194, 201, 209 |
| Piaget v. Headley, 108 Fed. 870; 48 C. C. A. 116..... | App. 385 |
| Piatt v. Vattier, 9 Pet. 416; 9 L. Ed. 403..... | 732 |
| Pickering v. McCullough, 104 U. S. 310; 26 L. Ed. 749.... | 49, 89, 92, 93, 431, 437, 594, 595, 596, 597, 601, 603, 607, 608, 612, 617, 624, 669, 674, 782, App. 597 |
| Pickhardt v. Packard, 22 Fed. 530..... | 171 |
| Pierson v. Eagle, 3 Story, 402; Fed. Cas. 11,156..... | 857 |
| Pine v. Bailey, 94 Fed. 258; 36 C. C. A. 229..... | 166, 179 |
| Pinney v. Bank, 68 Kan. 223..... | 920 |
| Pirkl v. Smith, 42 Fed. 410..... | 330 |
| Pitcher's Case, 1 Ct. Cl. 7..... | 715 |
| Pitts v. Edmonds, 2 Fish. 52; Fed. Cas. 11,191..... | 2, 18 |
| Pitts v. Hall, 2 Blatch. 229; Fed. Cas. 11,192..... | 261, 368, 629, 856, 857 |
| Pitts v. Wemple, 1 Biss. 87; Fed. Cas. 11,194..... | 372, 574, 746 |
| Pitts v. Whitman, 2 Story, 609; Fed. Cas. 11,196..... | 472 |
| Pittsburg v. Cowles, 55 Fed. 301..... | 107 |
| Pittsburgh v. Heck, 102 U. S. 120; 26 L. Ed. 58..... | 138 |
| Platt v. Fire Extinguisher, 59 Fed. 897; 8 C. C. A. 357..... | App. 755 |
| Plow v. Carson, 72 Fed. 387..... | 129, 544 |
| Plummer v. Sargent, 120 U. S. 442; 30 L. Ed. 737; 7 S. Ct. 640..... | 353 |
| Pohl v. Anchor, 134 U. S. 381; 33 L. Ed. 953; 10 S. Ct. 577.... | 420, 421, 422, App. 422 |
| Poillon v. Shmidt, 6 Blatch. 299; Fed. Cas. 11,241..... | 689 |
| Pomeroy v. Bank, 1 Wall. 592; 17 L. Ed. 638..... | 126 |
| Pope v. Gormully, 144 U. S. 238; 36 L. Ed. 420; 12 S. Ct. 637 ... | 163, 165, 926 |
| Pope v. Gormully, 144 U. S. 254; 36 L. Ed. 426; 12 S. Ct. 643..... | 174 |
| Pope v. Owsley, 27 Fed. 100..... | 213, 532, 732, App. 714 |
| Porter v. National, 17 Fed. 536..... | App. 157 |
| Portland v. Hermann, 160 Fed. 91; 87 C. C. A. 247..... | 456 |

TABLE OF CASES CITED

cliii

[References are to sections. "App." refers to Appendix]

Post *v.* Marsh, L. R. 16 Ch. Div. 395..... 151
 Post *v.* Richards, 26 Fed. 618..... 801
 Potter *v.* Crowell, 3 Fish. 112; Fed. Cas. 11,323..... 548, App. 559
 Potter *v.* Fuller, 2 Fish. 251; Fed. Cas. 11,327..... 561
 Potter *v.* Holland, 4 Blatch. 157; Fed. Cas. 11,572..... 164
 Potter *v.* Holland, 4 Blatch. 206; Fed. Cas. 11,329..... 753
 Potter *v.* Schenck, 1 Biss. 515; Fed. Cas. 11,337..... 459
 Potts *v.* Craeger, 155 U. S. 597; 39 L. Ed. 275; 15 S. Ct. 194.... 88, 89,
 94, 215, 222, 435, 459, 616, 617, 618, 622, 635, 655, 671, 672, 673, 696,
 699, 709, App. 622, 656, 671, 672, 673
 Potts, *In re*, 166 U. S. 263; 41 L. Ed. 994; 17 S. Ct. 520..... 138, App. 893
 Powder *v.* Powder, 98 U. S. 126; 25 L. Ed. 77.... 734, 815, 821, 871, 872,
 877, 881, 883, 888, App. 871, 881
 Power Co. *v.* Allen, 120 Mass. 252..... 481
 Pratt *v.* Paris, 168 U. S. 255; 42 L. Ed. 458; 18 S. Ct. 62.... 714, 718,
 App. 718
 Pratt *v.* Sencenbaugh, 64 Fed. 779..... App. 74
 Pratt *v.* Wright, 65 Fed. 99..... App. 253
 Prentiss *v.* Duluth, 58 Fed. 437; 7 C. C. A. 293..... 161
 Pressed Steel *v.* Hanson, 137 Fed. 403; 71 C. C. A. 207..... App. 160, 365
 Presto Gear *v.* Orme, 18 R. P. C. 17..... App. 420
 Preston *v.* Manard, 116 U. S. 661; 29 L. Ed. 763; 6 S. Ct. 695... 672, 908
 Price *v.* Berrington, 7 Eng. L. & Eq. 260..... 425
 Price *v.* Steel Co. 46 Fed. 107..... 558, 568
 Prindle *v.* Brown, 155 Fed. 531; 84 C. C. A. 45..... 860
 Proctor *v.* Ackroyd, 6 O. G. 603..... 861
 Proctor *v.* Bennis, L. R. 36 Ch. D. 740.... 230, 453, 507, 519, 605, 686,
 768, 815
 Proctor *v.* Globe, 92 Fed. 357; 34 C. C. A. 405..... 544, App. 544
 Prouty *v.* Ruggles, 16 Pet. 336; 10 L. Ed. 985.... 145, 198, 377, 456, 468,
 473, 528, 577, 612, 872
 Providence *v.* Goodyear, 76 U. S. 805; 19 L. Ed. 828..... 777, 821
 Purcell *v.* Uliner, 4 Wall. 519; 18 L. Ed. 437..... 790
 Purifier Co. *v.* Christian, 3 B. & A. 42; Fed. Cas. 307..... 541
 Raffity *v.* King, 6 L. J. 93..... 798
 Railroad *v.* Dubois, 79 U. S. 47; 20 L. Ed. 265..... 224, 390, 483, 795
 Railroad, *Ex parte*, 95 U. S. 221; 24 L. Ed. 355..... 21
 Railroad *v.* Fraloff, 100 U. S. 24; 25 L. Ed. 531..... 131
 Railroad *v.* Huson, 95 U. S. 465; 24 L. Ed. 527..... 920
 Railroad *v.* Ketchum, 101 U. S. 289; 25 L. Ed. 932..... 121
 Railroad *v.* National, 102 U. S. 14; 26 L. Ed. 61..... 532, 893
 Railroad *v.* Soutter, 2 Wall. 510; 17 L. Ed. 900..... 304
 Railroad *v.* Stimpson, 14 Pet. 448; 10 L. Ed. 535..... 317, 560, 629, 638,
 795, 811
 Railroad *v.* Swasey, 23 Wall. 405; 23 L. Ed. 136..... 116
 Railroad *v.* Trimble, 77 U. S. 367; 19 L. Ed. 949..... 173, App. 806
 Railroad *v.* Turrill, 94 U. S. 695; 24 L. Ed. 238..... 290, 295, 298, 827,
 829, 837
 Railroad *v.* Turrill, 101 U. S. 836; 25 L. Ed. 1009..... 835
 Railroad *v.* Turrill, 110 U. S. 301; 28 L. Ed. 154; 4 S. Ct. 5.... 282, 835
 Railroad *v.* United States, 92 U. S. 733; 23 L. Ed. 634..... 308
 Railway *v.* Monroe, 147 Fed. 241; 77 C. C. A. 383..... 574
 Railway Register *v.* North Hudson, 23 Fed. 593..... App. 26
 Rainear *v.* Western, 159 Fed. 431; 86 C. C. A. 411..... 591, App. 602
 Ralston *v.* Smith, 9 C. B. N. S. 117..... 343, 679

[References are to sections. "App." refers to Appendix]

| | |
|--|-------------------------|
| Randall <i>v.</i> Baltimore, 109 U. S. 478; 27 L. Ed. 1003; 3 S. Ct. 322... | 402, 734 |
| Randolph <i>v.</i> Allen, 73 Fed. 23; 19 C. C. A. 353..... | 136 |
| Ransom <i>v.</i> N. Y., 1 Fish. 252; Fed. Cas. 11,573..... | 574 |
| Ransome <i>v.</i> Hyatt, 69 Fed. 148; 16 C. C. A. 185.... | 198, 484, 629, App. 629 |
| Rathbone <i>v.</i> Orr, 5 McLean, 131; Fed. Cas. 11,585..... | 152 |
| Read <i>v.</i> Schultze-Berge, 78 Fed. 493..... | 380 |
| Reckendorfer <i>v.</i> Faber, 92 U. S. 347; 23 L. Ed. 719... 46, 47, 48, 595, 596, 597, 599, 601, 603, 607, 608, 609, 617, 629, 656, 657, 674, 696, 774, 872, App. 594, 597, 603 | |
| Red Jacket <i>v.</i> Davis, 82 Fed. 432; 27 C. C. A. 204..... | 476 |
| Reece <i>v.</i> Globe, 61 Fed. 958; 10 C. C. A. 194... 194, 207, 208, 212, 222, 224, 226, 228, 230, 245, 375, 378, 380, 453, 459, 497, 937 | |
| Reed <i>v.</i> Chase, 25 Fed. 94..... | 212, 234 |
| Reed <i>v.</i> Cutter, 1 Story, 590; Fed. Cas. 11,645..... 10, 71, 89, 318, 344, 368, 391, 811, 860, App. 861 | |
| Reed <i>v.</i> Lawrence, 29 Fed. 915..... | 298, 435 |
| Reed <i>v.</i> Stockmeyer, 74 Fed. 186; 20 C. C. A. 381..... | 20 |
| Reedy <i>v.</i> Scott, 90 U. S. 352; 23 L. Ed. 109..... | 473, 532, 887 |
| Rees <i>v.</i> Gould, 82 U. S. 187; 21 L. Ed. 39.... 145, 201, 202, 374, 377, 459, 468, 473, 499, 608, 609, 612, 674, 872, App. 608 | |
| Reeves <i>v.</i> Bridge Co. 5 Fish. 456; Fed. Cas. 11,660..... | 860, 867 |
| Regan <i>v.</i> Pacific, 49 Fed. 68; 1 C. C. A. 169..... | 163, 926 |
| Regent <i>v.</i> Penn. 121 Fed. 80; 57 C. C. A. 334..... | 614, App. 384 |
| Regina <i>v.</i> Otto, 114 Fed. 505..... | App. 841 |
| Registering Co. <i>v.</i> Sampson, L. R. 19 Eq. 462..... | 365, 746 |
| Rein <i>v.</i> Clayton, 37 Fed. 354..... | 532 |
| Renard <i>v.</i> Levenstein, 2 Ham. & M. 628..... | 165 |
| Renwick <i>v.</i> Pond, 10 Blatch. 39; Fed. Cas. 11,702..... | 476, 477 |
| Rhodes <i>v.</i> Lincoln, 64 Fed. 218..... | App. 68 |
| Rice <i>v.</i> Wheatley, 9 Dana, 272..... | 140 |
| Rich <i>v.</i> Baldwin, 133 Fed. 920; 66 C. C. A. 464..... | 198 |
| Rich <i>v.</i> Lippincott, 2 Fish. 1; Fed. Cas. 11,758..... | 10, 152 |
| Richards <i>v.</i> Chase, 158 U. S. 299; 39 L. Ed. 991; 15 S. Ct. 831... 49, 116, 323, 325, 326, 389, 595, 597, 654, 707, 709, App. 325, 652, 653 | |
| Richards <i>v.</i> Chase, 159 U. S. 477; 40 L. Ed. 225; 16 S. Ct. 53.... | 207, 692 |
| Richards <i>v.</i> Todd, 127 Mass. 167..... | 836 |
| Richards <i>v.</i> Michigan, 186 U. S. 479; 46 L. Ed. 1259; 22 S. Ct. 942... 325 | |
| Richards <i>v.</i> Michigan, 179 U. S. 686; 45 L. Ed. 386; 21 S. Ct. 918.... 325 | |
| Richards <i>v.</i> Michigan, 102 Fed. 508; 42 C. C. A. 484..... | 325 |
| Richardson <i>v.</i> Noyes, 2 B. & A. 398; Fed. Cas. 11,792..... | 476, 477 |
| Richert <i>v.</i> Felps, 6 Wall. 160; 18 L. Ed. 849..... | 308 |
| Richmond <i>v.</i> Atwood, 48 Fed. 910; 1 C. C. A. 144..... | 117, 130 |
| Richmond <i>v.</i> Atwood, 52 Fed. 10; 2 C. C. A. 596.... 116, 118, 120, 302, 539, 544, 893 | |
| Richter <i>v.</i> Union, 115 U. S. 55; 29 L. Ed. 345; 5 S. Ct. 1162.... | App. 371 |
| Ricker <i>v.</i> Powell, 100 U. S. 104; 25 L. Ed. 527..... | 790, 805 |
| Riddell <i>v.</i> Mandevill, 5 Cranch. 322; 3 L. Ed. 321..... | 720 |
| Ries <i>v.</i> Barth, 136 Fed. 850; 69 C. C. A. 528..... | 673, App. 497 |
| Ripley <i>v.</i> Elson, 49 Fed. 927..... | 332, 635 |
| Risdon <i>v.</i> Medart, 158 U. S. 68; 39 L. Ed. 899; 15 S. Ct. 745... 326, 426, 682, 686, 688, 709, 817, 819, 823 | |
| Risdon <i>v.</i> Trent, 92 Fed. 375..... | 197, App. 477 |
| Ritter <i>v.</i> Ulman, 78 Fed. 222; 24 C. C. A. 71..... | 543, 544 |
| Robbins <i>v.</i> Chicago, 4 Wall. 657; 18 L. Ed. 427..... | 894, App. 386 |

TABLE OF CASES CITED

clv

[References are to sections. "App." refers to Appendix]

Robbins *v.* Dueber, 71 Fed. 186..... 447
 Robbins *v.* Illinois, 78 Fed. 124..... App. 277
 Roberts *v.* Cooper, 20 How. 467; 15 L. Ed. 969..... App. 128
 Roberts *v.* Harnden, 2 Cliff. 500; Fed. Cas. 11,903.... 374, 459, 473, 599
 Roberts *v.* Nail, 53 Fed. 916..... 195, 432
 Roberts *v.* Northern, 158 U. S. 1; 39 L. Ed. 873; 15 S. Ct. 756..... 894
 Roberts *v.* Ryer, 91 U. S. 150; 23 L. Ed. 267..... 188, 215, 379, 380, 427,
 486, 598, 601, 617, 651, 654, 655, 656, 670, 671, 672, 676, 679, 818,
 919, App. 188, 598, 599, 616
 Robertson *v.* Blake, 94 U. S. 728; 24 L. Ed. 245... 297, 298, 377, 608,
 670, 830, 847
 Robertson *v.* Perkins, 129 U. S. 233; 32 L. Ed. 686; 9 S. Ct. 279.... 407
 Robinson *v.* Bland, 2 Burrows, 1086..... 827
 Robinson *v.* Satterlee, Fed. Cas. 11,967..... 716
 Robinson *v.* Sutter, 8 Fed. 828..... 219
 Robinson *v.* Sutter, 11 Fed. 798..... 716
 Rodwell *v.* Housman, 58 Fed. 870..... 324
 Roemer *v.* Bernheim, 132 U. S. 103; 33 L. Ed. 277; 10 S. Ct. 12..... 345
 Roemer *v.* Peddie, 132 U. S. 313; 33 L. Ed. 382; 10 S. Ct. 98.... 54, 207,
 380, 871, 876, App. 207
 Roemer *v.* Simon, 95 U. S. 214; 24 L. Ed. 384... 82, 321, 396, 407, 795, 807
 Roemer *v.* Simon, 91 U. S. 149; 23 L. Ed. 267..... 139, 890
 Rogers *v.* Cox, 96 Ind. 157..... 765
 Rogers *v.* Fitch, 81 Fed. 959; 27 C. C. A. 23..... 672, App. 65
 Rogers *v.* Mergenthaler, 64 Fed. 799; 12 C. C. A. 422..... 60
 Rogers *v.* Mergenthaler, 58 Fed. 693..... 570
 Rogers *v.* U. S. 141 U. S. 548; 35 L. Ed. 853; 12 S. Ct. 91..... 131
 Roosevelt *v.* Western Electric, 20 Fed. 724..... 756
 Root *v.* Ball, 4 McLean, 177; Fed. Cas. 12,035..... 503
 Root *v.* Railway, 105 U. S. 189; 26 L. Ed. 975.... 279, 282, 285, 290, 292,
 298, 299, 336, 371, 562, 568, 717, 718, 719, 730, 745, 764, 778, 807,
 835, 837, 839, 847, App. 371, 717, 845
 Root *v.* Sontag, 47 Fed. 309..... 603
 Root *v.* Third Avenue, 146 U. S. 210; 36 L. Ed. 946; 13 S. Ct. 100
 18, 412, 855
 Rose *v.* Clark, 1 Yew. & C. Ch. 534..... 720
 Rose *v.* Hirsh, 94 Fed. 177; 36 C. C. A. 132..... App. 841
 Rose *v.* Woodruff, 4 Johns. Ch. 547..... 305
 Rosenthal *v.* Walker, 111 U. S. 185; 28 L. Ed. 395; 4 S. Ct. 382.... 578
 Ross *v.* Dowden, 157 Fed. 681; 85 C. C. A. 449..... App. 652
 Ross *v.* Ft. Wayne, 63 Fed. 466; 11 C. C. A. 288..... 21, 550, 717
 Ross *v.* Fuller, 105 Fed. 510..... 764
 Ross *v.* Montana, 45 Fed. 424..... 287
 Ross *v.* Railway, Fed. Cas. 12,181..... App. 722
 Ross-Moyer *v.* Randall, 104 Fed. 355; 43 C. C. A. 578..... 211, 507
 Rousseau *v.* Brown, 21 App. D. C. 73..... 143, App. 421
 Rowan *v.* Ide, 107 Fed. 161; 46 C. C. A. 214..... 542
 Rowbotham *v.* Steele, 71 Fed. 758..... 797
 Rowe *v.* Blodgett, 112 Fed. 61; 50 C. C. A. 120..... 333, 335
 Rowe *v.* Blodgett, 103 Fed. 873..... 335
 Rowell *v.* Lindsay, 113 U. S. 97; 28 L. Ed. 906; 5 S. Ct. 507.... 12, 198,
 200, 202, 377, 379, 473, 577, 605, App. 456
 Royal *v.* Art, 121 Fed. 128..... 335
 Royer *v.* Coupe, 146 U. S. 524; 36 L. Ed. 1073; 13 S. Ct. 166... 54, 207,
 208, 871, App. 194, 207

[References are to sections. "App." refers to Appendix]

| | |
|---|---|
| Royer <i>v.</i> Coupe, 29 Fed. 358..... | 287 |
| Royer <i>v.</i> Roth, 132 U. S. 201; 33 L. Ed. 322; 10 S. Ct. 58.... | 49, 595, 596, 603, 667, 671, 675 |
| Royer <i>v.</i> Schultz, 135 U. S. 319; 34 L. Ed. 214; 10 S. Ct. 833.... | 404, 497, App. 131, 404 |
| Royer <i>v.</i> Schultz, 28 Fed. 850..... | 456 |
| Rubber <i>v.</i> Ewing, 9 Wall. 805; 19 L. Ed. 829..... | 890 |
| Rubber <i>v.</i> Goodyear, 76 U. S. 788; 19 L. Ed. 566.... | 223, 288, 291, 310, 317, 532, 751, 777, 807, 821, 827, 828, 829, 830, 833, 837, 838, 841, 844, App. 845 |
| Rubber <i>v.</i> Welling, 97 U. S. 7; 24 L. Ed. 942..... | 46 |
| Rubber Tip <i>v.</i> Howard, 87 U. S. 498; 22 L. Ed. 410.... | 43, 261, 426, 629; 651, 656, 657, 661, 667, 696 |
| Rubber Tire <i>v.</i> Milwaukee, 154 Fed. 358; 83 C. C. A. 336..... | 574, 744 |
| Rude <i>v.</i> Westcott, 130 U. S. 152; 32 L. Ed. 888; 9 S. Ct. 463..... | 288, 292, 294, 842, App. 292 |
| Rumford <i>v.</i> Baking Co., 134 Fed. 385; 67 C. C. A. 367..... | 648 |
| Rumford <i>v.</i> Hygienic, 159 Fed. 436; 86 C. C. A. 416..... | 476 |
| Rumford <i>v.</i> Hygienic, 148 Fed. 862..... | 476 |
| Rumford <i>v.</i> Lauer, 10 Blatch. 122; Fed. Cas. 12,135..... | 200 |
| Rumsey <i>v.</i> Buck, 20 Fed. 697..... | 451 |
| Runnion <i>v.</i> Ramsey, 93 C. C. A. 410..... | App. 144 |
| Rupp <i>v.</i> Elliott, 131 Fed. 730; 65 C. C. A. 544..... | 510, 574, 744, 745, App. 476, 477 |
| Russell <i>v.</i> Cowley, 1 Web. 470..... | 222, 903 |
| Russell <i>v.</i> Dodge, 93 U. S. 460; 23 L. Ed. 973..... | 871, 873, App. 871 |
| Russell <i>v.</i> Farley, 105 U. S. 433; 26 L. Ed. 1060..... | 273, App. 579 |
| Russell <i>v.</i> Kern, 69 Fed. 94; 16 C. C. A. 154..... | 111 |
| Russell <i>v.</i> Place, 94 U. S. 606; 24 L. Ed. 214..... | 31, 383, 561, 893, 894, App. 31 |
| Russell <i>v.</i> Mallory, 10 Blatch. 140; Fed. Cas. 12,166..... | 857 |
| Russell <i>v.</i> U. S. 182 U. S. 516; 45 L. Ed. 1210; 21 S. Ct. 899.... | App. 498 |
| Ryan <i>v.</i> Goodwin, 3 Sumn. 514; Fed. Cas. 12,186..... | 223, 228, 668 |
| Ryan <i>v.</i> Hard, 145 U. S. 241; 36 L. Ed. 691; 12 S. Ct. 919..... | 671 |
| Ryder <i>v.</i> Schlichter, 126 Fed. 487; 61 C. C. A. 469..... | App. 189 |
| Ryerson <i>v.</i> Eldred, 18 Mich. 12..... | 539 |
| Sadler <i>v.</i> Hoover, 48 U. S. 646; 12 L. Ed. 644..... | 113 |
| Safety Oiler <i>v.</i> Scovill, 110 Fed. 203..... | App. 207 |
| St. Germain <i>v.</i> Brunswick, 135 U. S. 227; 34 L. Ed. 122; 10 S. Ct. 822 | 617, 651, 676 |
| St. Louis <i>v.</i> American, 156 Fed. 574; 84 C. C. A. 340..... | 603, App. 207 |
| St. Louis <i>v.</i> Knapp, 104 U. S. 658; 26 L. Ed. 883..... | 807 |
| St. Louis <i>v.</i> Quincy, Fed. Cas. 12,240..... | App. 691 |
| St. Louis <i>v.</i> Southern, 108 U. S. 24; 27 L. Ed. 638; 2 S. Ct. 6..... | 116 |
| St. Paul <i>v.</i> Starling, 140 U. S. 184; 35 L. Ed. 404; 11 S. Ct. 803..... | 65, 108, 762, 809 |
| St. Louis <i>v.</i> Terre Haute, 145 U. S. 393; 36 L. Ed. 738; 12 S. Ct. 953 | App. 289 |
| Sage <i>v.</i> Wyncoop, 104 U. S. 319; 26 L. Ed. 740..... | 98 |
| Saling <i>v.</i> Ger. Sav. Bk. 8 N. Y. 469..... | App. 144 |
| Saltmarsh <i>v.</i> Tuthill, 12 How. 387; 13 L. Ed. 385..... | 537 |
| Sand Creek <i>v.</i> Robbins, 41 Ind. 79..... | 717 |
| Sanders <i>v.</i> Aston, 3 B. & A. 881..... | 679 |
| Sanders <i>v.</i> Hancock, 128 Fed. 424; 63 C. C. A. 166..... | 603, 608 |
| Sanders <i>v.</i> Logan, 2 Fish. 167; Fed. Cas. 12,295..... | 857 |

TABLE OF CASES CITED

clvii

[References are to sections. "App." refers to Appendix]

Sanford, Petitioner, 160 U. S. 247; 40 L. Ed. 414; 16 S. Ct. 291. .128, App. 893
 Sanitas v. Voigt, 139 Fed. 551; 71 C. C. A. 535. 646
 Santa Maria, The, 10 Wheat. 431; 6 L. Ed. 359. 140
 Sapphire v. Napoleon, 85 U. S. 51; 21 L. Ed. 814. 277
 Sargent v. Hall, 114 U. S. 63; 29 L. Ed. 67; 5 S. Ct. 1021 54, 202, 207,
 211, 215, 380, 587, 889, App. 205
 Sargent v. Larned, 2 Curt. 340; Fed. Cas. 12,364. 600, App. 701
 Sargent v. Seagrave, 2 Curt. 553; Fed. Cas. 12,365. 532, 554, 857
 Savary v. Lauth, Fed. Cas. 12,389. App. 727
 Sarven v. Hall, 21 Fed. Cas. 512. 448
 Sawin v. Guild, Fed. Cas. 12,391. App. 157
 Sawyer v. Bixby, 1 O. G. 165; Fed. Cas. 12,398. 775
 Sawyer v. Carpenter, 143 Fed. 976; 75 C. C. A. 162. 421
 Sawyer v. Carpenter, 133 Fed. 238. 421, App. 421
 Sawyer v. Massey, 25 Fed. 144. 587
 Sawyer v. Turner, 55 Fed. 979. 548, App. 559
 Sayre v. Scott, 55 Fed. 971; 5 C. C. A. 366. 219, 298
 Saxby v. Gloucester, 7 Q. B. Div. 305. 675
 Saxe v. Hammond, 1 B. & A. 629; Fed. Cas. 12,411 477
 Schenck v. Singer, 77 Fed. 841; 23 C. C. A. 494. . 633, 648, 673, App. 325
 Schnectady v. Holbrook, 101 N. Y. 45. 764
 Schillinger v. Guenther, 17 Blatch. 66; Fed. Cas. 12,458. 344, App. 344
 Schillinger v. United States, 155 U. S. 163; 39 L. Ed. 108; 15 S. Ct. 85
 498, 715, App. 498
 Schillinger's Case, 24 Ct. Cl. 278. 498
 Schlender v. Corey, 30 Minn. 501. 539
 Schliet v. Sherwood, 36 Fed. 590. 596
 Schneider v. Lovell, 10 Fed. 666 904, 915
 Schneider v. Missouri, 36 Fed. 582. 477
 Schneider v. Pountney, 21 Fed. 399. 477
 Schollenberger, *Ex parte*, 96 U. S. 369; 24 L. Ed. 853. 723
 Schrader v. Bank, 133 U. S. 67; 33 L. Ed. 564; 10 S. Ct. 238. . . App. 386
 Schreiber v. Grimm, 72 Fed. 671; 19 C. C. A. 67. .380, 437, 599, 646, 656, 672
 Schroeder v. Brammer, 98 Fed. 880. 374, 378, 459, 468, 622
 Schroeder v. Lahrman, 26 Minn. 87. 386
 Schumacher v. Cornell, 96 U. S. 549; 24 L. Ed. 676. 456, 473, 605
 Schwarzwald v. New York, 66 Fed. 152; 13 C. C. A. 380. 344
 Schutz v. Jordan, 141 U. S. 213; 35 L. Ed. 705; 11 S. Ct. 906. 578
 Scott v. Neeley, 140 U. S. 106; 35 L. Ed. 358; 11 S. Ct. 712. 285
 Scruggs v. Memphis, 108 U. S. 368; 27 L. Ed. 756; 2 S. Ct. 780. 778
 Seabury v. Johnson, 76 Fed. 456. 203
 Seal v. Bookkeeper, 130 Fed. 449; 64 C. C. A. 651. App. 762
 Seaman, *In re*, 4 O. G. 691. 337
 Seattle v. McNamara, 81 Fed. 863; 26 C. C. A. 652. 285, 293
 Seed v. Higgins, 8 El. & Bl. 767. 341, 679
 Seibert v. Michigan, 34 Fed. 33. 579
 Seitz v. Brewers, 141 U. S. 510; 35 L. Ed. 837; 12 S. Ct. 46. 756
 Sessions v. Gould, 49 Fed. 855. 485, 579
 Sessions v. Romadka, 145 U. S. 29; 36 L. Ed. 609; 12 S. Ct. 799. . . . 287,
 290, 295, 497, 503, 532, 612, 672, 777, 846, App. 204, 845
 Sewall v. Jones, 91 U. S. 171; 23 L. Ed. 275. 95, 215, 223, 230, 375,
 453, 454, 470, 516, 616, 671, App. 682
 Sewing Machine v. Frame, 24 Fed. 596. 454
 Seymour v. McCormick, 16 How. 480; 14 L. Ed. 1024. . . . 280, 285, 292,
 298, 843, 844, 845, 846, 857, App. 292